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1924

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ABBREVIATIONS EXPLAINED.

Reports.

All. or A.	Indian Law Reports, Allahabad Series.
A. L. J.	...	...	...	Allahabad Law Journal.
1924 All. or 1924 A.	...	...	...	All-India Reporter 1924 Allahabad.
Bom. or B.	...	...	...	Indian Law Reports, Bombay Series.
Bom. L. R.	...	...	...	Bombay Law Reporter.
1924 Bom.	...	...	...	All-India Reporter 1924 Bombay.
Bur. L. T.	...	...	...	Burma Law Times.
Bur. L. J.	...	...	...	Burma Law Journal.
Cal. or C.	...	...	...	Indian Law Reports, Calcutta Series.
C. L. J.	...	...	...	Calcutta Law Journal.
C. W. N.	...	...	...	Calcutta Weekly Notes.
1924 Cal.	...	...	...	All-India Reporter 1924 Calcutta.
Cr. L. J.	...	...	...	Criminal Law Journal.
I. A.	...	...	...	Law Reports, Indian Appeals.
I. C.	...	...	...	Indian Cases.
Lah. or L.	...	...	...	Indian Law Reports, Lahore Series.
1924 Lah.	...	...	...	All-India Reporter 1924 Lahore.
Lah. L. J. or L. L. J.	...	...	...	Lahore Law Journal.
L. B. R.	...	...	...	Lower Burma Rulings.
L. W.	...	...	...	Law Weekly.
Mad. or M.	...	...	...	Indian Law Reports, Madras Series.
M. L. J.	...	...	...	Madras Law Journal.
M. L. T.	...	...	...	Madras Law Times.
M. W. N.	...	...	...	Madras Weekly Notes.
1924 Mad.	...	...	...	All-India Reporter 1924 Madras.
N. L. J.	...	...	...	Nagpur Law Journal.
N. L. R.	...	...	...	Nagpur Law Reports.
1924 Nag.	...	...	...	All-India Reporter 1924 Nagpur.
O. & A. L. R.	...	...	...	Oudh and Agra Law Reporter.
O. C.	...	...	...	Oudh Cases.
1924 Oudh	...	...	...	All-India Reporter 1924 Oudh.
O. L. J.	...	...	...	Oudh Law Journal.
O. W. N.	...	...	...	Oudh Weekly Notes.
P. R.	...	...	...	Punjab Record.
P. L. R.	...	...	...	Punjab Law Reporter.
P. W. R.	...	...	...	Punjab Weekly Reporter.
Pat.	...	...	...	Indian Law Reports, Patna Series.
1924 P. H. C. C.	...	...	...	Patna Supplement to C. W. Notes.
1924 P.	...	...	...	All-India Reporter 1924 Patna.
1924 P. C.	...	...	...	All-India Reporter, Privy Council Section.
Pat. L. R.	...	...	...	Patna Law Reporter.
Pat. L. J.	...	...	...	Patna Law Journal.
R. or Rang.	...	...	...	Indian Law Reports, Rangoon Series.
1924 R.	...	...	...	All-India Reporter 1924 Rangoon.
S. L. R.	...	...	...	Sind Law Reporter.
1924 S.	...	...	...	All-India Reporter, 1924 Sind.
U. B. R.	...	...	...	Upper Burma Rulings.

Other Abbreviations.

Appl.	...	...	Applied.	Expl.	...	...	Explained.
Appr.	...	...	Approved.	Foll.	...	...	Followed.
Dist.	...	...	Distinguished.	F. B.	...	...	Full Bench.
Disc.	Discussed.	P. C.	Privy Council.
Diss.	Dissented from.	Ref.	Referred to.
Cr.	Criminal.	Rev.	Revenue.

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THE "YEARLY DIGEST," 1924

I—INDIAN DECISIONS.

ABADI.

ABADI—*Outgrowth of a sub-division not a separate sub-division.*

There is no authority for the proposition that the accretion to or an overgrowth of an old sub-division of a town within the limits of that town is to be regarded as a sub-division of it, though there are rulings to the effect that the new suburbs beyond the limits of the town constitute new sub-divisions. (*Harrison and Zafar Ali, JJ.*) **AHMAD SHAH v. THE CHURCH MISSIONARY TRUST ASSOCIATION, LONDON.** 1924 Lah. 700.

———*Right of tenant to enclose and build on.*

A tenant cannot enclose and construct a house upon a plot of open land in the *abadi* without the consent of the landlord though he may have been using it for temporary purposes for a long time. (*Kanhaiya Lal, J.*) **MAHOMED TAQI KHAN v. DORI,** 78 I. C. 881 (1) : 1924 A. 723 (1).

———*Right to occupy house—Non-agriculturists—If transferable.*

A non-agriculturist cannot transfer his right to occupy a house and site without the *malguzar's* consent unless there is an agreement to that effect. The position of a regular lessee is different. (*Hallifax, A. J. C.*) **LAXMI PRASAD v. AHMAD KACHI.** 80 I. C. 635.

ABANDONMENT—*Proof.*

Where a *rayat* left his village and settled down in another village and did not either cultivate his lands or pay rent for 16 years, the facts constitute a complete abandonment or relinquishment. (*Sukrawardy and Chotzner, JJ.*) **KASIRAM KAIBORTA v. BOGA KAIBORTA.** 78 I. C. 503.

ABATEMENT.—See C. P. CODE, O. 22.

ABWAB—*Abolition of—Exceptions in Bengal.*

Though *abwabs* have been abolished under the Bengal Regulations for many years, the right to *Banjar*, *Jhalakar* and *Phulkar* was always an exception and rent in respect of fruit trees or other classes of trees can be charged in addition to the ordinary rent under an agreement or custom. (*Miller, C.J. and Mullick, J.*) **MAHARAJA-DHIRAJ RAMESHWAR SINGH v. WAZUL HAQ** 78 I. C. 463.

ACCOUNTS—*Entries in—If proof of binding nature of debt.*

Where the creditor of a minor brings a suit against him and relies merely on entries in the

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account books to show items of consideration, the evidence is not sufficient, as he is bound to prove by independent and reliable evidence the purposes for the loan. (*Kinkhede, A. J. C.*) **TULSI-RAM v. ANUSUYA.**

78 I. C. 380 : 1924 Nag. 360.

———*Suit for—Procedure—Directions to produce accounts.* 1924 P. 176.

ACCOUNTS SETTLED—*Reopening of—Trading partnership—Mistake or fraud in carrying part of profits to a new account—Effect—Remedy by way of surcharge and falsification.* See **PARTNERSHIP.** 75 I. C. 171.

ACKNOWLEDGMENT—*Suit on—Maintainability.*

Every acknowledgment implies a promise to pay and a suit is maintainable on the basis of the same. (*Kinkhede, A. J. C.*) **SITARAM v. NANDRAM.** 78 I. C. 234 : 1925 Nag. 9.

ACQUIESCENCE—*Building a structure on another's land with that person's knowledge—Omission on the part of the true owner to protest—True owner's suit to recover possession after the building reaches completion.*

When a party has all along a firm conviction that a certain strip of land is his property and on the strength of that conviction starts building a structure on it to the knowledge of the true owner without any protest being made on his behalf, the doctrine of acquiescence applies and it is not open, after the whole building reaches completion, to the true owner to assert his legal rights and claim possession of the land.

Ramsden v. Dyson, 149 R.R. 543 and *Bussche v. Alt*, L. R. 8 Ch. D. 286 followed, and 21 A. 496 referred to. (*Wazir Hasan, J.C.*) **RAFIQ HUSAN v. BISHNATH PRASHAD.** 10 W. N. 418 : 10 O & A. L. R. 848 : 11 O. L. J. 677.

———*What is—Onus of proof.*

Acquiescence is quiescence in such circumstances as that assent may be reasonably inferred from it and is no more than an instance of the law of estoppel by words or by conduct. Mere absence of interference is not sufficient to create an estoppel. Nor does delay in coming to Court amount to it. The onus of proving it is on the person who sets it up. (*Mukerji, J.*) **BANESWAR BANDOPADHYA v. AMULYA CHARAN.** 82 I. C. 369

ADMINISTRATION.

ADMINISTRATION — Decree on mortgage — When realisable. 1924 P. 110.

——— *Executor putting up building—Assets—Liability.*

If an executor invests a portion of the assets in constructing a building it forms part of the assets which will be liable to meet legacies. Where he borrows money after the death of the testator his liability is ordinarily personal in character. (*Dalal, J. C. and Cumming, A. J. C.*) **ANANT RAM v. ISHRI PRASAD.** 78 I. C. 320.

ADMINISTRATOR—Appointment of — Considerations to be taken into account—Relationship to the deceased—Interest and safety of the estate. See PROB. AND ADMN. ACT, S. 41.

40 C. L. J. 24.

——— *Surety—Right to be released from liability.*

A surety to an administration bond is not entitled as a matter of right to be released of future obligation at his choice. His remedy, if it exists at all, is only on showing good cause. (*Mookerjee and Rankin, J.*) **KADHIKANATH BISWAS v. RATI KANTA BAKSHI.** 76 I. C. 1009.

——— *Pendente lite—Duties and powers of—Decree in the suit—Appeal.*

The duties of an Administrator and Receiver *pendente lite* commence from the order of appointment, and, if the decree in the action is appealed from, do not cease until the appeal has been disposed of. In the absence of any appeal the functions of an Administrator *pendente lite* terminate with a decree pronounced in favour of a Will and do not continue until the executors obtain probate. The case is not altered if there are no executors. (*Mookerjee and Chotcner, J.*) **PRAMILA BALA DEVI v. JYOTINDRA NATH BANERJEE.** 28 C. W. N. 576 : 1924 Cal. 631.

——— *Tenants—Wrongful collection of rents by claimant—Action in tort by administrator against claimant.*

Where the appellant, an administrator, let out certain lands to tenants and the rents were collected by the respondent claiming to be the beneficial owner of the properties.

Held, that an action lay against the respondent in tort for wrongful collection of the rent which was quite distinct from the appellant's right of action against the tenants for recovery of the rent. (*Lentaigne and Carr, J.*) **MA MA GUN v. MAUNG BO THAN.**

3 Bur. L. J. 25 : 82 I. C. 35 2 : 1924 R. 282.

ADMIRALTY COURTS ACT (1861), Ss. 5 and 35—(Act of 1840), S. 6—Interpretation Act (1889), S. 18 (2)—Claim for necessities supplied to ship—Suit in rem and in personam—Jurisdiction.

76 I. C. 458.

ADMIRALTY JURISDICTION — Bombay High Court—Service on ship — Writ of summons—Warrant of arrest. 76 I. C. 433.

ADMISSIONS—Pleadings—How to construe.

In construing admissions in a pleading a Court ought to look to the plaint and the pleadings as a

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whole. The rule is that if a party makes a qualified statement, it cannot be used against him apart from the qualification (*Prideaux and Kinkhede, A. J. Cs.*) **KRISHNABAI v. DHONDO RAMCHANDRA.** 20 N. L. R. 63 : 78 I. C. 542 : 1924 Nag. 129.

——— *Value of—Shifting of burden of proof.*

In a suit for recovery of money paid to defendant by mistake, an admission by the defendant in a prior suit that he had received the money was put in evidence. *Held*, as a result of the admission the burden of proving want of consideration or undue influence in giving receipt for the money was shifted to the defendant. (*Broadway and Campbell, J.*) **WASAKHI RAM v. HUSSAIN KHAN.** 75 I. C. 1027 : 1924 Lah. 650.

ADVANCEMENT — *Presumption of — Anglo-Indians.*

Where among Anglo-Indians, a husband obtains a conveyance in the name of his wife, there is, as in England, a presumption of advancement 48 C. 260, Rel. (*Robinson, C. J. and May Oung, J.*) **LECUN v. LECUN.** 2 Rang. 253 :

82 I. C. 696 : 3 Bur. L. J. 85 : 1924 R. 283.

ADVERSE POSSESSION—Acts necessary to constitute—Tying cattle. 79 I. C. 450 : 1924 A. 103.

——— *Adverse possession of one of the proprietary body against others is possible.*

The plaintiffs brought the suit under S. 106, Bengal Tenancy Act, to have a certain entry in the record of rights corrected. The subject-matter of the suit was a two-storied building with the tank and orchard round it and some tenanted lands, the area of the whole being some sixty bighas. The building and the tank were in the centre of a village which became a municipality. The record of rights treated that these lands were in the possession of the plaintiffs and that they were liable to be assessed with rent by the Zemindars. The plaintiffs themselves were fractional owners of the Zemindary. The case made by the plaintiffs was that there was an old Brahamatter grant made in 1165 B. S. to one A. that by a kobala dated 1296 B. S. their predecessor-in-interest took from the executor of A.'s (grantee's heir) estate the Niskar right which had been in this Brahmin family for a very long time.

Held, that the plaintiffs had succeeded in tracing back the possession to grantee's grandson and his possession without any stipulation for payment of rent was undoubtedly adverse to the proprietors of the estate and that the plaintiffs were not liable to pay rent. (*Rankin and Ghose, J.*) **SAILAJA NATH ROY CHOUDHURY v. RAJA RESHEE CASE LAW.** 51 Cal. 135 : 81 I. C. 493 : 39 C. L. J. 380 : 1924 Cal. 693.

——— *Co-heirs—Enjoyment of rents and profits.*

The possession of one co-heir is in law the possession of all co-heirs unless it is shown to be otherwise. The fact that one co-heir has not been

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in enjoyment of the rents and profits of the property is not sufficient to establish a title by adverse possession in the persons who have enjoyed such profits. (*Wazir Hasan, A. J. C.*) *ABDUL SHAKUR KHAN v. MAHOMMAD ALI KHAN.*

78 I. C. 282.

—Co-mortgagee.

Where the mortgage is an indivisible transaction according to its terms, any one of the co-mortgagees cannot obtain adverse possession of a particular share in it by lapse of time. The mortgagor could only redeem the whole of the mortgage by a payment of the whole of the mortgage money irrespective of the shares of the co-mortgagees *inter se*, the money contributed by each being not stated in the deed. A co-mortgagee takes the place of each co-mortgagee whom he pays off; he does so, as a co-mortgagee and thus his possession in his place is that of a mortgagee only and not in other capacity. (*Broadway and Zafar Ali, JJ.*) *SHUJA-U-D-DIN KHAN v. SHER MUHAMMAD KHAN.*

1923 Lah. 366.

—Co-owners—Possession among—Repudiation of title—Non-receipt of profits, effect of—Plea abandoned in lower appellate Court, whether can be raised before High Court.

The ordinary presumption of law is that joint possession of co-owners is continued until there is some overt act of ouster or separation. Therefore mere non-receipt of rents and denial, in the course of previous litigation, of a party's title are not sufficient to constitute adverse possession against that party. 20 O. C. 231, 9 I. C. 425 and 20 A. L. J. 545, Ref. 10. A plea abandoned in the lower appellate court cannot be raised before the High Court in second appeal. (*Neave, A. J. C.*) *RAM NIDH V. JANKI.*

10 W. N. 674;
10 O. & A. L. R. 937.

—Constructive possession of a portion of the property—Effect of.

Where a person is shown to have exercised acts of possession on land as it reformed and became capable of possession and all these acts of possession were all done in the assertion of claim to the land by virtue of settlements made by the Government, the possession extends to the whole of the property especially where there were circumstances to link together various portions of ground so as to make the possession of a part as it emerged amount constructively to possession of the whole. 44 C. 558, Ref. (*Newbould, Ghose and Page, JJ.*) *SURESH CHANDRA MUKHERJI v. SHITI KANTA BANERJEE.*

51 Cal. 669 : 78 I. C. 679 :
28 C. W. N. 637 : 1924 Cal. 855.

—Co-owners—Possession of one owner not presumed to be adverse—Onus.

Where one or more of several joint owners are in possession of property, they are presumed to hold that possession on behalf of the whole body of joint owners, and the burden of proving that their possession had become adverse is on them. 20 Bom. L. R. 1064; 10 L. B. R. 45, Ref. (*Heald, J.*) *MA SAN HLA ME v. MA TUN ME.*

8 Bur. L. J. 105 : 82 I. C. 821;
1925 Rang. 40.

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—Co-owners—Overt act necessary.

The possession of one co-sharer is ordinarily on behalf of all, but if by means of an overt act he shows unequivocally that he is holding for himself alone, his possession becomes adverse from that moment. (*Campbell, J.*) *HIRA SINGH v. PUNJAB SINGH.*

78 I. C. 113.

—Co-owners—Ouster—Proof of—Essential.

Where the parties are co-owners, in order to establish title by adverse possession in favour of one co-owner against another, it must be established by unambiguous evidence that there was a complete ouster to the knowledge of the co-sharer. The possession of one co-sharer can be said to be adverse against another, only if there is an open denial of title and limitation can run, if at all, only from that date. 43 M. 244 : 35 C. L. J. 554, Ref. (*Mookerjee and Rankin, JJ.*) *HASIM ALI v. ABJAL KHAN.*

40 C. L. J. 30 :
82 I. C. 392 : 1924 Cal. 1046.

—Co-owners—Transferee from co-owner—Position of.

A transferee from a co-sharer, if he pleads that he was in adverse possession, must prove exclusion or denial of title, but in the event of his having neither actual nor constructive notice of the common character of the property, he will be on the same footing as any ordinary transferee. (*Oldfield and Ramesam, JJ.*) *VENKATRAMA AIYAR v. SUBRAMANIA SASTRY.*

20 L. W. 122 : 78 I. C. 37 :
1924 Mad. 741.

—Co-sharer—Essentials.

The possession of one co-sharer being on behalf of all, if he sets up title by adverse possession, he must show overt acts amounting to hostile possession and not as co-sharer. (*Moli Sagar, J.*) *UDI v. MARU MAL.*

78 I. C. 159 : 1924 Lah. 682.

—Co-sharers—Nature of possession.

Possession of joint property by one co-sharer does not constitute adverse possession against other sharers until there has been a disclaimer of the latter's title by open assertion of hostile title on the part of the former. Nature of such adverse possession discussed. Mere non-participation in the rents and profits or residence outside will not amount to such ouster. (*Kinkaid, J. C. and Raymond, A. J. C.*) *MT. BHAGBHARI v. MT. KHATUN.*

80 I. C. 118.

—Co-sharers—Stranger in possession on behalf of co-sharer—Effect of.

1924 Cal. 366.

—Co-sharers—Release of rights—Effect of.

The possession of one co-sharer is not adverse to another who is also thereby constructively in possession. Even where a co-sharer's possession is adverse, if he releases his rights to the other, all the adverseness of the possession is wiped off. (*Wazir Hasan, A. J. C.*) *CHHOTAY LAL v. HANUMAN SING.*

1 O. W. N. 496 :
80 I. C. 619 : 10 O. & A. L. R. 924 :
11 O. L. J. 735.

—Co-tenants—Possession of property under claim of co-tenancy.

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The plaintiff, a son of a member of a joint Hindu family, was in actual joint possession with his father of an undivided half share in the whole of the property. That was reduced to a third share on the birth of his half-brother. Of that third share he had been in possession since his birth, a great deal more than twelve years ago, along with his father, and later his half-brother also, but in derogation of their title to possess the whole that is to say, adversely to them. Even therefore if the property could be regarded as the self-acquired property of the father the plaintiff would still have been in adverse possession as a tenant-in-common of an undivided third share in the property for more than the statutory period and he is entitled to claim partition of that share. (*Baker, J. C. and Hallifax, A. J. C.*) JAGESHWAR v. PANDURANG.

7 N. L. J. 82 : 78 I. C. 840 :
1924 Nag. 73.

———*Delivery of actual possession under decree—Effect.*

Delivery of actual possession under a decree interrupts adverse possession and gives a fresh starting point of limitation. (*Daniels, J.*) HARPAL KURMI v. MOHAN KURMI.

79 I. C. 1047 : 1924 All. 844.

———*Easement—Permanent tenancy—Prescription by one tenant against another.*

1924 Cal. 363.

———*Entry in revenue record that tenant has higher rights than those of cultivator—Decision of Revenue Court to the same effect—Title whether can be deemed adverse from the date of such entry or decision—Suit for declaration by landlord—Burden of proof.*

It is now settled law that an entry in the village record or even the opinion of a Revenue Court that a person cultivating land has rights higher than those of a tenant will not start adverse title of an under-proprietor in the cultivator and not compel the landlord to seek a declaration in the Civil Court at the risk of losing his right if he did not do so within six years of the final order in litigation.

In a suit for declaration by the landlord that the defendants are tenants and not under-proprietors the burden lies on the defendants to prove that they are under-proprietors and not on the landlord.

Where a person sets up a claim to property on the basis of a grant and fails to prove it, he cannot turn round and start the theory of adversity of title which can only commence if he did not lay claim to any title whatsoever for the commencement of his possession. (*Dalal, J. C.*) SULTAN KHAN v. HARDWARI. 1 O. W. N. 768.

———*Formal possession with another—Effect.*
77 I. C. 509.

———*Hindu widow—Possession of joint family property—Intention of the parties.*

Where the widow of a person who died as an undivided member of a joint Hindu family took possession of the family properties recorded in her deceased husband's name and dealt with the properties as her own for over the statutory

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period, held that she must be held to have prescribed for an absolute estate in the absence of proof that her claim was limited to a widow's estate. Where adverse possession commenced on the death of her husband while the property legally vested in the next surviving male co-parcener, the death of such survivor does not interrupt the running of adverse possession. 22 A. L. J. 304, Dist. 42 A. 152 ; 41 A. 729 ; 22 C. 445, Ref. and Fol. (*Daniels and Neave, JJ.*) KALI CHARAN v. PEARE.

46 A. 769 : 22 A. L. J. 725 :
L. R. 5 A. 677 : 1924 A. 740 (2).

———*Invalid title—Effect on.*

Possession for twelve years or any other period prescribed by the law on an invalid title cannot perfect anything but that title. (*Hallifax, A. J. C.*) DINA SINGH v. JAMAL SINGH. 78 I. C. 446.

———*Landlord and tenant—Encroachment on adjoining land—Possession of landlord.*

If the person encroaching upon other land is not a tenant, then the mere fact of his open and continuous encroachment would *prima facie* be possession adverse to the fullest extent against the landlord. Because he is a tenant it is presumed in the landlord's favour that the possession is only under a claim of a limited right. If the possession is under a claim which is adverse to the landlord though only to a limited extent then for the purpose of the right which the tenant is claiming the possession of the tenant is no longer the possession of the landlord. (*Rankin and Ghose, JJ.*) NEKJANNESSA BIBI v. ABBAS MOLLA. 40 C. L. J. 160.

———*Landlord and tenant.*

75 I. C. 325 : 1924 Cal. 168.

———*Landlord and tenant—Non-payment of rent—Possession—Nature of.*

Where a person entered into possession as tenant, the onus is on him to prove the relationship came to an end and his possession began to be adverse. Mere non-payment of rent or carrying out of repairs will not amount to adverse possession. But where he openly disclaims to hold as tenant, pays rent to nobody, has his name entered in the municipal register, etc., his possession is adverse. It is not necessary that he should first give up possession and then only claim adversely. (*Rupchand Bilaram, A. J. C.*) MAHOMED FARUQ v. SIDIK. 79 I. C. 59.

———*License—Long possession does not create title.*

A licensee cannot claim title only from possession however long, unless it is proved that the possession was adverse to that of the licensor, to his knowledge and with his acquiescence. (*Mr. Amcer Ali.*) KODOTH AMBU NAIR v. SECY. OF STATE. 47 Mad. 572 : (1924) M. W. N. 572 :

26 Bom. L. R. 639 : 20 L. W. 49 :
80 I. C. 835 : 35 M. L. T. (P.C.) 128 :
(1924) P. C. 150 : 47 M. L. J. 35 (P. C.)

———*Limited interest—Assertion of higher interest—Lapse of time—No acquisition of title.*

19 L. W. 283 : 39 C. L. J. 295 :
28 C. W. N. 840.

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Limited interest.

There can be in law adverse possession of a limited interest. (*Baker, J. C.*) *MT. KASTURI v. BALIRAM.* 79 I. C. 117 : 1924 Nag. 222.

Mortgagee—Intention to transfer.

The equity of redemption may be acquired by a mortgagee by adverse possession, when there was a subsequent intention of the parties to sell the equity of redemption, but a valid deed of transfer was not executed. (*Kendall and Pullan, A. J. Cs.*) *SITLA SAHAI v. DHUM SINGH.* 10 O. & A. L. R. 655 : 82 I. C. 406 : 11 O. L. J. 543.

—Mortgagor and mortgagee—Possession adverse to mortgagor when adverse to mortgagee. 77 I. C. 125 : 1924 Oudh 40.

—Mortgagor and mortgagee—Mortgage void—Mortgagee in possession under—Sale void in favour of—Possession held under for 12 years—Effect—Rights of parties.

The first defendant was admitted into possession of immoveable property in 1893 under a mortgage executed by a person who was not the guardian of the plaintiffs, then minors, i.e. under a void mortgage. While the 1st defendant was so in possession, the same person acting on behalf of the plaintiffs sold the property to the 1st defendant in 1900. This sale was, like the mortgage void.

Held, that the effect of the sale was to alter the nature of the possession which 1st defendant had in the property, viz. from that of a mortgagee to that of an absolute owner, and that after 12 years from 1900 1st defendant acquired absolute ownership by adverse possession. (*Wallace, J.*) *AIYISA BIVI AMMAL v. KALANDARSA ROWTHER.* 80 I. C. 561 : 1924 Mad. 720 : 46 M. L. J. 501.

—Mortgagor and mortgagee—Rival mortgagors.

The possession of a mortgagee is not adverse to his mortgagor. But where there are rival mortgagors, the possession of their respective mortgagees must be held to be mutually adverse. (*Kendall, A. J. C.*) *RAM CHHOR BAKSH v. RAM SURAT.* 80 I. C. 582.

—Mortgagor and mortgagee—Mutation entry whether sufficient to convert possession as mortgagee into adverse possession.

A mere mutation entry of the mortgagee as proprietor clearly cannot convert his possession as mortgagee into adverse possession. (*Daniels and Neave, J.*) *RAM GANESH RAI v. RUP NARAIN RAI.* 80 I. C. 944 : L. R. 5 A. 542.

—Mortgagor and mortgagee—Discharge of mortgage—Mortgagee continuing in possession—Effect of.

Where after the discharge of an usufructuary mortgage, the mortgagee continues in possession his possession is not adverse to the mortgagor. (*Neave, J.*) *GOBIND RAM v. MT. RAM KOER.* L. R. 5 A. 421 : 1924 A. 522.

—Mortgagor and mortgagee—Forfeiture clause—Possession taken under.

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Where under a forfeiture clause in a mortgage deed the mortgagee takes possession of the mortgaged property and continues for over 12 years, his possession is adverse to the mortgagor and extinguishes his rights. (*Lentaigne and Carr, JJ.*) *MG. SAN CHEN v. MA DAUNGU.* 3 Bur. L. J. 95 : 82 I. C. 829 (2) : 1924 R. 290.

Mortgagor and mortgagee.

So long as the right to redeem subsists, a mortgagee cannot deny the title of the mortgagor or his successor in interest or set up adverse possession. (*Sulaiman and Kanhaiya Lal, JJ.*) *BAKHA SINGH v. RAM NARAIN SINGH.* L. R. 5 A. 681 : 80 I. C. 935 (2) : 22 A. L. J. 805.

—Nature of—If affected by intervention of life-estate. 1924 Lah. 292.

—Nature of possession—Trespassers—Tacking of adverse possession.

Where some of the members of a joint family sue to recover possession of property on the ground that the defendant had been put in possession collusively and against the plaintiffs' wishes under a transfer, the possession of the defendant must be considered to have been adverse from the date of the transfer. One trespasser succeeding another can tack his possession on to the former's even in cases where there is no valid transfer by the former to the latter. (*Dulal and Daniels, JJ.*) *BAHNATH v. RAM BILAS.* L. R. 5 A. 386 : 80 I. C. 12 : 1924 A. 739.

—Nature of the possession—Relationship between the parties—Intention.

Mere relationship between the parties (in this instance, aunt and nephew) does not prevent the possession of one from being adverse to the other, unless it can be shown that the person in possession entered into it and continued in it under some agreement or arrangement with the legal owner and thereby admitted the nature of his possession to be permissive. (*Wazir Hasan, A. J. C.*) *JAISI RAM v. RAJ BAHADUR KURMI.* 11 O. L. J. 87 : 1924 Oudh 328.

—Nature of right acquired—Unregistered deed—Recitals.

Where there is an unregistered deed of gift though it is inadmissible to prove a conveyance the recitals in the deed can be relied upon to show the nature of the interest acquired by prescription by the donee. (*Venkatasubba Rao, J.*) *NARAYANASWAMI DEVARAYAR v. THANGAVELU PADAYACHI.* (1924) M. W. N. 571 : 82 I. C. 67 : 1924 Mad. 800.

—Plea of—If can be raised *suo motu*.

The plea of adverse possession being one of limitation can be raised *suo motu* by the Court. (*Kendall, A. J. C.*) *RAM CHHOR BAKSH v. RAM SURAT.* 80 I. C. 582.

—Proof of title—Presumption that possession follows title—Acquisition of title by prescription—Burden of proof.

Where the plaintiffs sued for possession on the strength of their title and the defendants never raised any plea of adverse possession, and the

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question of title was found in favour of the plaintiffs within the period of limitation, a subsisting title ought to be presumed. The burden lay on the defendants to plead and prove affirmatively that they had adverse possession for such a long period as to destroy the plaintiff's title. 39 M. 617; 41 A. 669, Ref. 20 A. 182 not foll. (*Wazir Hasan, J. C.*) *INDARPAL SINGH v. THAKUR DIN SINGH*.
10 O. L. J. 646; 78 I. C. 895;
27 O. C. 77: 1924 Oudh 266.

——— *Religious endowment—Idol—Adverse possession against shebait—Necessity for.*

Adverse possession affects the right and interest of the idol as well as the right and interest of the shebait. Where adverse possession is proved, time will also run against the idol even in a case where no shebait has been appointed. Where a shebait has been appointed the right to sue for possession of the property with which the idol is endowed belongs to the shebait and not to the idol. Where a shebait has not been appointed, it is permissible to file a suit for possession in the name of the idol. The Court may appoint a person to act as agent for the idol pending the suit. (*Page, J.*) *ADMINISTRATOR-GENERAL OF BENGAL v. BALKISHEN MISSEER*.
51 C. 953.

——— *Reversioner—Limitation Act, Art. 144.*

If the plaintiff's title to the property commences from the death of the previous full owner, limitation begins to run against him from that date notwithstanding the estate may be in the possession of the last full owner's widow under a will which he had no power to make. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) *HARIHAR PRASAD v. KASHEO PRASAD SINGH*.
5 Pat. L. T. Supp. 1: 1925 Pat. 68.

——— *Vacant site—Formal delivery—Effect against true owner.*

In the case of a vacant site possession follows title and a true owner's rights are not defeated by a person obtaining a formal delivery in execution of a decree against a person having no right to the same. (*Brasher, J.*) *ABDULLAH v. GIRDHARI*.
79 I. C. 692.

——— *Vacant site—Possession follows title.*

In the case of vacant sites of which no effective physical possession is feasible, the presumption is that possession will follow title. (*Wallace, J.*) *SRINIVASACHARIAR v. RAGHAVA CHARIAR*.
19 L. W. 621: 79 I. C. 1011;
(1924) M. W. N. 628: 1924 Mad. 676;
46 M. L. J. 560.

——— *Void transaction—Possession—Nature of.*

Where for some reason or other a conveyance is void *ab initio* but possession passes under it, the transferee can acquire title by adverse possession. (*Baker, J. C.*) *MT. KASTURI v. BALIRAM*.
79 I. C. 117: 1924 Nag. 222.

——— *Widow's possession, nature of—Mortgage by widow jointly with her husband's brother—Widow entered in the village records as Sir holder—Unhindered transfers of property by the widow—Adversity of possession to the extent of a widow's estate—Indian Limitation Act (IX of 1908), Arts, 141, 144, applicability of.*

AGRA TENANCY ACT (II OF 1901).

Where a widow took possession of certain sir plots of land and a house, set up her own independent title, sold part of property jointly with her deceased husband's brother declaring that her defence in a previous foreclosure suit that she had no interest in the property was false, was continuously shown in the village records a Sir holder, realized rents and made unhindered transfers of property.

Held, on a suit by the widow's deceased husband's brother, that the possession of the widow was adverse ever since she took possession.

Held further, that under certain circumstances the possession of a widow may be adverse to the extent of a widow's estate but it is not so, where the widow has no right to a widow's estate when she takes possession and no allegation is made in the plaint that she was holding a widow's estate in the transfer made by her.

Obiter. In a suit for possession involving the question as to the nature and effect of the possession of property by a Hindu widow whether the possession was in lieu of her maintenance or adverse, the period of limitation is 12 years from the time when the possession of the defendant becomes adverse to the plaintiff and Art. 144, Indian Limitation Act, applies. 42 A. 152: 29 C. 664 (P.C.) ref. to. (*Dalal, J. C.*) *LAL BAHADUR SINGH v. MATHURA SINGH*.
1 O. W. N. 740.

——— *Widow—Suit by reversioners after widow's death—Compromise decree with the widow when binding on reversioners.*

75 I. C. 614.

AGENCY—*Fire insurance proposal—Canvasser granting receipt for initial premium—Whether operates as interim cover note pending formal acceptance of proposal—Extent of authority.*

A canvasser of a Fire Insurance Office who is entrusted with a bundle of proposal forms and a receipt book for the purpose of canvassing business and granting receipts for the initial premium and who grants such a receipt under his signature with the addition of the Agent's name underneath is not an Agent *per se* with implied authority to accept an insurance so as to bind the Company. All that it indicates is that such a person may be trusted to submit the proposals made and any money deposited with him. To enable such an agent to accept an insurance so as to bind the Company there must be special authority given to him.

Lingford v. The Provincial Horse and Cattle Insurance Company, 55 E. R. 617 followed.

A contract of insurance is not binding on the insurers before a policy is delivered unless the circumstances point to an acceptance of the proposal. The acceptance of premium does not of itself show that the insurers have accepted the proposal. It is, however, essential that the premium should have been agreed upon. *Christie v. North British Insurance Company*, (1826) 3 Shaw (Ct. of Sess.) 519 referred to. (*Robinson, C. J. and May Oung, J.*) *KWA HAI v. THE NORTHERN ASSURANCE CO., LTD.*
2 R. 158;
3 Bur L. J. 40: 1924 R. 269.

AGRA TENANCY ACT (II OF 1901)—*Construction—Agreement between the Zamindar and tenant regarding payment of rent—Whether amounts to a lease—Effect of non-registration.*

AGRA TENANCY ACT (II OF 1901).

Where in an ejectment, the parties compromised by the execution of an unregistered document which laid down that the tenant should pay at a specified rate and that the Zamindar should not eject him so long as the stipulated rate was paid for 20 years, *Held*, under S. 97 of the A.T. Act the compromise agreement did not operate as a lease for 20 years because it was not registered; and the tenant could be regarded only as an ordinary tenant. (*Burn, J. M.*) *NUR AHMED v. RAGUBAR DYAL*,
L. R. 5 A. 302 (Rev.).

———Landlord and tenant—Tenant groveholder dying without heirs but indebted—When their landlord responsible for the debts of the landholder. *MT. RAMMAN BIBI v. MATHURA PRASAD*,
75 I. C. 621.

———Occupancy holding—Suit by a tenant to eject a mortgagee in possession—Mortgage invalid—Mortgagee cannot set up adverse possession.

The possession of the mortgagee being permissive, even though the mortgage was invalid, the occupancy tenant can sue to eject the mortgagee, on paying the mortgage money. 16 A. L. J. 747, Foll. (*Kanhaya Lal, J.*) *DURGA CHOWDHURI v. JAGROOP*, 79 I. C. 232 : 1923 All. 191.

———S. 4—Grove—Transferability.

79 I. C. 577: L. R. 5 A. 13 (Rev.) : 1924 A. 229 (1).

———Ss. 4 and 51—Payment of rent—Contract as to—Effect of statute.

A lease by a Zamindar stipulated that the rent due thereunder should be payable irrespective of whether there was any drought or flood or any calamity by which there was no produce in the village. The lessee claimed an abatement in the rent on the ground of a Government Notification remitting land revenue for a portion of the year. *Held*, that the lessee was a tenant within the meaning of S. 4 of the Tenancy Act and that the contract between the parties was entirely overridden by S. 51 of the Agra Tenancy Act. (*Mukerji and Dalal, JJ.*) *FATEH CHAND v. MURARI LAL*,
22 A. L. J. 758 : 80 I. C. 8 :

L. R. 5 A. 241 (Rev.) : 1924 A. 906.

———S. 4, cl. (2)—Land taken on, payment of premium—Planting of trees—Rights of parties.

The defendants obtained certain land from the landholder on payment of a lump sum on premium without any agreement for the express purpose of planting trees. *Held*, that the land on which the grove stood was not "land" within the meaning of S. 4, cl. (2) of the Agra Tenancy Act, that the premium was not rent in any sense of the term and that the defendants were not tenants of the landholder. (*Sulaiman and Mukerji, JJ.*) *LAL BAHNATH SINGH v. CHANDRAPAL SINGH*,
L. R. 5 A. 255 (Rev.) : 1924 A. 795.

———Ss. 4 (2) and 11—Agricultural purposes—Letting for—Acquisition of occupancy rights.

In view of the definition of land in S. 4 (2) of the Tenancy Act, rights may be acquired under S. 11 if the land were originally let for agricultural purposes, even though in some years sub-

AGRA TENANCY ACT, S. 11.

sequently the land has lain fallow or had been used for grazing. If a tenant misuses or neglects his land, the landholder has a remedy in S. 57 (b) of the Act. (*Fremantle, S. M. and Burn, J. M.*) *HUKUM SINGH v. BISHNATH PRASAD*,
L. R. 5 A. 85 (Rev.) : 10 O. & A. L. R. 417.

———S. 6—Construction.

L. R. 5 A. 23 (Rev.).

———Ss. 8, 20—Lease in perpetuity by Zamindar—If a fixed rate tenancy—Mortgage of rights—Effect of.

A fixed rate tenancy cannot be created by a contract with the Zamindar as such grants should be consistent with S. 20 of the Tenancy Act. When such a tenancy right is mortgaged, the mortgage is unenforceable and the mortgagee can only get a simple money decree. (*Kanhaya Lal, J.*) *OUSBAN ALI v. MAJID HUSAIN*, 62 I. C. 289.

———S. 10—Accrual of expropriatory rights—Rent fixed by parties—No proceedings in Court for determination of—Effect.

Where rent agreed upon between the parties in respect of land subject to an expropriatory tenancy is less than the statutory rate laid down in S. 10 of the Agra Ten. Act, the rent is payable even though no formal proceedings under S. 36 of the Land Rev. Act have been taken. (*Daniels and Neave, JJ.*) *NAND RAM SINGH v. HARI SARAN DAS*,
82 I. C. 296 :

L. R. 5 A. 235 (Rev.).

———Ss. 10 and 36—Sale of expropriatory rights—Continuance of expropriator in sir plots—Expropriatory rights not claimed within 6 months—Effect of.

After the sale of proprietary rights the defendant had no claim to have sir recorded in his name yet he did as a matter of fact remain in possession of the field which was formerly his sir either by realising the rent from the sub-tenant or by cultivating it himself. *Held*, in these circumstances he could not be considered to have lost his rights by failing to claim them within six months as he had been in continuous possession and had claimed them as soon as the Zamindar sought to deprive him of possession. (*Fremantle, S. M. and Burn, J. M.*) *BINDRA PRASAD v. MAHARAJA OF BENARES*,
L. R. 5 A. 93 (Rev.).

———S. 10, cl. 1—Year—Meaning of.

The word "Year" in S. 10 of the Agra Ten. Act can refer only to a calendar year or to an agricultural year as defined in S. 4, cl. 10 of the Act and it is impossible to make it equivalent to a term like cultivating period. (*Fremantle, S. M. and Burn, J. M.*) *KEDAR NATH v. RAM KUMAR*,
L. R. 5 A. 216 (Rev.).

———S. 11—Acquisition of occupancy rights—Possession as mortgagee if Cereals.

Plaintiff was recorded as mortgagee up to 1328 Fasli and there was nothing to show that the plaintiff was regarded as tenant-in-chief in his own right until an ejectment suit was filed in 1919 against the mortgagor admitted as such. *Held*, that the plaintiff had not acquired occupancy rights. (*Fremantle, S. M.*) *KALLO v. HANUMAN PRASAD NARAIN SINGH*,
L. R. 5 A. 145 (Rev.).

AGRA TENANCY ACT, S. 11.

—S. 11—*Acquisition of occupancy rights—Separate cultivation—Period of joint cultivation, if can be added.*

Where there has been a partition of the holding, the period of a joint tenancy cannot be added to the period of separate tenancy in considering the time required for acquisition of occupancy rights. (*Fremantle, S. M. and Burn, J. M.*) SHEONANDAN KURMI v. BADRI PATHAK.

L. R. 5 A. 224 (Rev.).

—S. 11—*Acquisition of occupancy rights—Parties descended from common ancestor—Plaintiff recorded as tenant and defendant as sub-tenant.*

Plaintiff was recorded as an occupancy tenant. He sued to eject his brothers and nephews who were recorded as sub-tenants of two years. It was found that the holding belonged to the common ancestor of the parties and that the defendants had been in possession since the death of the common ancestor. *Held*, that it did not matter in these circumstances whether occupancy rights were acquired in the time of the common ancestor or after he died. The holding was that of the grandfather and the defendants were entitled to their share provided that they had been in possession of it since the death of the common ancestor. (*Fremantle, S. M. and Burn, J. M.*) MAHABIR v. PUSA.

L. R. 5 A. 266 (Rev.).

—Ss. 11 and 14—“*Held*,” meaning of—*Nominal possession—Insufficient.*

Cases of dispossession are provided for in Ss. 13 and 14. It is clear from these provisions of the law that the word “*held*” in S. 11 connotes physical possession and that nominal possession even under a genuine lease is not sufficient to enable a tenant to acquire a right of occupancy. (*Fremantle, S. M. and Burn, J. M.*) KUNWAR MAHOMED ABDUL JALIL KHAN v. CHANDER SEN.

L. R. 5 A. 83 (Rev.); 10 O. & A. L. R. 385.

—Ss. 11 (a) and 95—*Kabuliyat—Seven years—Agreement to vacate—No provision for re-entry.*

Where there is a *Kabuliyat* for seven years and more, in the absence of a specific statement in the agreement that the tenant is liable on breach of such a condition to be ejected, the mere promise to vacate the land or the statement that the Zamindar may take it does not amount to a special contract rendering the tenant liable to be ejected within S. 57 (c) on the *Agra Ten. Act*. (*Fremantle, S. M. and Burn, J. M.*) DEBI v. NAWAB MD. ABDUL SAMAD KHAN.

L. R. 5 A. 372 (Rev.).

—S. 11—*Sir land—Possession of sub-tenants—Accrual of occupancy rights.*

Ordinarily it would be correct to say that the rights of a tenant could not begin to accrue until the whole of the *sir* had been transferred or proceedings under S. 36 had been concluded. But where almost the whole of the share to which the *sir* appertained was transferred and from the date of the transfer the rent of the *sir* was paid to the transferee and there was nothing to show that the payments were made as sub-tenants, *held* that on the date of the transfer the tenant rights began to accrue and the whole period counted towards the acquisition of occupancy rights. (*Fremantle, S. M.*) HARBANS v. HEMAI KOERI.

L. R. 5 A. 17 (Rev.).

AGRA TENANCY ACT, S. 14.

—S. 11, *Proviso (a)—Lease for seven years—Provision for Zamindar taking leased land in exchange for other land—Acquisition of occupancy rights by tenant.*

Defendants were holding under a lease for seven years executed by the Zamindar. There was a condition in the lease that if the Zamindar took the whole or part of the land for his own purposes the lessee was to vacate the land and was to get other land instead, for the remaining term of the lease. *Held*, that the condition for dispossessing the tenant on giving other land in exchange was a disturbance to the tenant and therefore the seven years' lease did not prevent the acquisition of occupancy rights by the tenants. (*Fremantle, S. M. and Burn, J. M.*) PHULA SINGH v. RAJA BHAGAT CHAND.

L. R. 5 A. 249 (Rev.).

—S. 11, *Proviso (a)—Lease for a term of seven years—No provision empowering Zamindar to shorten the term without the tenant's act or omission—Acquisition of occupancy rights.*

Where in a lease for seven years granted by a Zamindar in favour of a tenant there was no condition giving the Zamindar power to shorten the term of the lease without a definite act or omission on the part of the tenant. *Held*, that the lease did not bar the acquisition of occupancy right by the tenant. (*Fremantle, S. M. and Burn, J. M.*) MADHO PRASAD v. DALLU SINGH.

L. R. 5 A. 259 (Rev.).

—Ss. 14 (1) (d) and 58—“*Same landholder*”—*Meaning of—Co-sharers of a patti or mahal—Private partition—Effect of.*

The defendant held during the years 1314 Fasli to 1321 Fasli a minimum area of 4 bighas, 8 biswas, 7 dhurs in a joint patti. Towards the end of 1321 Fasli the co-sharers in the patti arranged a private partition. Of the area held by the defendant, 1 bigha 8 biswas 9 dhurs fell into plaintiff's share. The remainder of the defendant's holding fell into the share of other co-sharers who took the land into their own cultivation or let it to other tenants. To make up for this in 1320 Fasli the plaintiff gave the defendant new plots of area which was 2 bighas, 4 biswas, 5 dhurs. The question arose whether the defendant was entitled to count this area as having been given him in exchange for that of which he has deprived by the other co-sharers. *Held* that where the co-sharers of a joint patti had divided it so that the tenant's holding was split up and portions were allotted to different co-sharers in the patti, the landholder before and after the partition should be considered to be the same for the purpose of Section 14.

The new plots were given at the beginning of 1322 Fasli by the plaintiff in lieu of the plots which the other co-sharers had taken away from the defendant and the plaintiff could not be considered “the same landholder” under Section 14.

The term “landholder” is defined in the Act as “the person to whom rent is payable” and it has been frequently held that in the case of private partition between co-sharers of an undivided mahal the co-sharer in whose share the tenant's holding lies is the person to whom rent is payable. Consequently he has authority to eject without joining other co-sharers.

AGRA TENANCY ACT, S. 15.

Two co-sharers of a patti or mahal recorded as undivided who have made a private partition of the land among themselves cannot be regarded as the "same landholder" for the purpose of Section 14. (*Fremantle, S.M. and Burn, J. M.*) *BANSI CHAUDHURY v. AMIR CHAUDHURY*.

L. R. 5 A. 81 (Rev.).

—S. 15—*Ejectment—Immediate re-admission—Break in tenancy—Rent Act.*

Under Act XII of 1881 an ejectment constituted a break in tenure even if the defendant was immediately re-admitted. (*Fremantle, S. M. and Brown, J. M.*) *BALWANT SINGH v. HAFIZ KALLU*.

L. R. 5 A. 18 (2) (Rev.).

—S. 18 (a)—*Tenant's holding—Widow in possession—Surrender—Effect on rights of reversioners.*

A widow who has succeeded to the occupancy tenancy of her husband and therefore has only rights for her life is competent to relinquish the holding to the detriment of the reversioner's rights. (*Fremantle, S.M.*) *RAM BHAROSA v. MD. ALI KHAN*.

L. R. 5 A. 127 (Rev.).

—Ss. 20, 31—*Resumption on death—Mortgagee from tenant—Rights of.*

Where an occupancy tenant dies without heirs and the landlords resume the holding they can do so subject to rights created by the tenant. If the tenant has created a mortgage, which has not been challenged within the time allowed by law, the landlords can get possession on paying the money due under the mortgage. (*Kunhaiya Lal, J.*) *RAJRANGISINGH v. SHEO BARAT*.

78 I. C. 531 : 1924 A. 841.

—S. 20—*Transfer by will—Occupancy holding.*

Transfer in S. 20 does not include a will and an occupancy tenant cannot regulate succession to his tenancy by making a will. (*Neave, J.*) *KALLU v. GANGA RAM*.

L. R. 5 A. 179 (Rev.) : 1924 A. 508.

—S. 20 (3)—*Thekadar—Judgment against—Appointment of Receiver—If prohibited.*

Where in execution of a decree against a thekadar, a receiver is appointed in execution to collect rents and profits, there is no transfer of the interest of the thekadar and the appointment is not contrary to S. 20 (3). (*Mukerji and Dalal, JJ.*) *KIRTARATH GIR v. MATHURA PRASAD RAM*.

81 I. C. 741.

—S. 21—*Occupancy holding—Mortgage—Validity—Receipt of rent by mortgagor—Resumption.*

The mortgage of an occupancy holding is illegal and the mortgagee gets no rights thereunder. Where the mortgagor in such case receives rent from his lessee, it amounts in law to resumption of the holding. (*Banerjee, A.C.J. and Piggott, J.*) *ATA HUSAIN v. RAMMAN LAL*.

78 I. C. 539 : 1924 A. 710.

—S. 22—*Co-sharing in cultivation—Minor and guardian.*

Where a guardian and a minor shared in the profits and loss of a holding, this amounts to co-

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sharing within the meaning of S. 22. (*Fremantle, S.M.*) *RANJIT SINGH v. YUSUF CHAUDHURI*.

L. R. 5 A. 46 (Rev.).

—S. 22—*Co-sharing in cultivation—What constitutes.*

Where the brothers, though separate, came together for cultivation and pooled their agricultural stock, it amounts to sharing in cultivation. (*Fremantle, S. M.*) *HANUMAN PRASAD v. SHAM-SHER*.

L. R. 5 A. 229 (Rev.).

—S. 22—*Death of occupancy tenant—Succession by widow—Death of widow—Rights of daughter.*

An occupancy tenant died while the Rent Act of 1881 was in force and was succeeded by his widow. In the subsequent settlement his daughter's name was added as occupancy tenant. The widow died after Act II of 1901 came into force. *Held*, that the occupancy right of the widow could not descend to the daughter, that the right of occupancy was extinguished at the widow's death, and the fact that the daughter had been recorded with her mother as occupancy tenant of the land in suit and that the Zamindar realized the share of the rents from her did not operate to give her an occupancy right. The entry at the settlement proceedings did not constitute an admission on the part of the Zamindar of her occupancy rights. (*Fremantle, S. M. and Burn, J. M.*) *SHEIKH MAHOMED SALIM v. MT. MARTULA KUARI*.

L. R. 5 A. 232 (Rev.).

—S. 22—*Joint holding—Mortgage of portion—Right to redeem.*

1924 A. 147.

—S. 22—*Partition among tenants—Female tenant allotted some fields—Status of tenant—Co-sharing in the fields—Effect of.*

Under a deed of private partition among themselves the tenants gave some plots to their sister-in-law. After this the defendant was admitted by the tenants to share in the cultivation of the plots in their possession.

Held, that the temporary and private arrangement among the tenants having been made for their mutual convenience all the co-sharers continued to be tenants of the entire holding. On the death of the sister-in-law the plots that had been assigned to her reverted to the surviving co-sharers of the holding. 3 U. D. 419, Foll.

The defendant, having as nearest collateral, co-shared in the cultivation of the holding to which the fields assigned to the sister-in-law were to revert after her death, his right as collateral must be deemed to extend to the whole holding. He had therefore occupancy rights on all the fields. (*Fremantle, S.M.*) *RAM DAYAL v. GOPAL*.

L. R. 5 A. 121 (Rev.).

—S. 22—*Succession—Personal law—Applicability of—Co-disciple of deceased tenant—Distant collateral—Preference.*

Co-disciples of a deceased tenant cannot exclude as nearest collaterals a more distant collateral who has shared in the cultivation of the deceased. Where S. 22 is not directly contrary to the Hindu law, it should be read along with

AGRA TENANCY ACT, S. 23.

the personal law of the parties. (*Fremantle, S. M.*) *SABHU SINGH v. KHANZADA SINGH*,
L. R. 5 A. 256 (Rev.)

—Ss. 23 to 30—Thekadars—Position of.
L. R. 5 A. 28 (Rev.)

—Ss. 24 and 28, 58—Scope of—Suit in ejectment—Maintainability—Sub-lease from a non-occupancy tenant.

Where a sub-lease was granted by a female non-occupancy tenant in her own right the Zamindar filed an ejectment suit against the sub-lessees after her death, which was opposed by the lessees. *Held*, the sub-tenant is liable to be ejected, on the ground, that under S. 58 of the Act, a non-occupancy tenant or sub-tenant is liable to be ejected before 12 years, and the contention that under S. 28, the Zamindar is bound by the leases granted by the tenant-in-chief, during his lifetime would mean a serious invasion of his rights. *Held* further, the provision in S. 28 which preserved sub-leases after the interest of the tenant-in-chief has been extinguished is subject to the proviso in S. 24, viz. a tenant by sub-letting cannot be relieved from any of his liabilities to the landlord. A non-occupancy tenant cannot make a valid transfer of interest exceeding those which he has himself. (*Fremantle, S. M. and Burn, J. M.*) *MURLIDAR v. JABBU LAL AND OTHERS*,
L. R. 5 A. 297 (Rev.)

—S. 25—Exproprietary holding lease or mortgage—Term of 5 years.

An exproprietary tenant executed a lease of the holding for 5 years at Rs. 120 rental per year. It was stipulated that Rs. 48 should be paid out of the rental to the Zamindar and the balance was to be adjusted towards a debt due by the lessor under a document of even date. *Held*, that the transaction was a lease for 5 years and not opposed to S. 25. (*Fremantle, S. M.*) *LAKHAR SINGH v. DAMMAR SINGH*,
L. R. 5 A. 161 (Rev.)

—S. 25—Lease—Provision for re-entry on non-payment of rent—Effect of.

A condition in a lease providing for re-entry on failure to pay rent is inconsistent with the Act. (*Burn, J. M.*) *GHUREY v. SEWA RAM*,
L. R. 5 A. 125 (Rev.)

—S. 32 (2)—Joint tenants—Occupancy holding—Possession of specific plots—Dispossession of one—Suit for possession.

Joint tenants of an occupancy holding can agree among themselves to hold specific plots and if one of them is dispossessed of the plot assigned to him by the others, he can sue them for possession. This does not in any way affect the rights of the landlord. (*Dalal, J.*) *GHASI v. MR. BHARTO*,
80 I. C. 941
L. R. 5 A. 307 (Rev.)

—S. 34—Ejectment suit—Want of consent—Proof of.

Where the plaintiff has sued under S. 34 he must show that the defendant had entered on the land without his consent. (*Fremantle, S. M. and Burn, J. M.*) *PIRTHI v. BHAGWAN DAS*,
L. R. 5 A. 223 (Rev.)

AGRA TENANCY ACT, S. 34.

—S. 34—Decision regarding defendant's status—Whether constitutes *res judicata* in a subsequent suit for ejectment.

In a suit under S. 34 of the A.T. Act by the plaintiffs alleging that the defendant had occupied the land without their express consent, and the latter pleaded acquisition of occupancy rights by succession and the Judge decided that defendant had not succeeded to occupancy rights, *Held*, in a subsequent suit for ejectment, against the same defendant, that the finding of the Judge as to his status in the previous suit was an essential part of the judgment and operated as *res judicata* against the defendant. (*Fremantle, S. M. and Burn, J. M.*) *SYED ALI MUSI RAZU AND OTHERS v. JUKHI SINGH AND OTHERS*,
L. R. 5 A. 300 (Rev.)

—S. 34—Ejectment—Non-occupancy tenant—Proprietary rights—Question of.

S. 34 applies wherever agricultural land is occupied by a person without the consent of the landlord. In such a case, the landlord can sue to eject him, and need not specifically plead the section. In such a suit it is open to the defendant to ask to have the question of proprietary right referred to Civil Court under S. 199. (*Daniels, J.*) *IQBAL AHMAD v. SURAJ BALI*,
82 I. C. 651.

—Ss. 34, 58—Person recorded as sub-tenant—No payment of rent—Presumption of tenancy by sufferance when arises.

10 O. & A. L. R. 64.

—Ss. 34, 177—Proprietary title pleaded—Appeal. *NANJADIK RAI v. RAM JATAN RAI*,
L. R. 5 A. 14 (Rev.)

—S. 34—Suit for profits—Amount claimed as rent—Subsequent suit for ejectment under S. 34—Whether plaintiff estopped.

In a suit for profits a decree was passed awarding a certain sum on account of the rent of a particular plot to the plaintiffs. Subsequently he brought an ejectment suit under S. 34 of the Agra Tenancy Act on the plea that there was no contract of tenancy. The defendants claimed occupancy rights.

Held, that the plaintiff was estopped from arguing that the recovery in the profits suit could not be considered as evidence of taking rent. (*Burn, J. M.*) *RADHEY LAL AND OTHERS v. PARAMPAT*,
L. R. 5 A. 311 (Rev.)

—S. 34—Sir rights—Proprietary right—Distinction between.

Sir rights though they can only be held by a proprietor are something beyond and apart from the mere proprietary right. The right of a Sirholder is a right to exclusive possession coupled with the fact that no person cultivating under him can acquire occupancy rights. In a joint undivided village each proprietor may have his own separate Sir although the proprietary rights in the whole village are joint. The Sir rights cannot be transferred by purchase. Where the entire Sir has been sold and the purchaser obtained actual cultivatory possession, the land is treated as his *Khudkasht* and not as his Sir. (*Daniels, J.*) *RAM PRASAD SINGH v. JANKI PRASAD SINGH*,
80 I. C. 899; L. R. 5 A. 278 (Rev.)

AGRA TENANCY ACT, S. 34.

—S. 34—*Unrented land—Entry in settlement record—Consent of Zamindar.*

An entry of a plot as unrented in the settlement papers, even if attestation takes place, is insufficient to constitute an admission of consent by the Zamindar. (*Fremantle, S. M. and Burn, J. M.*) *GULZARI v. NAWAB SYED MOHAMMAD ALI HUSSAIN KHAN.* L. R. 5 A. 246 (Rev.).

—Ss. 41 and 97—*Entry of enhanced rent in Khatauni with signatures of landlord, one of the tenants, quanungo—Whether amounts to agreement to pay enhanced rent.*

The mere entry of a figure in the Khatauni with the signatures of the landlord, the tenant, and quanungo cannot be regarded as an agreement to enhance rent duly attested under the provisions of Ss. 41 and 97 of the Tenancy Act. (*Neave, J.*) *RAM PRASAD v. RAJAN AND ANOTHER.*

82 I. C. 332 : L. R. 5 A. 316 (Rev.).

—S. 47—*Enhancement of rent—Compromise decree—Registration.*

A compromise decree for enhancement of rent requires registration under S. 47, Agra Tenancy Act. (*Neave, J.*) *SANTU v. ABHAINANDAN PRASAD.* L. R. 5 A. 292 (Rev.) : 81 I. C. 297 : 1925 A. 32.

—S. 57—*Occupancy tenant—Conversion of holding into grove—Ejectment.*

An occupancy tenant has no right to convert a portion of the occupancy holding into a grove. If he does so, the landholder has got the power to eject him for doing an act detrimental to the purpose for which the land was let. But that power can be exercised only within one year from the date of the conversion. (*Kanhaiya Lal, J.*) *MAN SINGH v. MADHO SINGH.* 22 A. L. J. 70 : L. R. 5 A. 34 (Rev.) : 79 I. C. 599 : 1924 A. 430.

—S. 57—*Occupancy holding—Lands in several villages—Suit for rent—If to be separate.*

Where the lands constituting one occupancy holding are situate in several villages, separate suits for rent should be filed with respect to the lands in the several villages. (*Stuart, J.*) *BHUP NARAIN RAI v. SRI THAKUR RADHA.*

78 I. C. 277 : L. R. 5 A. 211 (Rev.).

—Ss. 57, 63 (a)—*Ejectment—Suit under—Alienation by Hindu widow.* 75 I. C. 681 (2).

—S. 57 (a) (c)—*Non-payment of rent—Ejectment—Maintainability of suit.*

77 I. C. 927.

—S. 57 (a)—*Occupancy holding—Mortgage—Suit for rent by Zamindar—Mortgagee impleaded—Subsequent suit in ejectment—Estoppel.*

Neither the joining of the names of the mortgagees of an occupancy holding as defendants in a suit for arrears of rent nor the styling of them as mortgagees in receipts for rent, amount to a recognition of their rights as such and the Zamindar is not estopped thereby from ejecting the mortgagees when the tenant himself has been ejected. Where owing to default in payment of a decree for rent a Zamindar brings a suit in

AGRA TENANCY ACT, S. 57 (d).

ejectment under S. 57 the mortgagee of the holding is not a necessary party to the suit. The mortgagees who have not contractual relations with the Zamindar are not entitled to be joined as parties to the suit. (*Fremantle, S. M.*) *RAM SUBHAG SINGH v. MAHARAJA KESHO P. SINGH.* L. R. 5 A. 214 (Rev.).

—S. 57, cl. (b)—*Hindu widow—Permanent lease—Suit by reversioners for ejectment of the lessee in the revenue court—Maintainability of.*

Where a Hindu widow in possession of agricultural land inherited by her from her husband granted a perpetual lease of the same in favour of strangers and after the death of the widow the reversioners sued in ejectment under S. 57 alleging that the plots were agricultural land treating the debts as non-occupancy tenants no point was raised as to the nature of the land and the character of the tenancy either in the pleadings or in issues. *Held*, that the suit was maintainable in the revenue court. The institution of a suit in ejectment was an election to treat the lease by the widow as a nullity and it was not incumbent upon him to sue in civil court for cancellation of the lease. (*Walsh, A. C. J. and Sulaiman, J.*) *RAIROOP KUAR v. KANDHEYA.*

22 A. L. J. 546 : L. R. 5 A. 318 (Rev.) :

82 I. C. 238 : 1924 A. 785.

—Ss. 57 (b) and 65—*Ejectment suit—Decree directing removal of construction on a portion of holding by tenant—Whether plff. entitled to costs and compensation.*

In an ejectment suit a decree was passed, awarding costs, and compensation to the plaintiff, and directing the defendant that, if within one month, the constructions were not removed he could be ejected. The defendant removed the construction as per the decree and the Court did not allow plaintiff's costs and compensation as originally decreed. *Held*, there was no reason at all for depriving plaintiff of his costs and compensation. (*Fremantle, S. M. and Burn, J. M.*) *KUNDUN v. SHADI.*

L. R. 5 A. 308 (Rev.).

—S. 57 (c)—*Lease for seven years—Option to enter—Suit in ejectment—Jurisdiction—Civil and Revenue Court.*

Under the terms of a lease for a period of seven years the landholder was given power to take back all or any of the lands at his option during the period of the lease. In a suit by the landholder to eject the tenant, *Held* that the suit fell under S. 57 (c) of the Agra Ten. Act and item 13 of Group B of the fourth schedule of the Ten. Act. An appeal therefore lay to the Civil Court. (*Fremantle, S. M. and Burn, J. M.*) *PARTAP SINGH v. RIRWA.* L. R. 5 A. 341 (Rev.).

—S. 57 (d)—*Illegal transfer by occupancy tenant—Effect of—Mortgage—Redemption.*

Where an occupancy tenant illegally transfers his holding, the tenancy does not cease at once, but only if the landlord sues to eject him. Where the transfer was by way of mortgage, the occupancy tenant can before ejectment redeem the mortgage. (*Kanhaiya Lal, J.*) *DURGA CHOWDHURI v. JAGROOP.* 79 I. C. 232

AGRA TENANCY ACT, S. 58.

— S. 58—*Ejectment—Burden is on tenant to prove his tenure.*

The mere fact that the plffs. called the defts. lessees does not imply that they said or meant that the defts. were holding for a term. The burden of proof is on the tenant when he is sued by his landlord for his ejectment, to show that he has a permanent right to stay on the land and cannot be ejected by the proprietor. (*Mukerji, J.*) *CHOB SINGH v. DARYAI SINGH.*

L. R. 5 A. 163 (Rev.) : 82 I. C. 594 : 1924 A. 915.

— S. 58—*Landlord and tenant—Admission to tenancy—No proof of agreement as to length of tenancy—Taking of premium—Effect.*

The taking of a premium on admission to tenancy does not ordinarily imply a contract for an indefinite or even a very long term and very seldom does it imply a term long enough to ensure the acquisition of the status of any occupancy tenant. The test to be applied is whether in all the circumstances the term of occupation is reasonably long, the implied agreement being seldom capable of satisfactory proof.

In cases where there is no proof of any agreement not to eject for a definite term the circumstances must be considered. If the amount of the premium had been large with reference to the size of the holding it might have been found that there was an implied agreement not to eject for a term sufficient to allow occupancy rights to grow up. (*Fremantle, S. M.*) *SAYED JAWAD ALI SHAH v. UJAGIR LOHAR.*

L. R. 5 A. 87 (Rev.) : 10 O. & A. L. R. 440.

— S. 58—*Lease for seven years—Execution in the middle of the year—Ejectment.*

Where a lease is executed more than two months after the commencement of the year and there is no evidence of any agreement being come to at the beginning of the year, the mere recital in the lease for 7 years that it is to come into effect from the beginning of the year will be inoperative. (*Fremantle, S. M.*) *MAHOMED MOHSIN v. BEHARI.*

L. R. 5 A. 169 (Rev.).

— Ss. 58, 194—*Sale of undivided share—Effect—Expropriatory rights—Nature of.*

10 O. & A. L. R. 92.

— S. 59—*Ejectment—Minor judgment-debtors—Service of notice.*

In a suit in ejectment under S. 59 the judgment-debtors were minors and one of the two guardians was not served personally. *Held*, that ejectment was not justified. (*Fremantle, S. M. and Burn, J. M.*) *POHAP SINGH v. MT. GANESH.*

L. R. 5 A. 154 (Rev.)

— S. 61—*Ejectment—Arrears of rent decreed—Habitual defaulter—No proper explanation of inability to pay.*

A notice was issued to a tenant who had been a habitual defaulter to pay the amount of rent decreed within a fortnight or to show cause why he should not be ejected. After the expiry of the fortnight the tenant put in an application for time on the ground that he was unable to borrow money but no explanation was given as to how he had disposed of the produce of the holding.

AGRA TENANCY ACT, S. 79.

Held, that the Court had exercised a proper discretion in rejecting the application and ordering ejectment of the tenant. (*Fremantle, S. M.*) *BHAGWAN DIN v. HARPRIYA SARAN.*

L. R. 5 A. 60 (Rev.).

— S. 63—*Ejectment—Right of one co-sharer to sue.* *MUNESHWAR TEWARI v. MAHESHA KUERI.* 1924 A. 165.

— S. 63—*Ejectment suit—Party brought on record after expiry of time—Knowledge of proceedings—Effect of.*

Where a party who had full knowledge of the proceedings was brought on the record in an ejectment suit after a period fixed for filing the suit, the suit is not vitiated thereby. (*Fremantle, S. M.*) *PRAG NARAIN v. KANCHAN SINGH.*

L. R. 5 A. 126 (Rev.).

— S. 73—*Acquisition of occupancy rights—Ejectment after beginning of year—Earlier portion of the year if can be tacked on.*

Ejectment after the beginning of a year had the effect of making it impossible for the ejected tenant to count the period of possession during that year for the acquisition of occupancy rights, but there is nothing in Ss. 73 and 78 of the *Agra Ten. Act* which would make it possible for a man admitted after the date of actual ejectment to count the earlier portion of that year during which the ejected tenant was actually in possession for acquisition of rights by the incoming tenant. (*Fremantle, S. M. and Burn, J. M.*) *MT. SHIAMA DEVI v. BUDHWA.*

L. R. 5 A. 339 (Rev.).

— S. 79—*Applicability.*

S. 79 applies only to a case where there is more or less forcible ejectment and not where there is ejectment by mutual consent. (*Mukerji, J.*) *BIJAI BAHADUR v. PARMESHWARI RAM.*

78 I. C. 1026 (2) : 1924 A. 834.

— S. 79—*Agricultural lease by Zamindar in favour of defendant—Registered lease—Lambardar acknowledging plaintiff as non-occupancy tenant—Dispossession—Ejectment—Damages—Injunction—Suit if maintainable in Civil Court.*

On the death of a tenant the Zamindar granted a registered agricultural lease of the holding in favour of the defendant, but the Lambardar acknowledged the plaintiff who was the heir of the deceased tenant, as a non-occupancy tenant and recovered rents from him. More than a year after the lease, the defendant dispossessed the plaintiff and cut and carried away his crops. The plaintiff thereupon sued the defendant for recovery of possession, damages, and injunction within six months of the dispossession without impleading the Zamindar as a party. The suit was filed in the Civil Court and it was objected that the Civil Court had no jurisdiction. *Held*, that there was no ejectment by the Zamindar, the defendant being merely a trespasser and that the suit as against him was maintainable in the Civil Court. The plaintiff even if he were regarded as a non-occupancy tenant was entitled to remain in possession till eviction in the course of law and that the registered lease could not supersede the plaintiff's right. (*Sulaiman and Kanhaiya Lal, JJ.*) *CHET RAM v. SITA RAM.* 48 A. 717 : 22 A.L.J. 713 : 82 I.C. 251 : L. R. 5 A. 366 (Rev.) : 1924 A. 678 (2).

AGRA TENANCY ACT, S. 79.

—S. 79—*Death of tenant—Succession—Obstruction—Dispossession—Limitation.*

The provisions of S. 79 apply to cases where there has been a constructive as well as an actual or physical ejectment of a tenant from his tenancy. Where a person claiming to have succeeded to a tenancy right by right of inheritance finds that on endeavouring to take possession of the same his right is denied and his possession ousted by the Zamindar, he has suffered an ejectment at the hands of the landlord within S. 79 and his appropriate remedy is by a suit under the Tenancy Act. (*Dalal, J.*) *BIDIYA MISIR v. MT. DARVAT KUAR.*

L. R. 5 A. 184 (Rev.) : 79 I. C. 566 :
1924 A. 678 (1).

—S. 79—*Dispossession by one among several proprietors—Applicability of the section.*

Dispossession by one member of the proprietary body, not being the lambardar, cannot be treated as ejectment of the tenant by the landlord within the meaning of S. 79 of the Agra Tenancy Act. (*Daniels, J.*) *LAGAN RAI v. RAJA RAI.*

L. R. 5 A. 176 (Rev.) :
79 I. C. 1025 : 1924 A. 507.

—S. 79—*Ejectment—Landlord and tenant—Limitation.*

In a suit in ejectment the Court found that plffs. were occupancy tenants, that there was no relation of landlord and tenant between the parties and that the deft. was one of the co-sharers in the patti where the suit land was situate and that he had been in possession for 16 years without the consent of the plaintiffs. The defendant pleaded that he was a co-sharer and holding the land as kudka-ht. The suit having been decreed, the defendant appealed. *Held*, that the case was one to which S. 79 or the shorter period of limitation prescribed by the Act applied. The decree was therefore correct. To make S. 79 applicable ejectment of a tenant must be by the whole body of co-sharers or by the lambardar. (*Mukerji, J.*) *RANI v. EDAL SINGH*

L. R. 5 A. 37 (Rev.) :
78 I. C. 1041 : 22 A.L.J. 113 : 1924 A. 431.

—S. 79—*Ex-proprietary holding—Suit to recover possession by tenant—Jurisdiction of Civil Court—Absence of defence—Effect.*

A suit by a tenant against his landlord and a person claiming under him to recover possession of an ex-proprietary holding is one of the nature described in S. 79 and is not cognizable by a Civil Court. The fact that the Zamindar did not defend the suit is immaterial. (*Daniels, J.*) *AIDAL SINGH v. GYAN SINGH*

L. R. 5 A. 257 (Rev.) : 79 I. C. 318 :
1924 A. 615.

—S. 79—*Rent-free grantee—Illegal ejectment—Suit for possession—Revenue Court.*

If a rent-free grantee has been wrongfully ejected by the Zamindar no suit under Section 79 can be brought in the Revenue Court. The only remedy open to a rent-free grantee is, therefore, to sue in a Civil Court. (*Sulaiman, J.*) *CHAUDHRI HAR SARUP v. BRIJ NANDANLAL.*

L. R. 5 A. 103 (Rev.) : 79 I. C. 587 :
1924 A. 479.

AGRA TENANCY ACT, S. 97.

—S. 79—*Undivided mahal—Suit for ejectment of tenant—Parties.*

To enable a suit to be brought under S. 79 the ejectment must have been made by the landlord (*i. e.*) by the whole of the coparcenary body. A tenant in an undivided mahal is the tenant of the whole coparcenary body and a suit under S. 79 cannot be brought against one of those coparceners, only. (*Walsh, A. C. J. and Neave, J.*) *CHEDDA v. ACHHU SINGH.*

22 A.L.J. 570 : 46 A. 690 :
L. R. 5 A. 265 (Rev.) : 1924 A. 572.

—S. 80 (1)—*Applicability—Reversal of ejectment suit against non-occupancy tenant—Appellate court's powers to deliver possession.*

L. R. 5 A. 301 (Rev.).

—S. 80 (1)—*Scope of—Appellate Court's powers to restore possession—Non-occupancy tenant.*

Where the Collector in an ejectment suit found that the defendant at the time of suit was dead, and an application for substitution of legal representatives of the defendant was refused on the ground that there was really no suit in existence, and it was contended on appeal, by the plaintiff that under S. 80 (1) of A. T. Act an appellate court, when dismissing an ejectment suit, had no power to restore a non-occupancy tenant to possession, *Held*, S. 80 (1) of the Agra Tenancy Act refers to a different class of cases, and has no reference to the powers of an appellate court to restore a non-occupancy tenant to possession, when it reverses a decree for his ejectment. (*Burn, J. M.*) *KUNWAR BRIJ RAJ SARAN SINGH v. RAMCHANDER.*

L. R. 5 A. 301 (Rev.).

—S. 95—*Landlord and tenant—Receipts in the name of occupancy tenant and a stranger—How far an admission by the Zamindar of the latter to tenancy.*

In a suit by a Zamindar for declaration under S. 95 of the Agra Tenancy Act, that K was the only occupancy tenant in his holding, and C who had been sharing in cultivation with K, had no manner of right in the holding, the latter relied on statements in rent receipts as indicating admission of C to tenancy, by the Zamindar. *Held*, relying on *Shaik Habib v. Salamad Khan U.D. v. 496*, that statements in rent receipts were not sufficient to prove an admission by a Zamindar to a share in an occupancy holding. (*Burn, J. M.*) *CHEDA v. SALIM-UD-DIN.*

L. R. 5 A. 289 (Rev.).

—S. 96—*Applicability of.* 75 I. C. 605.—S. 96—*Whether attestation necessary for a lease.*

S. 96 of the Agra Tenancy Act does not require that a lease should be witnessed. (*Fremantle, S. M. and Burn, J. M.*) *JAGGU v. NIAZ AHMAD KEAN.*

L. R. 5 A. 295 (Rev.).

—S. 97—*Leases—Separate leases for portions of a single holding—Rent exceeding Rs. 100—Validity of lease.*

Where in respect of different plots composing a single holding a number of Kabuliyaats were taken showing a rent of less than Rs. 100 but the aggregate rent was more than hundred rupees and the

AGRA TENANCY ACT, S. 131.

leases were attested before the Kanungo but not stamped or registered. *Held*, that the leases were invalid for want of proper stamp and registration. (*Burn, J. M.*) *SHAHBUL HASAN v. BAZ KHAN*.
L. R. 5 A. 245 (Rev.)

—S. 131—Co-sharer—Partition—Ejectment of tenants.

A co-sharer after the partition has been confirmed can sue to eject tenants allotted to his patti without waiting for the subsequent first of July on which the partition comes into force. (*Fremantle, S. M. and Burn, J. M.*) *SITAL RAI v. LODI*.
L. R. 5 A. 183 (Rev.)

—S. 142—Suit for refund of amount collected by distraint—If maintainable in Civil Court.

A suit for arrears of rent having been decreed the landlord collected it by distraint under the Act. Subsequently the decree was reversed and a suit was brought for refund of the amount collected. *Held*, the suit was not cognizable by a Civil Court, but was provided for by S. 142. (*Piggott, J.*) *MAN SINGH v. RAM NATH*.
75 I. C. 922 : 1924 A. 828.

—S. 158—Sale of proprietary rights—Sir land—Revenue payable by vendee—Assessment of revenue.

On the sale of proprietary rights of a co-sharer certain sir land was excluded from the sale deed it being provided that the revenue thereon should be paid by the vendee.

Held, that the Resumption Chapter of the Tenancy Act applied to the case and revenue was assessable on the sir land under S. 153 of the Act. (*Fremantle, S. M. and Burn, J. M.*) *HAR PRIYA SARAN v. RAM NATH*.
L. R. 5 A. 118 (Rev.)

—Ss. 159 to 162, 164 and 165—Appeal lies to Dist. Judge in case of question of proprietary title.

Where the appeal raises no question of proprietary title, the appeal lies to the Commissioner, but where the cross-objection introduces a question of proprietary title as an issue in the decision of the appeal, the Commissioner must return the appeal and the cross-objection to the parties with directions to file them before the District Judge. 31 I. C. 857, Appr. (*Stuart, J.*) *LALA BHAGWAN DAS v. MOHABAT SHAH*.
1923 A. 170.

—S. 159—Payment of revenue by lambardar—Subsequent payment by co-sharer—Lambardar if can recover from co-sharer.

Under the law, a co-sharer is to pay Government revenue through a lambardar and where the latter pays the money in the first instance, a subsequent payment by the co-sharer direct into the treasury does not prevent the former claiming payment from the co-sharer. (*Daniels, J.*) *MT. AISHAH v. ABDUL GHANI*.
80 I. C. 916 : L. R. 5 A. 305 (Rev.)

—S. 160—Usufructuary mortgagee's name entered in revenue records—Suit for recovery of proportionate amount on account of that share which has been redeemed. 75 I. C. 663.

AGRA TENANCY ACT, S. 167.

—S. 164—Suit by a co-sharer against Lambardar for recovery of share of profits—Onus when shifted. *MT. HIRA v. RAM ADHN SINGH*.
75 I. C. 553.

—Ss. 164 and 165—Suit under—Amendment.

The nature of a suit is indicated by the allegations made in the plaint and not by quoting a section which does not apply. Though there is a difference in the nature of the suits under Ss. 164 and 165 no harm could be done by amending a suit under one section into a suit coming within the other. (*Mukerjee and Dalal, JJ.*) *CHANDER SEN v. MOHAR SINGH*.
L. R. 5 A. 335 (Rev.)

—S. 164—Co-sharer—Suit for profits—Basis of—Negligence or misconduct of lambardar—Limitation—Starting point.

In a suit under S. 164 a co-sharer is entitled to a decree for his share of the arrears collected on account of previous years, as well as his share of the gross rental for the year in suit, in case negligence or misconduct of the Lambardar is proved. The period of limitation for a suit under S. 164 for a share of the profits in respect of arrears collected subsequently begins to run from the 1st of August following the year in which the arrears are realised. (*Walsh, A. C. J., Sulaiman, Ryves, Mukerji and Daniels, JJ.*) *SHEO GHULAM v. SALIK RAM*.
22 A. L. J. 610 (F. B.) : 46 A. 791 : L. R. 5 A. 189 (Rev.) : 1924 A. 481.

—S. 165—Lambardar—Powers of—Right to sue co-sharers for profits.

A lambardar is not merely a co-sharer but the agent of the other co-sharers and can represent them in transactions relating to the estate. He can bring a suit for rent not only against tenants but also against other co-sharers who hold sir and khudkhast in excess of their shares for the extra profits realised. (*Kanhaiya Lal, J.*) *KUNDAN LAL v. BASANT RAI*. 75 I. C. 330 : 1924 A. 935 (2).

—Ss. 165 and 10 (5)—Purchaser of khudkhast land—Rent. 77 I. C. 382 (1).

—S. 165—Suit for profits against co-sharer lambardar and thekadar—Thekadar whether properly impleaded.

In a suit brought in the Revenue Court for profits under S. 165 of the Agra Tenancy Act, by two co-sharers, a Thekadar of the lambardar was impleaded as a party defendant along with others on the allegation that he had been making collections for the lambardar. *Held*, that the Thekadar was not a co-sharer, or a legal representative or assignee of the co-sharers and no suit could under S. 165 of A. T. Act could lie against him. (*Neave, J.*) *PURAN v. KHIATI RAM*.
I. R. 5 A. 284 (Rev.)

—S. 165—Suit for profits—Lambardar—Negligence—Second Appeal. 77 I. C. 1032 : 1924 A. 613.

—S. 167—Applicability—Suit between rival claimants to tenancy—Decision of Revenue Court—If can be questioned in Civil Court.

AGRA TENANCY ACT, S. 167.

S. 167 does not apply to suits between rival claimants to a tenancy and such a suit lies exclusively in the Civil Courts. But once the matter has been decided by the Revenue Courts, it cannot be reopened in the Civil Courts. (*Sulaiman, J.*) *SURJAN SINGH v. UMARI SINGH.*

78 I. C. 1008 : 1924 A. 609.

—S. 167—*Ejectment decree—Revenue Court—Subsequent declaratory suit in Civil Court—Maintainability of.*

The Civil Courts will not entertain a suit the object of which is to reverse a decision of a Revenue Court in a matter which is under S. 167 within the Revenue Court's exclusive jurisdiction and if this is the substantial object of the civil suit it is immaterial that the plaintiff may have framed his relief in a form in which it could not have been granted by the Revenue Court. The Courts will look to the substance of the matter and not to the form. Plaintiff sued in the Civil Court for a declaration that he was a joint tenant with the defendant with the object of setting aside the Revenue Court's decree for ejectment. *Held*, that the suit in the Civil Court was not maintainable. The plaintiff could have substantially obtained the same relief which he was seeking in the Civil Court by bringing a declaratory suit under S. 95 of the Tenancy Act against the landholder and making the defendants a party to it. The fact that since the institution of the civil suit the plaintiff had been able to get from the Revenue Court a pronouncement that he was not liable to ejectment as sub-tenant is irrelevant. To see whether the suit is maintainable the Court has to look to the date when it was instituted. (*Daniels, J.*) *GOBIND v. AMMAR.*

78 I. C. 628 : L. R. 5 A. 138 (Rev.).

—S. 167—*Ejectment suit in Revenue Court—Decree—Subsequent suit in Civil Court—Maintainability of.*

Plaintiff cannot by merely changing the form of his relief evade the provisions of S. 167 of the Agra Tenancy Act. Defendant ejected the plaintiff in a suit brought under the Act and decided *ex parte*. An application by the plaintiff to get the *ex parte* decree set aside, on the ground that no notice was served on him was dismissed by the Revenue Court. Plaintiff then brought a suit in the Civil Court alleging that the decree in the Revenue Court had been fraudulently obtained and should therefore be cancelled and for a declaration that the plaintiff was a grove-holder. *Held*, that the Civil Court had no jurisdiction to grant the relief. The ejectment suit being before the Revenue Court, that Court had jurisdiction to decide whether the defendants in the Civil Court were agricultural tenants or not. It decided against them and its decision was under S. 167 a bar to a civil suit on the same matter. (*Daniels and Dalal, JJ.*) *KUNDAN LAL v. PRASAD.*

46 A. 570 : 22 A. L. J. 466 : L. R. 5 A. 159 (Rev.) : 79 I. C. 960 : 1924 A. 744.

—S. 167—*Lease by Hindu father—Suit by sons in Revenue Court to eject lessee—Revenue Court leaving validity of the lease to the Civil Court—Declaratory suit in Civil Court—No bar.*

AGRA TENANCY, ACT S. 177.

The father of the plaintiffs granted a perpetual lease of certain agricultural land forming part of their joint family property in favour of the defendant. The plaintiffs sued after the father's death to eject the defendant in the Revenue Court which refused to do so until the decision of a Civil Court had been obtained on the validity of the lease. Subsequently the plaintiffs sued in the Civil Court for a declaration that the lease granted by the father was not binding upon them.

Held, that that suit was maintainable in the Civil Court. Where the decision of the Revenue Court refusing to eject the defendant unless and until the validity of the lease had been adjudicated upon by the Civil Court was right or wrong, it was binding upon the parties to it and could not be challenged by them. (*Walsh, Ag. C. J. and Piggott, J.*) *PHOOL SINGH v. MT. GOBIND KOER.*

80 I. C. 399 : L. R. 5 A. 141 (Rev.).

—S. 167—*Suit for declaration of—Occupancy rights—By whom cognizable.* 1924 A. 102.

—S. 177—*Appeal—Question of proprietary title—Power of Commissioner—Procedure.*

The Commissioner found that a question of proprietary title was in issue with respect to three plots of land and he gave no decision as regards these plots. He decided the appeal with regard to three other plots, with reference to which no question of ex-proprietary title had been raised. *Held*, that the procedure of the Commissioner was not correct. When he found that the question of proprietary title had been in issue in the Court of first instance and was a matter of appeal before him, he should have returned the memorandum of appeal for presentation to the District Judge. (*Fremantle, S. M. and Burn, J. M.*) *SANT PRASAD SINGH v. DEBI DIN KOERI.*

L. R. 5 A. 343 (Rev.).

—S. 177—*Jurisdiction—Objection to—Duty of Court to enquire.*

Where an objection to jurisdiction is taken, it is the duty of the trial Court to decide whether or not the plea is *bona fide*. If the trial Court makes the enquiry treating the plea as *bona fide*, the appellate court will not interfere. (*Walsh, A. C. J. and Ryves, J.*) *KHUB SINGH v. MOHAN SINGH.*

L. R. 5 A. 183 (Rev.) : 1924 A. 476.

—S. 177—*Suit for ejectment as sub-tenant—Defendant pleading possessions as khudkasht—Question of proprietary title—Appeal.*

In a suit brought for ejectment against the defendants on the allegation that they were plaintiff's sub-tenants, one of the defendants pleaded that he was not a sub-tenant at all and there was no relation of landlord and tenant between him and the plaintiff. He asserted that he held possession of this land as his *Khudkasht*, being himself a proprietor. *Held*, that there was a question of proprietary title involved in the case. (*Sulaiman and Mukerji, JJ.*) *GHURIYA v. BANESHWAR.*

L. R. 5 A. 251 (Rev.) : 1925 A. 30.

—Ss. 177 and 202—*Direction by Civil Court to institute suit in Revenue Court—Appeal—Jurisdiction.*

AGRA TENANCY ACT, S. 177.

The defendant in a civil suit was directed to sue in the Revenue Court under S. 202 of the Tenancy Act and the suit was accordingly instituted in the Court of the Assistant Collector. *Held*, that an appeal from the decision of the Assistant Collector lay to the Commissioner and not to the Dt. Judge. (*Mukerji, J.*) *HIRDEV NARAIN RAI v. JAGDISH NARAIN RAI*, 22 A. L. J. 909; 82 I. C. 317; L. R. 5 A. 276 (Rev.).

—S. 177 (e)—*Ejectment—Suit for—Defence of co-tenancy and proprietary title—Jurisdiction—Appeal—Civil or Revenue Court.*

The defendants in an ejectment suit pleaded by way of defence that they were either co-sharers, with the last occupancy tenant, or were holders of land by virtue of their position as mortgagees of proprietary rights in the patti. The Assistant Collector decided on the first point of defence and did not decide regarding khudkasht. The Commissioner on appeal decided both questions. *Held*, the Collector overlooked the provisions of S. 177 (e) of the Tenancy Act, and that the memo. of appeal should be returned to the appellant with orders to present it to the Civil Court. (*Fremantle, S. M. and Burn, J. M.*) *GAMDAN LAL v. RAMRATAN LAL*, L. R. 5 A. 318 (Rev.).

—S. 177 (e)—*Ejectment suit—Defendants claiming that their brother had proprietary rights—Claim whether frivolous—Appeal—Jurisdiction—Civil and Revenue Courts.*

The plff. sued two persons as non-occupancy tenants. They alleged that their own brother had proprietary rights and was holding as khudkasht. The Asst. Collector having found that the defendants' brother had obtained a decree conferring proprietary rights during the pendency of the suit dismissed the suit. The Collector found that the decree was obtained subsequent to the filing of the present suit, and proceeded to decide on the merits.

Held, on appeal, that the defendants' claim was not entirely frivolous and that the Collector had no *locus standi* to hear the appeal. (*Fremantle, S. M. and Burn, J. M.*) *MULA v. KIRPA RAM*, L. R. 5 A. 319 (Rev.).

—S. 177 (e)—*Proprietary title—Suit under S. 34, Agra Ten. Act. NANJADIK RAI v. RAM JATAN RAI*, L. R. 4 A. 14 (Rev.).

—S. 179—*Appealable order—Review—Order if appealable.*

Section 179 limits the orders from which appeals are admissible in cases under that Act. An order of review is thus not applicable *per se*, though the judgment giving effect to that order, on the basis of which a decree is drawn up, may be appealable. (*Burn, J. M.*) *PARMA v. GANNU*, L. R. 5 A. 107 (Rev.).

—S. 189—*Power of Commissioner to transfer appeals to Collector—Special order, if necessary.*

S. 189 (1) allows Commissioners to transfer appeals to Collectors under a general sanction given by the Local Government. Special orders dealing with appeals then pending before the Commissioner are unnecessary. (*Fremantle, S. M.*) *PRAG NARAIN v. KANCHAN SINGH*, L. R. 5 A. 126 (Rev.).

AGRA TENANCY ACT, S. 194 (2).

—S. 193—*Scope of—Shares of profits assigned—Insolvency of sharer—Suit for profits by assignee—Pro. Ins. Act, S. 28.*

S. 193 must be construed in the sense and for the purpose for which it was intended, namely, the regulation of procedure in the Revenue Courts and it cannot be extended so as to withdraw from the cognizance and determination of these Courts pleas which do not go to procedure but substantive legal rights. Where therefore an assignee of profits from a co-sharer who had been adjudged an insolvent prior to the assignment sued the lambardar in a Revenue Court for profits accrued and the lambardar questioned the plaintiff's right to sue on the ground that his assignor had no title to convey after his insolvency. *Held* by *Lindsay and Sulaiman, JJ.* (*Kanhaiya Lal, J. dissenting*) that the plea was not one relating to procedure but of a substantive legal right and the Revenue Court had jurisdiction to decide it. (*Lindsay, Sulaiman and Kanhaiya Lal, JJ.*) *GOVIND RAM v. KUNJ BHARI LAL*, 46 A. 398; 22 A. L. J. 217; L. R. 5 A. 65 (Rev.); 1924 A. 341.

—S. 194—*Lambardar—Position of—Suit for rent or ejectment—Agency—Presumption—Onus.*

A lambardar sued a tenant for recovery of rent or for ejectment. The defendant pleaded that the lambardar had no authority to realise the rent in the mahal in suit and that the co-sharers had each collected his own share of the rent. *Held*, that though the presumption was that the lambardar was appointed as agent to act on behalf of all the co-sharers it was open to the tenant to prove an arrangement among the co-sharers of a particular mahal under which each co-sharer was to collect his own share of the rent. In respect of such mahal the lambardar is not an agent of the co-sharers. (*Dalal, J.*) *SYED SIDDIQ ALI v. CHANDA*, L. R. 5 A. 271 (Rev.).

—S. 194—*Partition—Amalgamation of several khatas into one—Ejectment—Parties.*

At a partition several khatas owned separately by different proprietors were consolidated into one single khata. Before the partition was confirmed but after the commencement of the partition proceeding the former proprietors of one of the old khatas brought a suit to eject a tenant of a holding in that khata without joining the proprietors of the other khatas. *Held*, that the suit was maintainable. (*Fremantle, S. M.*) *JAGESHAR MAL v. RAGHUNANDAN SAHU*, L. R. 5 A. 217 (Rev.).

—S. 194—*Right of—One co-sharer to sue. See CIV. PRO. CODE, O. 1, R. 8.* 77 I. C. 760.

—S. 194 (2)—*Sir land—Tenant of—Land ceasing to be sir—Position of tenant—Ejectment.*

Where a tenant of *sir* land which has since ceased to be *sir* land is sought to be ejected by a proprietor who let the land to him, *Held*, that though the tenant was the tenant of the entire proprietary body, yet the suit was properly brought. (*Fremantle, S. M. and Burn, J. M.*) *KASH PRASAD RAI v. SHEIKH GULLI*, L. R. 5 A. 182 (Rev.).

AGRA TENANCY ACT, S. 194.

—S. 194 (1) — *Arrangement—Every co-sharer to collect his own rent—Lambardar—If agent of all.*

When there is an arrangement in a village that each co-sharer should collect his own rent, the *lambardar* cannot be held to be the agent of all the co-sharers. In the absence of such an arrangement, the presumption is, he is an agent of all the sharers. (*Dalal, J.*) SVED SIDDIQ ALI v. CHAN-DA. 80 I. C. 732 : L. R. 5 A. 271 (Rev.)

—S. 194 (2)—*Suit in ejectment—Co-sharers—Non-joinder.*

Where in a suit in ejectment brought by one of the co-sharers, it was found that though there were other co-sharers in the proprietary right, the land was let to the defendants by the plaintiff alone and the plaintiff had let other holdings similarly. *Held*, that there was evidence from which a special contract could be inferred with- in S. 194 (2) of the Act and the suit was not bad for non-joinder of parties. (*Burn, J. M.*) JANKI PRASAD v. HAR PRASAD. L. R. 5 A. 178 (Rev.)

—S. 198—*Suit by landlord for arrears of rent—Tenant pleading payment in good faith to third person—Decision against landlord—Right of suit in civil court.* 1924 A. 270.

—S. 201—*Mortgage—Lease by mortgagee—Mortgagor in receipt of rents from mortgagee—Suit for profits from lambardar.*

A mortgagee, having been unable or unwilling to obtain possession of the mortgaged property by occupation himself leased the mortgaged property to the mortgagor for a term of seven years and during those seven years remained in possession by the receipt of the rents. Since those 7 years expired the mortgagor has continued to remain in possession. The mortgagee took no active steps to turn him out. *Held*, that the ordinary presumption was that the mortgagor had remained in possession with the mortgagee's consent without an express agreement. The mortgagee could not be said to have been dis- possessed in any shape or form and he was entitled to sue the *lambardar* for profits.

Per Piggott, J.—The usufructuary mortgagee of a co-sharer in possession of the share is entitled to maintain a suit against the *lambardar* for profits. Mere non-payment by a *lambardar* to any co-sharer of the said co-sharer's proper quota of the annual divisible profits of the mahal does not in the absence of evidence to the contrary constitute an ouster of the said co-sharer from possession. (*Walsh and Piggott, JJ.*) LACHMAN PANDE v. TRIBENI SAHU. 22 A. L. J. 518 :

79 I. C. 538 : L. R. 5 A. 174 (Rev.) : 1924 A. 719.

—S. 201, cls. (i) and (iii)—*Mortgagee of a mahal—Redemption—Payment of revenue for entire property—Suit for contribution—Scope of enquiry.*

In a suit under S. 169 of the Agra Ten. Act, it was found that the plaintiff during the years in question stood recorded as usufructuary mortgagee of a share of 16 biswas and odd in a mahal. By reason of this record he was compelled to pay the whole of the land revenue demand in respect

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of the said share. As a matter of fact a portion of the mortgage had been redeemed and the plff. was really in possession as mortgagee over a share of 8 biswas only. The defendant was a co-sharer in possession of the remainder. *Held*, that the possession of the plaintiff was that of a co-sharer not recorded as having the particular proprietary right which would entitle him to maintain the suit brought by him. In reality his case fell under the first and not under the third clause of S. 201. (*Mears, C. J. and Piggott, J.*) JWALA PRASAD v. IRSHAD MAHOMED KHAN. L. R. 5 A. 146 (Rev.) : 46 A. 512.

—S. 202—*Suit in ejectment—Plea of tenancy—Power of Civil Court.* L. R. 5 A. 26 (Rev.)

—Sch. 4, Art. 18—*Status of sub-tenant—Fresh letting if necessary every year.*

A sub-tenant is a tenant from year to year and remains so till ejectment or surrender. His tenancy does not come to an end at the end of the first and each successive year and there is no need for a fresh act of sub-letting to continue him in his tenancy. (*Fremantle, S.M. and Brown, J. M.*) SHEO PRASAD v. ANAND MADHO. L. R. 5 A. 18 (1) (Rev.)

ALLAHABAD HIGH COURT RULES, Ch. III, R. 3—*Second appeal—No evidence to support finding—Certificate of Counsel—Admission without such certificate—Effect of.*

No appeal from an appellate decree presented by an advocate, attorney or vakil shall be admitted on the ground of want of evidence to support a finding of fact unless such advocate, attorney or vakil certifies under his hand the memorandum of appeal that he has examined the record and that, in his opinion, such a ground is well founded in fact. The rule is imperative. Unless the certificate is present, the matter cannot be argued in spite of the fact that the appeal has been admitted to hearing. (*Stuart, J.*) ISH NARAIN UPADHIA v. RAMESHAR LOHAR.

22 A. L. J. 244 : 78 I. C. 164 : L. R. 5 A. 91 (Rev.) : 1924 A. 423.

—Chapter XXI, R. 1—*Pleader's certificate—Time for filing of.*

For the purpose of determining whether a certificate of payment of pleader's fee has been filed in time, the first day of hearing is to be interpreted as the first day fixed for hearing after the framing of issues. (*Neave, J.*) MADHO LAL v. BANERSI DAS. 82 I. C. 73 (1) : L. R. 5 A. 582.

ALLUVION AND DILUVION—*Riparian owners—Rights of—Accretion.* NARESH NARAYAN ROY v. SECRETARY OF STATE FOR INDIA. 77 I. C. 1048.

ANIMALS—*Ownership in—Wild animals—Rights of killer and proprietor of land.* See PENAL CODE, Ss. 97 AND 105. 3 Pat. 549.

APPEAL—*Abatement on account of death of one of the appellants—Suit for redemption.*

Where two appellants filed an appeal, and one of them died, his legal representative not having been brought on record within time, the other continued the appeal. *Held*, that the appeal

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cannot abate entirely. (*Young and Baguley, JJ.*) MAUNG BYAUNG v. MAUNG SHWE BAW. 2 Rang. 486 :

3 Bur. L. J. 171 : 1924 Rang. 376.

—*Abatement on account of omission to bring legal representatives on record—Surviving respondents the sole legal representatives of the deceased.*

In an appeal arising out of a suit for possession, the defendants contended that the legal representatives of the deceased were not brought on record within the time allowed by law, and that the suit was not sustainable. *Held*, the fact that the other respondents, who are the sole representatives of the deceased respondent, will make the appeal survive as against them, and that it can proceed even though they have not been specifically joined. (*Duckworth, J.*) MAUNG PO v. MA SHWE MA. 2 Rang. 445.

—*Appeal—Adverse finding—Suit dismissed against defendant—Right to appeal.* See C. P. CODE, S. 11. 20 L. W. 63.

—*Adverse finding—Appeal from—Decree in favour of party—Effect—Finding not res judicata.*

A party in whose favour a decree has been passed cannot appeal against the decree merely on the ground that the finding on one of the issues is against him. Such a finding will not be *res judicata*. (*Devadoss and Jackson, JJ.*) LATCHAYYA v. KOTTAMMA.

20 L. W. 734 : 47 M. L. J. 743.

—*Amendment—Decree reviewed subsequently—Liability of appellant not affected—Appeal if competent from first decree.*

A decree having been passed against some defendants, one of them appealed against it. Subsequently the decree was reviewed and the other defendants against whom the suit had been dismissed before were also made liable, but the appellant was neither made a party to the review proceedings nor his liability affected. *Held*, an appeal against the first decree was quite competent so far as the appellant was concerned. (*Suhrawardy, J.*) SATYA RANJAN NAG v. KABITRICH CHANDRA PAL. 78 I. C. 525 : 1924 Cal. 898.

—*Batch of suits—Evidence in each not considered separately—Effect.* NAND LAL CHAUBE v. KESHO PRASAD SINGH.

78 I. C. 593 : 1924 P. 245.

—*Burden of proof—Appellant to show judgment is wrong.*

An appellant has always to prove that the judgment appealed against is wrong. It is not enough for him to show that on the facts and evidence a different conclusion is possible. (*Wazir Hasan, J. C.*) MANNI LAL v. MOOL CHAND. 80 I. C. 683.

—*Finding as to credibility of witness—When trial Court's opinion as to witness depends not on honesty of witness but on reason not acceptable to appeal Court, trial Court's finding on fact can be disturbed.*

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It is with great hesitation that an appeal Court differs with the trial Court on its estimate of witnesses whom the trial Court has had an opportunity of seeing; but where the opinion of the trial Court depends not upon the honesty of the witness but upon reasons which the appeal Court cannot accept, it is obviously the duty of the appeal Court to record its disagreement with the trial Court and to set aside the findings of fact arrived at by it. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) HARIHAR PRASAD v. KESHEO PRASAD SINGH. 5 Pat. L. T. Supp. 1 : 1925 Pat. 68.

—*Judgment—Finding on all issues in appealable cases to be given.* 76 I. C. 772.

—*Judgment—Failure to refer to document—Effect.*

From the omission to refer to a document in the appellate judgment it does not follow the Court did not take it into consideration. (*Prideaux, A. J. C.*) MT. SARASWATIBAI v. YADORAO. 78 I. C. 887 : 1924 Nag. 240.

—*Lower Court's finding on facts is not to be disturbed merely because a different view is also possible—The lower Court's finding can only be disturbed by proof of its being wrong.*

Where a case tried by a Judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the Judge below was wrong, then inasmuch as the appeal is in the nature of a rehearing the decision should be reversed; if the case is left in doubt, it is clearly the duty of the Court of Appeal not to disturb the decision of the Court below. If all that the appellant can show is nicely balanced calculation which lead to the equal possibility of the judgment on either the one side or the other being right, he cannot succeed. (1896) 1 Q.B. 38 and *Sevage v. Adam*, W. N. 95, 109 foll. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) HARIHAR PRASAD v. KESHEO PRASAD. 5 Pat. L. T. Supp. 1 : 1925 Pat. 68.

—*New case—If allowable.*

Ordinarily a party will not be allowed to raise in appeal for the first time a case not raised in the pleadings or during the course of the trial. (*Newbould and B.B. Ghosh, JJ.*) HARI CHARAN DAS v. TARAPRASANNA SEN. 79 I. C. 354.

—*New case—If allowed.*

Parties should not be allowed to raise in appeal or second appeal a new case, as it would enable a defeated litigant to evade his defeat, and expose successful party to bear the brunt of a new attack if he had no notice. (*Kinkhede, A.J.C.*) LALA ANANTRAM v. MURLIDHAR. 78 I. C. 194 : 1924 Nag. 204.

—*New case—New point of law—When can be raised.*

Where the determination of a question of law which is raised for the first time in appeal does not depend upon a decision as to facts which are

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in dispute, the Court is not only competent but should in the interests of justice entertain the plea. (*Scott-Smith and Fforde, JJ.*) **KESAR SINGH v. INDAR SINGH**, 6 Lah. L. J. 454 : 76 I. C. 172 : 1924 Lah. 543.

———New case can be made on—Question of jurisdiction where fresh evidence is not necessary. 78 I. C. 63.

———Offer by a party to be bound by the decision of the trial Court—Offer not accepted by the opposite party—Competency of the party to prefer an appeal. 75 I. C. 619.

———Point not raised in the memorandum—If to be allowed to be argued. 1924 A. 149.

———Question of fact—Reversal of, when justified.

Where a finding of fact of the trial Court is questioned in an appellate Court and all that the appellant can show is nicely balanced calculations which lead to the equal possibility of the judgment appealed from on either the one side or the other being right, he cannot succeed. 20 A. L. J. 22, Foll. (*Wazir Hasan, A. J. C.*) **JASIR RAM v. RAJ BAHADUR KURMI**, 11 O. L. J. 87 : 1924 Oudh 326.

———Question of fact—Interference—General rule.

A Court of appeal rarely interferes with findings of fact by a trial Judge, who sees and hears witnesses and has an opportunity of noting their demeanour especially where the issue is simple. (*Kincaid, J. C. and Aston, A. J. C.*) **FIRM OF JOSOMAL VALIRAM v. CHELLARAM BHOJRAJ**, 78 I. C. 534.

———Right of—Order of Court to be taken as it stands: **NASIR KHAN v. ITWARI**, L. R. 5 A. 26 : 1924 A. 144.

———Right of—Partly guilty of contempt of Court—Not entitled to appeal or to be heard in the appeal. 39 C. L. J. 217.

APPELLATE COURT—Evidence admitted without objection in trial Court—Objections. **MT. CHANNI BIBI v. AHMAD KHAN**, 1924 Lah. 265.

———Evidence—Whether allowed. **MOTICHAND RAOJI v. MANECKCHAND RAMCHAND**, 77 I. C. 515.

APPROVER—Evidence of—Corroboration—Evidence of accomplice or confession—If sufficient. See EVIDENCE ACT, S. 114, III. (b). 81 I. C. 891.

ARBITRATION—Award—Application for filing—Correction of mistakes—Execution proceedings. 1924 A. 62.

———Award—Bias on the part of arbitrator—Effect.

The existence of any circumstance in the situation of the arbitrator which tends to produce a bias in the mind of the arbitrator is sufficient to justify the interference of the Court, whether in fact such circumstance has any operation on his

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mind or not. In such a case the award will not be remitted to him. (*Rupchand Bilaram, A. J. C.*) **FIRM OF MAHOMED ALI KARIMJI & SONS v. CHARATSINGH BUDSINGH**, 80 I. C. 596.

———Award—Cancellation.

On the very day on which an award was filed in the Sind Judicial Commissioner's Court, the non-applicants filed a suit at Lahore and got an *ex parte* decree cancelling the contract and holding that the reference to arbitration was invalid and restraining the applicant and the arbitrator from filing the award. On objection by the non-applicant on the basis of the Lahore decree, *Held*, that the Lahore decree operated as *res judicata* and was sufficient to justify the taking off the file of the award filed at Karachi. (*Kennedy, A. J. C.*) **MOHAN SHAH v. MESSRS. DIWAN CHAND & Co.**, 81 I. C. 1024 : 1924 S. 60.

———Award—Arbitrator awarding more than amount claimed—Effect.

Where an arbitrator who is a near relation of one of the parties awards an amount greater than what is claimed, the award is open to grave suspicion, even if he is not guilty of partiality. (*Rupchand Bilaram, A. J. C.*) **TRUSTEES OF THE FIRM MOTHARAM DOWLATRAM v. FIRM OF MAYADAS DOWLATRAM**, 78 I. C. 521.

———Award—Decree—Executability of—Declaration of liability.

In a suit for partition and possession of immoveable properties a decree was passed on an award providing that in a case of the loss of any properties owing to defect of title, both parties to the award should bear the loss equally and accounts should be taken in certain manner in the event of certain contingencies. One of the parties applied to execute the decree and recover certain sums alleged to be due on account of loss of some of the properties and on adjustment of other accounts.

Held, that the award merely declared the basis upon which certain disputes should be settled leaving it to the parties themselves to do so if they agreed and if they could not agree, it could be done in a regular suit and that the claim was not one which could be gone into in execution. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) **SHAMA RAO v. VENKATAPPA**, 2 Mys. L. J. 62.

———Award—Ex parte award—When set aside.

An award passed *ex parte* can be set aside by Court if the party convinces the Court that he had sufficient cause for his non-appearance. (*Rupchand Bilaram, A. J. C.*) **TRUSTEES OF THE FIRM MOTHARAM DOWLATRAM v. FIRM OF MAYADAS DOWLATRAM**, 78 I. C. 521.

———Award—Family settlement—Rejection as partly invalid—If ceases to be enforceable as a family arrangement.

Where one party to the award led another to believe to his prejudice that he is going to abide by the award he is estopped from contesting it. The fact that he signed the award does not however by itself render it more binding on him. 6 C.P.L.R. 95, Foll. It has always been the policy

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of Courts of equity to uphold family settlements, even when they are not in legal form. 43 All. 1 and 42 Cal. 801, Foll. (*Baker, O.J.*) CHOWDHURI MANOHARLAL v. MT. AMANO. 1924 Nag. 14

——— Award—Legality of—Misconduct—Arbitrators not acting together. 28 O. C. 350.

——— Award—Legality of—Arbitrators accepting compromise suggested by parties and making an award in accordance therewith—Propriety of.

Where a reference had been made to arbitration in a pending suit, the arbitrators embodied a compromise of the parties themselves in the award and made their award accordingly. *Held*, that there was no reason why arbitrators should not accept a compromise of the parties before them and set out their award in terms thereof. Such a proceeding is as much an adjudication of the case as is a decree of Court founded on a compromise. To admit that an award may be challenged on the ground that the arbitrators had not themselves independently considered and decided the matter would be contrary to the principle laid down in para. 15 of the second schedule to the C. P. Code. (*Wallace, J.*) LEKKALA RAMU NAIDU v. VETCHALAPU NAYANAPPA. 19 L. W. 562 : (1924) M. W. N. 356 : 80 I. C. 571 : 1925 Mad. 56.

——— Award—Legality—Reference to arbitration—Pending suit without intervention of the Court—Suit subsequently withdrawn—Effect of—Arbitration proceeded with and award passed—Legality of. See C. P. CODE, SCH. II, PARA. 116, ETC. 1924 P. H. C. C. 110.

——— Award—Error—What amounts to.

Courts cannot investigate beyond the award of arbitrators and the documents actually incorporated therein and where no error is patent on these, the Court cannot go into the proceedings of the arbitrator. (*Kennedy and Rupchand Bilaram, A. J. Cs.*) RAMJIBHOY & Co. v. YUSUFALI MAHOMEDALI. 80 I. C. 403.

——— Award—Error on the face of the award, meaning of—Sale of goods—Objection to quality—Burden of proof—Award made without surveying goods as provided by the rules of the Bengal Chamber of Commerce—Legality of.

In a suit by the plaintiffs against the defendants for a declaration that an award made by the Bengal Chamber of Commerce was invalid and inoperative, the grounds on which the claim was based were first that the award was bad on the face of it and secondly, that the arbitrators had no jurisdiction to make the award. In the contract for the sale and purchase of goods between the plaintiffs and the defendants it had been agreed that in the event of any dispute arising as to inferiority of quality, defects or differences in the goods, the same should be referred to the Bengal Chamber of Commerce. The dispute having arisen as regards the quality of the goods tendered, the parties referred the same to arbitration. The award was as follows :—"Complaint—Inferior quality and other defects as per buyers' statement, dated 1st March, 1921. Award :—We have

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considered the papers and as the buyers are unwilling to produce the bales required for inspection their claim cannot be upheld and we award that they pay for and take delivery of the goods in terms of the contract." *Held* (1) that the buyers having failed to produce the goods for inspection before the arbitrators could not rely on the abstract doctrine of burden of proof and seek to invalidate the award as being erroneous on the face of it; and (2) that it was not a proper or legitimate inference from the terms of the award that the arbitrators had decided against the buyer relying upon the mere fact of their omission to produce the goods, inasmuch as the award itself stated that the arbitrators had considered the documentary evidence in the case. Though the rules of the Bengal Chamber of Commerce contemplated the making of the survey, the award of the arbitrators made without such a survey is not invalid because it was only one mode of settling the dispute and it was not contemplated that that should be the only means of settling the dispute. (*Sanderson, C. J. and Walmsley, J.*) S. & C. NORDLINGER v. CHANDMULL MULCHAND. 28 C. W. N. 888 : 82 I. C. 341 : 1924 Cal. 1051.

——— Award—Error on the face of the award—Damage granted in Pounds—Exchange rate not specified—Award not uncertain—Civil Procedure Code, Sch. II, para. 14.

An error in law on the face of the award must be distinctly collected from the face of the award or from any paper so connected with the award as to form any part of it. Where, in an arbitration the arbitrator had awarded the amount claimed in pounds sterling and the rate of exchange for payment was not specified, *Held* that the award was not bad for uncertainty. (*Raymond, A. J. C.*) MESSRS. BEITH STEVENSON CO., LTD. v. FIRM OF NAROOMAL KHEMCHAND. 80 I. C. 1009 : 17 S. L. R. 86 : 1924 S. 117.

——— Award—"Error of law on the face of award"—Meaning of—When arbitrator can be examined as witness—Courts if can interfere with his construction.

So long as an arbitrator acts within jurisdiction and without fraud or misconduct, an award cannot be set aside unless there is an error of law which appears on the face of the award or in some document so closely connected that it must be regarded as part of the award. The expression means some legal proposition which is the basis of the award and which can be said to be erroneous.

An arbitrator is a competent witness and may be examined as such where his award is attacked on the ground of want of jurisdiction or misconduct. But he cannot be examined nor his evidence used to scrutinise his decision on a matter within his jurisdiction.

On a question of construction being referred to arbitration, his award cannot be set aside merely because the Court itself would have come to a different conclusion unless he has proceeded illegally, e. g., on inadmissible evidence. (*Raymond and Rupchand Bilaram, A. J. Cs.*) DUTTON MASSEY & Co. v. JAMNADAS HARPRASAD. 76 I. C. 84 : 1924 S. 51.

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—Award—Error on the face of the award
 —Illegality—Arbitration by Bengal Chamber of Commerce—Sale of goods—Breach of contract—Damages—Award without inspection of goods.

The parties to a contract for the sale of goods entered into an agreement containing terms under which they would conduct business with each other, and amongst other terms the second provided that "in the event of any dispute arising as to inferiority of quality, defects or differences in the goods, the same shall be referred within 90 days of the arrival of the goods in Calcutta to the Bengal Chamber of Commerce and no claim would be entertained if made after 90 days from date of arrival of the goods." The latter part of the same clause provided that "the Chamber shall arrange for survey in accordance with its rules, that surveys shall be held on the actual goods and not on shipment samples, and that all survey reports, accompanied by samples, signed and sealed by the surveyors, showing the basis on which their award has been made must be forwarded to the sellers whenever the award has been given against them. A dispute having arisen as regards the quality of goods supplied, the arbitrators passed an award to the following effect:—"We have considered the papers and as the buyers Messrs. C. & M. are unwilling to produce the bales required for inspection their claim cannot be upheld and we award that they pay and take delivery of the goods in terms of the contract." In a suit by the buyers to set aside the award on the ground of an error apparent on the face of the award. *Held*, that in a dispute as to the quality of the goods contracted for, it is the duty of the seller to prove that the goods are of the quality contracted for and that the award was erroneous in law on the face of it and liable to be set aside. (1923) A. C. 480 followed. (Buckland, J.) CHANDMUL MULCHAND v. NORDLINGER.

28 C. W. N. 261 : 80 I. C. 151 : 1924 Cal. 490.

[See on appeal 28 C. W. N. 888 : 82 I. C. 341 : 1924 Cal. 1051.]

—Award in favour of person not party to reference—Family settlement—Binding nature of.

The heirs of a deceased man submitted their disputes to arbitration and one of them wanted his share to be given to his minor son. This was accordingly done. *Held*, the arrangement could not be vitiated on the ground the minor was not a party to reference but should be upheld as a family arrangement. (Devadoss, J.) DADA SAHIB v. GAJARAJ SINGH. 20 L. W. 854 : 47 M. L. J. 928.

—Award—Right to trusteeship of a waqf—Enforceability of award.

Disputes between certain persons as regards the validity of a certain waqf and the right of management of its properties as Mutawallis were referred to arbitration and the arbitrators made an award to the effect that the parties were entitled to be co-Mutawallis and as such also entitled to the management and profits of the waqf property. In a suit by the plaintiff to recover his share of the profit against his co-Mutawallis, *held*, that the award was valid and binding upon the parties

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and the plaintiff was entitled to a decree. (Walsh, A. C. J. and Ryves, J.) MOZZAM ALI v. RAZA ALI. 22 A. L. J. 776 : L. R. 5 A. 585 : 81 I. C. 851 : 1924 A. 818 (1).

—Award—Validity—Objection to award—Appeal—Revision.

There was a reference to arbitration and an award was made. Objections were taken to the validity of the award. One of the grounds taken was that there was no valid reference to arbitration as one of the defendants in the case did not at all join in the reference. The objections to the award taken by the plaintiffs were not properly heard. There was no necessity for any evidence to be adduced and the objections were not frivolous. *Held*, that though no appeal lay from the order of the Lower Court passing a decree on the award, still the High Court could interfere in revision. (Mukherji, J.) SIDH NATH RAUT v. JARBANDHAN PRASAD. L. R. 5 A. 191 : 1924 A. 688.

—Award—Validity of—Arbitrator first cousin of one of the parties—Relationship not known to the other—Effect.

Where the parties to an arbitration appoint a person as arbitrator, but he happens to be a first cousin of one of the parties which fact is not known to the other, the award is bad. It is not necessary for the latter to prove actual bias or partiality on the part of the arbitrator. (Rupchand Bilaram, A. J. C.) TRUSTEES OF THE FIRM MOTHARAM DOWLATRAM v. FIRM OF MAYADAS DOWLATRAM. 78 I. C. 521.

—Award—Validity of—Award given after the expiry of the time prescribed—Effect of—Contract subject to rules of Association—Reference of disputes to arbitration—Umpire—Reference to.

The petitioner purchased on 11-9-1922 600 bales of cotton from the respondent for September 1922 delivery. The contract was made subject to the rules of the East India Cotton Association, Limited. The respondents' contention was, that the petitioner was not a member of the Association. Among the rules of the Association one ran thus:—

All questions in disputes (other than those of quality) arising out of, or in relation to (a) contracts (whether forwards or "ready") made subject to those Rules, or (b) the rights and responsibilities of Commission Agents, muckadams and brokers, shall be referred to arbitration of two disinterested members, one to be chosen by each disputant, the arbitrators having power to call in an umpire who must also be a member.

The arbitrators shall come to a decision within fifteen days of their appointment unless the Chairman, Vice Chairman or General Manager shall when nominating arbitrators (in the manner prescribed below) or upon subsequent application of the arbitrators grant an extension of this period.

If the two arbitrators cannot agree upon an award they shall appoint an umpire within fifteen days of the date on which the two arbitrators were originally appointed, or within such extended period as may be allowed by the Chairman, Deputy Chairman, or General Manager.

ARBITRATION—Award.

Upon application of either disputant the Chairman, Deputy Chairman or General Manager shall nominate two arbitrators having power to appoint an umpire, in any of the following cases :—

(a) If after one party has appointed an arbitrator the other party refuses or neglects to appoint a second arbitrator within 24 hours after service of written notice of that appointment.

(b) If from any cause the umpire fails to make his award within 10 days from the date of his appointment.

The arbitrators must in all cases be members or authorised representatives of members.

Disputes arose between the parties and the respondent appointed an arbitrator and called on the petitioner to appoint his. The petitioner failed to do so whereupon the Chairman of the Association, at the instance of the respondent, nominated C. and M. as arbitrators. The arbitrators differed and appointed an umpire on 21st December 1922 who was not a member of the Association but a partner of a firm which was a member. The umpire, without hearing the parties and further evidence, made an award on 5.1.1923. An appeal by the petitioner to the Appeal Committee of the Association was unsuccessful. Thereupon he applied to the High Court for a declaration that the award was invalid, that the appointment of the umpire was void, that not being a member of the Association he could not act as umpire, that the umpire gave his award without giving any opportunity to the petitioner to be heard and that the award was not made within 10 days from the date of his appointment. *Held*, the award not having been made within 10 days by the umpire was invalid and that the other grounds urged against the validity of the award were untenable. (*Shah, A.C.J. and Crump, J.*) CHATURBHUI BHAGWANDAS v. DEO KARAN NANJI. 26 Bom. L. R. 84 : 79 I. C. 769 : 1924 Bom. 370.

Award when vitiated—Error of law.

Where a specific question of law is referred to arbitration, even if a wrong decision of law is arrived at and is apparent on the face of the award it cannot be challenged. Where however a specific question of law is not so referred, an erroneous decision of law may be attacked provided such error appears on the face of the award itself, or any document so closely connected as to form part of the award. (*Rupchand Bilaram, A.J.C.*) MADHOWRAM HARDEVAS v. MITSUI BHUSAN KAISHA, LTD. 78 I. C. 230.

—Award—Secret enquiries of arbitrators—Court's decision apart from award—If revisable. See C. P. CODE, S. 115.

1924 All. 761 (1).

Award—Suit pending in Court—Private reference—Validity of award.

Per *Kennedy, J.C. and Madgavkar, A.J.C.*—While a suit is pending disposal the parties are competent to refer the matter without leave of Court to arbitration. But the Court cannot file the award as an award or pass a decree thereon under the C. P. Code or Arbitration Act, but can only treat it as an adjustment under O. 23, R. 3. In such a case the Arbitration Act does not apply and the reference is not illegal or invalid.

ARBITRATION—Jurisdiction.

Per *Aston, A.J.C.*—The Court has power to file the award and pass a decree under para. 21, Schedule II, C. P. Code, or file it under Ss. 11 and 15, Arbitration Act, as a decree of Court or record it as an adjustment under O. 23, R. 3 and pass a decree in accordance therewith if the award recorded is an adjustment in the strict sense. (*Kennedy, J.C., Madgavkar and Aston, A.J.Cs.*) HAJI UMAR v. SHIVALDAS.

81 I. C. 653 : 16 S. L. R. 174.

Award—Time for—Extension of—Oral application.

An oral application for extension of the period for submission on the award by arbitrators is valid. 3 M. 59, Dist. (*Macleod, C.J. and Shah, J.*) SAKAL CHAND MOTI v. AMBARAM.

26 Bom. L. R. 280 : 80 I. C. 260 : 1924 Bom. 380.

Court's power to limit time for objections—Waiver and estoppel.

76 I. C. 33 : 1924 Oudh 344.

Death of one of referring parties—Effect of.

The death of one of the parties to an arbitration before the award is made operates as a revocation of the authority of the arbitrator and an award made subsequently is not binding on his legal representatives. But if the hearing is completed by that time and nothing remains except the delivery of the award and the intention of the parties was that their heirs also should be bound, the award would be binding. (*Moti Sagar, J.*) TEGHA v. RAM SINGH.

79 I. C. 67 : 1924 Lah. 725.

Differences—Failure to pay claim—If amounts to—Plurality of references.

Where parties agree that all differences that may arise between them should be settled by arbitration, a failure to pay a claim arising out of the contract amounts to a difference which falls within the agreement. There can be as many awards as there are disputes and the mere fact that one award has issued does not exhaust the powers under the agreement. (*Raymond, A.J.C.*) TAYABALLY ABDUL HUSSAIN v. JAMES FINLAY & Co. 80 I. C. 969.

Filing of suit to set aside award—Effect on pending proceedings.

The filing of a suit for declaring an arbitration invalid does not render the arbitrators *functi officio* or the award void. (*Raymond, A.J.C.*) TAYABALLY ABDUL HUSSAIN v. JAMES FINLAY & Co. 80 I. C. 969.

Jurisdiction—C. I. F. Contract.

Where sellers had fulfilled their part of the contract by tendering the documents of title to buyers which was done at Amritsar and no part of the cause of action arose at Karachi, *Held*, the fact of the goods lying at Karachi was immaterial so far as the seller's cause of action was concerned and the Karachi Court has no jurisdiction to file an award of arbitrators. (*Raymond, A.J.C.*) MEHTA & Co. v. MESSRS. PARMESHARDAS PARSHOTAMDAS.

80 I. C. 303 : 1924 S. 4.

ARBITRATION.

—Mode of publishing award—Stamp—If necessary.

An award is valid as soon as the arbitrator signs it. There is nothing making its publication necessary nor is it the arbitrator's duty to stamp it. His only duty is to acquaint the parties with the fact that he has completed the award. (*Kinkhede, A. J. C.*) *LALA ANANTRAM v. MURLIDHAR*, 78 I. C. 194 : 1924 Nag. 204.

—Nomination "without prejudice"—Effect—Signature to reference—Absence of.

The nomination of an arbitrator "without prejudice" is not a proper compliance with the terms of an agreement to refer disputes to arbitration each party nominating one arbitrator. It is not clear and unequivocal and if as a result the other party nominates an arbitrator for the defaulter, the latter cannot exercise his right again. The fact that thereafter the reference is signed only by the first party does not vitiate the award. (*Aston, A. J. C.*) *RAMJIBHAI & CO. v. YUSUF ALI MAHOMED ALI & BROTHERS*, 76 I. C. 261 : 1925 S. 12.

—Parties asking Court to inspect locality and decide—If appealable—Duty of appellate Court.

The parties to a suit instead of leading evidence asked the Judge to have a local inspection and decide on the basis of that. The Judge did accordingly and passed a decree. The aggrieved party appealed. *Held*, the proceedings before the Judge were not *extra cursum curiae* and as there was no agreement by the parties to treat his decision as final, he was not in the position of an arbitrator. Hence there was a right of appeal. In disposing of the appeal, the appellate Judge has to decide on such materials as were before him and could not order a remand and allow fresh evidence to be taken. (*Kennedy, J. C. and Raymond, A. J. C.*) *TILLOOMAL JESSOMMAL v. HARBHAGWANDAS*, 76 I. C. 309 : 1924 S. 134.

—Pleader—Power to refer disputes.

Unless the *vakalatnama* executed in favour of a pleader specially empowers him to refer the matter in the suit to arbitration, he cannot bind his client by such a course. In such cases, the court has to see whether such a power is to be found within the four corners of the instrument either in express terms or by necessary implication. (*Kinkhede, A. J. C.*) *HUSSAINBHAI BHORA v. BANSILAL*, 79 I. C. 48 : 1924 Nag. 338

—Position of—Witness—Commission to examine.

An arbitrator is not in the position of an ordinary witness and a Judge should not allow him to be examined on commission. The Judge ought to exercise the severest possible control and circumspection over the examination of an arbitrator. He can be examined only on the course of procedure adopted and not on what led him to decide in a particular way. The Court, when an award is sought to be filed, does not sit in judgment on the decision of the arbitrators. (*Walsh, A. C. J. and Ryves, J.*) *KHUB LAL v. BISHAMBHAR SAHAI*, 22 A. L. J. 919 : 82 I. C. 219 : L. R. 5 A. 649.

ARBITRATION.

—Powers of arbitrator—Error of law—Effect.

An arbitrator cannot pass what he considers an equitable arrangement but must make an award confined to what is referred to him. If the reasons he gives are contrary to law and erroneous, the award is illegal on the face of it and can be set aside. (*Rupchand Bilaram, A. J. C.*) *FIRM OF MAHOMED ALI KARIMI & SONS v. CHARATSINGH BUDSINGH*, 80 I. C. 596.

—Provision for decision of other matter. *MANSARAM v. KARTARAM*, 76 I. C. 1007.

—Reference—Omission to answer referred points—Effect.

Where with the consent of parties, an arbitrator undertakes to decide a number of matters, but for some reason or other omits to decide some material issues, it vitiates the whole award. The arbitrators derive their authority from the consent of parties and hence cannot go outside that consent. (*Walsh, A. C. J. and Ryves, J.*) *KHUB LAL v. BISHAMBHAR SAHAI*, 22 A. L. J. 919 : 82 I. C. 219 : L. R. 5 A. 649.

—Reference to—Guardianship proceedings—Not to be the subject of reference to arbitration and decision by arbitrators without exercise of discretion by Court. 46 M. L. J. 179.

—Reference to—If should be in writing—Duty of arbitrator.

A reference to arbitration need not be in writing. Where both parties appeared before the arbitrator and conducted their case, an award cannot be set aside on the ground that reference was not in writing. Parties who refer disputes to arbitration cannot expect a technically perfect award couched in strictly legal form. (*Pullan, A. J. C.*) *WALIULLAH v. BHAGGAN*, 11 O. L. J. 570 : 80 I. C. 7 : 1 O. W. N. 394 : 10 O. & A. L. R. 761.

—Reference to—Validity—Absence of jurisdiction—Appearance—If amounts to waiver—Claim for moneys due under settlement.

Where the appointment of an arbitrator is without jurisdiction, an appearance before him even without protest and without prejudice does not amount to a waiver of the right to object to jurisdiction.

A reference to arbitration on the basis of an invalid submission is itself invalid. An agreement to submit disputes to arbitration must be in writing, but need not be signed.

In the case of cross-contracts, if there is a clause to settle disputes by arbitration, a claim for moneys due under a settlement can be referred to arbitration. But where the money is entered as paid in the account books and a loan of the same taken then and there, the latter is an answer to a suit on the claim and bars the right to claim arbitration under the cross-contracts. (*Bilaram, A. J. C.*) *FIRM OF KISHINDAS PURSUMAL v. FIRM OF MANGHRAJ KHALDAS*, 81 I. C. 834.

—Remedy of aggrieved party—If can file suit.

A person aggrieved by an award has got an option of remedies. He may when the other

ARBITRATION—Submission to.

party seeks to enforce his award raise objections to the filing of the same or pursue his common law remedy under S. 9, C.P. Code, by filing a suit to have a declaration that the proceedings are invalid for valid grounds, e.g., fraud. (*Raymond, A. J. C.*) TAYABALLY ABDUL HUSSAIN v. JAMES FINLAY & Co. 80 I. C. 969.

Submission if to be in writing.

Where parties have agreed in writing to submit any differences that may arise to arbitration, a subsequent submission to arbitration need not be in writing. (*Raymond, A. J. C.*) TAYABALLY ABDUL HUSSAIN v. JAMES FINLAY & Co. 80 I. C. 969.

Submission to—Revocation—Rights of parties.

In giving leave to revoke a submission to arbitration the Court should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. It would be contrary to justice to give leave to revoke a submission to a party who, as a consideration for a contract, had agreed to submit any disputes, whether of law or fact, which might arise, to arbitration, when he found the case going against him. The exercise of the power of giving leave to revoke is in general limited to cases where the arbitrators are exceeding their jurisdiction, or refusing jurisdiction, or failing to do all that their jurisdiction requires them to do, and the principle underlying the exercise of the power to revoke is, that the parties take the arbitrators for better or for worse, that their decision is final both as to law and fact, that unless a substantial miscarriage of justice may take place, leave ought not to be given, and it is no miscarriage of justice for a party to be injured by bad law which he has agreed to be bound by. (*Walshe and Ryves, JJ.*) GAYA PRASAD v. FIRM OF MATHU LAL BUDHA LAL.

78 I. C. 1050 : L. E. 5 A. 319.

Payment of money to—If amounts to payment to Court.

Where a pending suit was referred to arbitrator and moneys were paid to him to be deposited in Court, but he did not do so, payment does not operate as deposit in Court. (*Heald and Lenglenc, JJ.*) U PO SAN v. MA NGWE HNSIT.

3 Bur. L. J. 6 : 80 I. C. 233 : 1924 R. 263.

Powers of arbitrator—Partition—Provision for maintenance. MURLIDHAR v. MULCHAND 1924 Oudh 54.

ARBITRATION ACT (IX of 1899), Ss. 4 and 9—Appointment of arbitrator—Acceptance—Formal reference—Misconduct—Reading documents in the absence of parties—Duty of.

Where in pursuance of an agreement, both parties appoint an arbitrator each, it is not necessary that there should be a reference in writing or that they should accept the appointment formally in writing. The fact that arbitrators peruse the relevant papers in the absence of parties does not amount to misconduct. They are judges of law and fact and an erroneous decision on a point of law will not justify interference. (*Raymond, A. J. C.*) JAMES FINLAY & Co. v. GURDAYAL PAHLAJRAI.

76 I. C. 660 : 1924 S. 91.

ARBITRATION ACT, S. 10 (b).

—S. 9—Communication of nomination—Effect—Refusal to act—Another arbitrator if can be appointed.

When according to the agreement an arbitrator has been nominated and the same is communicated to the other party in clear and unequivocal language, it *ipso facto* confers authority to arbitrate. If he refuses to act and the submission does not show that it was intended the vacancy should not be supplied. S. 8 provides for the appointment of another, but the right of the party to nominate is exhausted. (*Aston, A. J. C.*) RAMJIBHAI AND Co. v. YUSUFALI MAHOMEDALLI & BROTHERS. 76 I. C. 261 : 1925 S. 12.

—S. 8—Does not apply to independent appointment of second arbitrator.

Where the proposal to refer disputes to arbitration and the nomination of first arbitrator were abandoned owing to the assurance of one party to come to an amicable settlement and as the latter proved futile, there was fresh nomination of an arbitrator.

Held, that the nomination was not in the place of first arbitrator but an independent one and S. 8 did not apply. (*Kennedy, J. C. and Raymond, A. J. C.*) FIRM OF KHALSA BROS. v. HARIRAM SRIRAM & Co. 1924 S. 29.

—S. 9 (b)—Private arbitration—Bengal Chamber of Commerce—Authority to arbitrate.

Plaintiffs were sellers and defendants were buyers of white java sugar. The contract contained an arbitration clause which provided for arbitration under the rules of the Bengal Chamber of Commerce or at the option of the sellers, by two European sugar importers. The sellers exercised their option but did not appoint the arbitrators or take any further steps. The defendants submitted to the arbitration of the Bengal Chamber of Commerce and there was an *ex parte* award. In a suit by plaintiffs to set aside the award, Held, that the election having been made and there being a procedure laid down by the Arbitration Act, which could and should have been followed in the absence of a different intention expressed in the submission, it was not open to the defendants to revert to arbitration by the Tribunal of Arbitration of the Bengal Chamber of Commerce. The Bengal Chamber of Commerce had no authority to arbitrate and the award must be set aside. (*Buckland, J.*) SUNDERMULL PORSHRAM v. TRIBHUBAN HIRA CHAND & Co. 51 Cal. 657 : 82 I. C. 769 : 1924 Cal. 828.

—Ss. 10 and 12—Private arbitration—Power of Court to order examination of witnesses on commission. 75 I. C. 221.

—S. 10 (b)—Case stated—Opinion of Court—If binding on arbitrators—Res judicata.

Where arbitrators appointed in a certain dispute state a case for the opinion of the Court, the order obtained thereon is not necessarily binding on them, as they still remain the final judges of fact and law. Nor can such order amount to a judgment or operate as *res judicata*. Distinction between the English and Indian Acts pointed out. (*Lobo, A. J. C.*) ADAMJI LUKANJI AND LOUIS DREYFUS & Co., *In re*. 79 I. C. 986.

ARBITRATION ACT, S. 11.

—S. 11—Award—Writing and signature of arbitrators—Essential.

An award under S. 11 must be in writing and signed. Before reducing their award to writing the arbitrators must no doubt arrive at their decision; but having done so, they are bound to make an award in writing and signing of the award is not a mere formality. (*Robinson, C. J. and May Oung, J.*) *LALJEE JAISING v. S. P. TAWARI*, 3 Bur. L. J. 102 : 82 I. C. 802 : 1924 R. 319.

—S. 11—Scope. *MANSARAM v. KARTARAM*, 76 I. C. 1007.

—S. 12—Extension of time—Discretion—Exercise of.

Where an award is made out of time and the arbitrator applies for extension of time in order to validate it, the Court must take into consideration all the circumstances and decide if the indulgence should be shown. Where the award is open to grave suspicion of partiality and more than what is claimed is awarded, the Court can decline to extend the time. (*Rupchand Bilaram, A. J. C.*) *TRUSTEES OF THE FIRM MOTHARAM DOWLATRAM v. FIRM OF MAYADAS DOWLATRAM*, 75 I. C. 521.

—S. 14—Misconduct—What is—Failure to give reasonable notice to party—Duty of Court.

The failure on the part of an arbitrator to give a reasonable opportunity to one of the parties to appear before him amounts to misconduct. But whether on account of this, the Court should set aside the award or remit it to the arbitrator, is a matter entirely in the discretion of the Court. Misconduct does not necessarily involve any moral turpitude, dishonesty, partiality or bias on the part of the arbitrator. (*Raymond, A. J. C.*) *FIRM OF JAGGI & Co. v. FIRM OF GANGA RAM VISHENDAS*, 76 I. C. 275 : 1924 S. 132.

—S. 14—Objections to award—Dismissal—Suit to set aside award on same grounds—Bar.

Where on an award being filed, objections are taken to it but they are dismissed, a suit to set aside the award on the same ground will be barred by *res judicata*. The arbitration court has exclusive jurisdiction to adjudicate on matters arising under S. 14. (*Rupchand Bilaram, A. J. C.*) *KHIMJI v. MT. NATHIBAI*, 76 I. C. 953.

—S. 14—Objection to award—If can be partly reserved for decision of Civil Court.

It is not open to a party to move a Court to set aside an award only on some of his objections and to reserve other objections falling within the scope of S. 14 for a separate suit. The principle of constructive *res judicata* in S. 11, Expl. IV, C.P. Code, will apply. (*Rupchand Bilaram, A. J. C.*) *KHIMJI v. MT. NATHIBAI*, 76 I. C. 953.

—S. 14—Party to contract can file suit to set aside award regarding the contract.

A person dissatisfied with an award, made without the intervention of a Court of justice, is entitled to bring an action to set it aside on the ground that no contract providing for a reference to arbitration was made or that the contract if

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made was cancelled before the reference in favour of the arbitrator had been executed. 3 Lah. 296 : 50 Cal. 1 (P. C.) Ref. and Foll. (*Raymond and Aston, A. J. Cs.*) *DEWANCHAND v. MOHAN-SHA*, 81 I. C. 782 : 1924 S. 25.

—S. 14—Setting aside award—Patent error of law. See C. P. C. (Sch. II), PARA. 15. 1924 S. 75.

—S. 15—Provisions of C. P. Code, if apply. 77 I. C. 868 : 1924 C. 117.

—S. 19—Duty of Court—Stay of suit.

Where parties have agreed to refer disputes to arbitration there is a *prima facie* duty cast on courts, when a suit is filed in connection with a dispute, to act on such agreement and to stay the suit and the onus is on the plaintiff to show why he should not be bound by the agreement. The Court is vested with a discretion either to stay or not to stay the suit, but the discretion must be guided by judicial principles. (*Raymond and Bilaram, A. J. Cs.*) *MESSRS. FORBES, FORBES CAMPBELL AND CO., LTD. v. VERSIMAL DEWANMAL*, 75 I. C. 1041 : 1924 S. 49.

—S. 19—Marine Insurance Policy.

A policy of marine insurance provided "all disputes must be referred to in England for settlement and no legal proceedings shall be taken to enforce any claim except in England where the under-writers are alone domiciled and carry on business."

Held, that the clause amounted to a submission to arbitration. (*Macleod, C. J. and Shah, J.*) *Haji Abdulla v. George Reginald Stamp*.

26 Bom. L. R. 224 : 80 I. C. 523 : 1924 Bom. 381.

—S. 19—"Taking a step in proceedings"—Oral application for time.

An oral application for time to file a written statement by defendant's counsel in answer to a Court's question is taking a step in the proceedings within the meaning of S. 19. (*Sanderson, C. J. and Richardson, J.*) *THE KARNANI INDUSTRIAL BANK, LTD. v. SATYA NIKANJAN SHAW*.

28 C. W. N. 771 : 81 I. C. 846 : 1924 Cal. 789.

—S. 19—Stay of suit—Proceedings before arbitrators—Order if appealable—C. P. Code—Applicability. See C. P. Code, S. 104.

22 A. L. J. 1031.

—S. 19—Stay of suit pending arbitration—Discretion of Court—Charges of fraud.

Under S. 19 the Court has a discretion in the matter of staying actions pending an arbitration, which the Court is bound to exercise judicially and in accordance with certain well-settled rules. The *prima facie* leaning of the Court is to stay the action and leave the plaintiff to the tribunal to which he has agreed but the Court may, in its discretion, after considering all the circumstances of the case, refuse a stay on the ground that the matters in dispute between the parties involve the investigation of grave charges of fraud and may hold that in such circumstances arbitration is not the most suitable method of determining the questions raised between the parties. Where on the affidavits a

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prima facie case of fraud is made out, the action will be allowed to proceed, although it is the party alleging fraud that desires a public inquiry. (*Ghose, J.*) MAHARAJAH SIR MANINDRA CHANDRA NANDY v. H. V. LOW & Co., LTD.

39 C. L. J. 504 : 1924 C. 796.

—S. 19—*Suit filed before arbitration began—Award come to during suit—Stay of suit not obtained—Award is not invalid but remains suspended till stay application is disposed of.*

Where before the arbitration proceedings had begun, a suit had been filed in respect of the same matter and the award was come to during the pendency of the suit before any stay order was obtained. *Held*, that the mere fact of the suit being filed does not invalidate the arbitration proceedings, and it is for the Court to decide whether it should try the suit or not. If, however, an order under S. 19 of the Act to stay the suit is refused or if the party applying under that Act has by pleading in the suit waived his right of going into arbitration, the arbitration proceedings are invalidated and the Court alone is seized of the dispute. Therefore until the Court has made up its mind under S. 19, the arbitrators are not *functi officio*. But until that application is disposed of by Court staying the proceedings, the award could not be filed. The award of the arbitrators however is not a nullity and is not bad, but is in suspense. In such cases the correct order is to reject the award and order it to be re-presented after the Court disposes of the application under S. 19 or otherwise ceases to be seized of the case without adjudication on the merits. Per *Aston, A. J. C.*—It cannot be laid down as a principle that a party who has obtained an award after the institution of the suit and has applied for the stay of the suit, and for the filing of the award, has abandoned his rights under the arbitration, or that a Court which has refused to stay a suit has decided that it alone shall be seized of the dispute. (*Kennedy, J. C. and Aston, A. J. C.*) MITSUE BUSSAN KAISHA, LTD., KARACHI v. TATARAM BHAGWAN DAS.

1924 S. 146.

—S. 23—Arbitration—Procedure—Powers of arbitrators—Award going beyond matters in dispute and adjudicating on claims of strangers—Legality of.

28 C. W. N. 424.

ARMS ACT (XI OF 1879), S. 4—Empty case of cartridges—If ammunition. 10 O. & A. L. R. 105 : L.R. 5 A. 22 (Cr.) : 46 A. 107 : 1924 A. 215.

—S. 4—Parts of arms. 77 I. C. 1003 : 25 Cr. L. J. 539.

—S. 4—Arms—Sharp knife with bladed edge—Possession of.

The accused imported certain knives described as hunting knives and kept them with him. The blade tapered gradually to a point, and was attached to a cross-guard and handle. One edge was sharp up to the guard, the other only at the point. The knife could be used for stabbing and thrusting. *Held*, that the instrument fell within the category of "Arms" within S. 4. (*Greaves and Pantou, JJ.*) BISHAN SINGH v. EMPEROR.

61 Cal. 573 : 81 I. C. 943 : 25 Cr. L. J. 1119 : 1924 Cal. 714.

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—Ss. 5 and 19 (a)—Manufacture of kirpans—Sikh—Absence of license. 77 I. C. 230 : 25 Cr. L. J. 242.

—S. 19 (b)—Possession of sword—Sikh—Exemption.

A Sikh possessing or wearing one sword commits no offence under S. 19 by virtue of the exemption under Sch. II, 3 (b) of the Act. 65 I. C. 430, Ref. (*Scott-Smith and Harrison, JJ.*) HARI SINGH v. EMPEROR.

5 Lah. 308 : 6 Lah. L. J. 265 : 1924 Lah. 600.

—S. 19 (e)—Armed—What is—Going about with gun but not ammunition.

A person who carries about a gun without the ammunition, for using it, is still 'armed' within the meaning of the Arms Act. The offence is punishable under S. 19 (e) and the sanction of the District Magistrate is not necessary. (*Kincaid, J. C. and Kennedy, A. J. C.*) EMPEROR v. MAHOMED PUNJAL.

77 I. C. 736 : 25 Cr. L. J. 448.

—S. 19 (e)—Servant—Use of gun for his own purposes in the absence of master—Offence—Conviction—Confiscation of gun—Legality of order.

There is nothing in the wording of S. 19 (e) to justify the view that any person who has got a license or who is exempted from taking out a license is entitled to allow any servant of his to use the gun for the latter's own purposes. If the servant carries the gun for the purposes of his master or in the presence of his master, that may not be an offence under the Act; but to go further will be going against the terms of the Act.

Where the master was misled by the District Magistrate into thinking that he was entitled to allow his gun to be used by his servant, and he and his servant honestly believed that they were doing nothing wrong in allowing the servant to take the gun and to use it for the purpose of shooting game in the forest, *held* that the order of confiscation of the gun was wrong though the servant might be rightly convicted of an offence under S. 19 (e). (*Krishnan and Waller, JJ.*) VAIRAVAN SERVAL, *In re*.

47 Mad. 438 : 19 L. W. 507 : 34 M. L. T. (H. C.) 97 : (1924) M. W. N. 375 : 81 I. C. 623 : 25 Cr. L. J. 975 : 46 M. L. J. 401 : 1924 Mad. 668.

—S. 19 (f)—Offence under—Temporary user of another's gun for shooting purposes.

The petitioner took away his father's gun without holding a license himself and shot birds. While so shooting he was found out by the police. *Held*, that the petitioner was guilty of an offence under S. 19 (f) of the Arms Act. 35 C. 219 : 16 A. 276, dist. (*Mukherji, J.*) MAHOMED HASAN v. EMPEROR.

22 A. L. J. 1095.

—Ss. 19 (f) and 20—Sanction. NGA THA HLA v. EMPEROR. 76 I. C. 571 : 25 Cr. L. J. 203 : 1924 Rang. 85.

ASSIGNMENT—What is—No form of words—Intention.

An assignment is a transfer of an estate or interest in property. No particular form of words is necessary to effect a transfer if the intention

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of transfer is clear from the language used. (*Moti Sagar, J.*) *FIRM NANAK CHAND KISHGRI LAL v. FIRM SARUP GUJAR MALL.* 78 I. C. 163 : 1924 Lah. 684.

— *Lien or charge—Assignment for purposes of collection—Rights of assignor.*

Where a person assigns to another for purposes of collection of certain arrears of rent and other dues, the assignee agreeing to pay over to the assignor half the net proceeds after deducting the costs of collection, the assignment creates in favour of the assignor a lien in the nature of a trust or charge on the moneys received thereunder and the trust can be enforced as against the receiver of the assignee's estate in the event of his bankruptcy. The assignor is not in a position of an ordinary unsecured creditor in the insolvency. (1891) 1 Q. B. 737 ; 38 M. 500, relied on. (*Phillips and Odgers, J.J.*) *RACHAMADUGU VENKATAPATHI v. RAMADOS RAO.*

82 I. C. 960 : 47 M. L. J. 528 : 1924 Mad. 780.

ATTESTATION—*Effect of—Knowledge of contents—Concurrence.*

Mere attestation of a deed by a relative of the executant does not involve any knowledge of its contents nor does it import concurrence. (*Iwala Prasad, J.*) *JAGDAM SAHAY v. RUP NARAIN MAHTON.* 5 Pat. L. T. 375 : 1924 P. 736.

ATTORNEY—*Costs—Lien on property—Execution of vakalat—Party if can set up absence of engagement.*

Where an attorney is engaged to oppose an application to set aside an execution sale and the application is dismissed, the Court can declare the costs due to the attorney to be a charge on the property, if the client tries to defraud him of his costs.

After executing a vakalat, it is not open to the party to plead that he never engaged him or agreed to pay any fees. (*Kumaraswami Sastri, J.*) *In re, APPLICATION OF ARUNACHALA IYER.*

19 L. W. 576 : 81 I. C. 732 : 1924 Mad. 793.

— *Marking of fees on brief—Fees not allowable on taxation—Letter of authorisation.*

When an attorney proposes or is asked by a client to mark on the brief or to pay fees to Counsel, which cannot be allowed on taxation, he must make it clear to his client that such fees will not be allowed on taxation and should obtain a letter authorising or ratifying payment. Unless he does so, he runs a grave risk of the payments made by him in respect of such a special fee being disallowed and becoming irrecoverable against the client. A Court too may require the production of the letter.

The actual fees, which, it has been arranged to pay to counsel, must be marked on the counsel's brief and no manipulation thereof can be permitted for the purpose of taxation or otherwise. (*Sanderson, C. J. and Richardson, J.*) *ROMESH CHUNDER BASU v. JADAB CHUNDER MITRA.*

28 C. W. N. 597 : 51 Cal. 829 : 1924 Cal. 753.

ATTORNEY AND CLIENT—*Duty of Attorney to keep his client's instructions and documents secret—Extent of duty—Privilege of client.* See EVIDENCE ACT, S. 126. 26 Bom. L. R. 887.

BANKER AND CUSTOMER.

BANKER AND CUSTOMER — *Clearing house—Provisional credit—Cheques subsequently dishonoured—Failure of Bank—Liability to refund—Liquidation.*

The Imperial Bank of India at its Calcutta branch performed the functions of a clearing house to various other banks in the city and among its constituents were the Chartered Bank and the Alliance Bank. Certain cheques drawn on the Chartered Bank on 27—4—1923 were delivered to the Alliance Bank by some of the customers of the latter to the credit of their account. The cheques were sent to the Chartered Bank and according to the usual practice credits and debits were provisionally made by the Imperial Bank in the accounts of the aforesaid two banks. As a result of this, the Alliance Bank received provisional credit for the cheques delivered and the Chartered Bank was provisionally debited with the amount of the cheques. The cheques were dishonoured by the Chartered Bank and returned on the same day to the Alliance Bank giving sufficient reasons for the dishonour. The Alliance Bank handed to the Chartered Bank debit clearing vouchers in exchange for the cheques. As a result of these operations on 27—4—1923 the Chartered Bank held three debit clearing vouchers on the Alliance Bank amounting to Rs. 8,724. On 27—4—1923 the Alliance Bank suspended payment and consequently the Imperial Bank refused to put the three debit clearing vouchers through the clearing on the next day or to readjust the entries. The liquidator of the Alliance Bank refused to comply with the demand of the Chartered Bank that they should be paid the amount of the said three debit clearing vouchers in full. On an application made to the Court, *held*, that the cheques drawn on the Chartered Bank in favour of the Alliance Bank were not finally cleared and the moneys payable under the cheques were never in fact collected by the Alliance Bank in such a way as to enable them to claim the said money as part of their general assets. Under the circumstances there was no relationship of debtor and creditor as between the Alliance Bank and the persons who had drawn the cheques in question. Consequently the liquidator of the Alliance Bank was liable to repay the full amount claimed by the Chartered Bank. The position of the Alliance Bank when they received the cheques in question from their customers for credit of their accounts was that of agents for collection, because of the fact that after the dishonour of the cheques in question by the Chartered Bank the Alliance Bank reversed original credit to their constituents' accounts in respect of these very cheques. (*C. C. Ghose, J.*) *ALLIANCE BANK OF SIMLA IN LIQUIDATION, In re.* 40 C. L. J. 223 : 1925 Cal. 54.

— *Interest—Compound interest—Liability to pay—Estoppel by conduct.* See INTEREST. 5 Lah. 129.

— *Letter of credit—Meaning and object—Letter of advice of credit—Bills drawn by seller of goods—Negotiation—Guarantee by banker—Liability of drawer.*

BANKER AND CUSTOMER.

A letter of credit (sometimes called a bill of credit) is an open letter of request whereby one person (usually a merchant or banker) requests some other person or persons to advance moneys or give credit to a third person named therein for a certain amount and promises that he will repay the same to the person advancing the same or accepts bills drawn upon himself for the like amount. It is called a general letter of credit when it is addressed to all merchants or other persons in general requesting such advance to a third person, and it is called a special letter of credit, when it is addressed to a particular person by name, requesting him to make such advance to a third person. While no set form of words may be necessary, yet a letter of credit as known to the law must contain a request (general or special) to pay the bearer or person named money or sell him some commodity on credit or give him something of value and look to the drawer of the letter for recompense, and it partakes of the nature of a negotiable instrument. The rules governing bills of exchange and negotiable promissory notes are always the same, fixed and determinate; while letters of credit are to be construed with reference to particular and often varying terms in which they may be expressed, the circumstances and intentions of the parties to them and the usages of the particular trade or business contemplated.

Plaintiff, a Calcutta merchant, sold goods to a buyer in England and sued the deft. bank on the strength of a document by the latter in these terms, "We beg to inform you that we are in receipt of advice by wire from our London office that a confirmed irrevocable credit has been opened under which we are authorised to negotiate your bills, as offered on M. G. & Co. (buyers) of London to the extent of 16,875 on the following conditions: "Bills to be drawn three months after sight and to be accompanied by proper shipping documents representing shipment of 2,000 bales of jute of a particular mark from Calcutta to Antwerp during November—December 1920." Among the conditions were: (1) "Please note that this advice does not release you from the liability attaching to the drawers of a bill of exchange," and (2) "under present conditions we can give no undertaking to negotiate bills drawn under this credit." *Held*, that the purpose of the document was to facilitate negotiation and not to furnish an ultimate guarantee, that the document was not intended to be an ordinary banker's credit and that the plaintiff's claim against the bank was not sustainable. (*Mookerjee and Rankin, JJ.*) **CHANDANMULL BENGANEY v. NATIONAL BANK OF INDIA, LTD.** 51 Cal. 43 : 79 I. C. 757 : 1924 Cal. 552.

Lien—Nature of—Set off—Limits of.

Bankers have a general lien on all security deposited with them by a customer. Unless there be an express or implied contract inconsistent with it they can set off what is due to a customer on one account against what is due from him on another account although the moneys due to him may in fact belong to other persons. But they cannot claim a lien on securities delivered to them

BENAMI—Test of.

for a special purpose inconsistent with the existence of the lien claimed. (*Aston, A. J. C.*) **ROCHALDAS GIDOOMAL AND Co. v. MERCANTILE BANK OF INDIA.** 78 I. C. 596.

BENAMI—Presumption exists that purchase is for benefit of person providing purchase money—But presumption is strong or weak according to circumstances and is rebuttable—Trusts Act, S. 82.

Where property is acquired in the name of one person but the purchase price is paid by another, a presumption arises that the transaction is one for the benefit of the person providing the money. (6 M. I. A. 53, 42 I. A. 202, 45 I. A. 97, 46 I. A. 1 and 1923 Cal. 228, Ref. to.) But apart from the fact that the presumption is rebuttable, its strength or weakness can only be gauged by reference to all the surrounding circumstances.

Per Mullick, J.—It is true the payment of the consideration money is not everything in a case of *Benami*. But after all it is a question of fact whether the payment of the money was a gift or a transaction for the benefit of the owner of the money. There is no question of presumption or of onus of proof; the matter is simply one of balance of evidence.

Per Foster, J.—Where the cost of acquisition has a double source and is only in part traceable to the plaintiff, the Court should, in the absence of an unambiguous criterion of ownership, take into consideration the surrounding circumstances, the position of the parties, and their relation to one another, the motives which could govern their actions, and their subsequent conduct including their dealings with or enjoyment of the disputed property. There is no presumption on either side. 1924 Cal. 228; 35 I. A. 104; 30 All. 258 and 14 M. I. A. 433, Foll. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) **HARIHAR PRASAD v. KESHEO PRASAD.**

5 Pat. L. T. Supp. 1 : 1925 Pat. 68.

—Sale-deed in the name of wife—Length of time in challenging the deed—Rights of ownership exercised by the wife—Mutation.

Where a sale deed stood in the name of the wife since the year 1882 when the property was conveyed to her, and mutation of names had been effected in her favour and possession delivered to her and it further appeared that she had exercised rights of ownership and possession, *e. g.*, issue of notices of ejectment and defending of suits in relation to the property by the tenants till 1886 when the husband died and that the husband had referred to her as owner and possessor in more than one deed and had never himself performed a single act of ownership and the transaction was challenged in Court after the lapse of a number of years, *Held* that the wife could not be treated as a benamidar although a considerable portion of the purchase money seemed to have been provided by the husband by borrowing loans for the purpose. (*Kendall and Pullan, A. J. Cs.*) **MUSSAMMAT RAJ KUNWARI v. MUSSAMMAT RANI MAHRAJ KUNWAR.** 82 I. C. 832 : 1 O. W. N. 710.

—Test of—Purchase by husband in the name of his wife—No presumption of advancement.

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Where a Hindu having two wives and children by both of them invests the bulk of his savings in the purchase of immovable property in the name of one of his wives, the wife is merely a benamidar for him and there is no presumption of advancement 48 C 260 relied on. (*Spencer and Kumaraswami Sastri, JJ*) *MOLLA PADAYACHI v. KRISHNASWAMI IYER.* 47 M. L. J. 622. 1925 M. 95.

—Persons dealing with benamidar—Notice of real title—Mortgage by benamidars—Money applied for averting sale of property in execution of decree against the real owner—Rights of mortgagee

Where subsequent to the acquisition of the property, both the husband and wife dealt with it jointly and the husband was also occupying a house forning a part of the acquisition and there were disputes in Court where the husband asserted his exclusive title to the acquisition, a person who having notice of these facts takes a mortgage of the property from the wife or her son as her legal representative without reference to the husband and without enquiry into the real state of the title, is not protected by S. 41 of the Transfer of Property Act. But where a portion of the money advanced by the mortgagee was deposited in Court under O. 21, R. 89, C. P. Code, to prevent the confirmation of a sale of the property held in execution of a joint decree obtained against the husband, the wife and their son, the mortgagee is to that extent entitled to a charge on the property as against the husband, the real owner and persons claiming title under him. 36 M. 272, 276; 36 M. 426; 17 L. W. 254 referred to

Per Kumaraswami Sastri, J.—Where the property is sold in execution of a decree against the real owner and the benamidar raises money for the purpose of setting aside the sale, it is contrary to all equitable principles to hold that the real owner who took no steps to avert the sale could step in afterwards and claim the property free from any obligation to repay the money borrowed by the benamidar for setting aside the sale. (*Spencer and Kumaraswami Sastri, JJ.*) *MOLLA PADAYACHI v. KRISHNASWAMI IYER.* 47 M. L. J. 622: 1925 Mad. 95.

BENAMI TRANSACTION—Burden of proof—Length of time, how far material.

A party cannot be relieved from the burden of proving the benami nature of the transaction by merely showing that a large proportion of the consideration was paid by the real purchaser. The burden is greatly enhanced by the length of time that passes since the transaction impugned. (*Kendall and Pullan, A. J. Cs.*) *MT. RAJ KUNWAR v. MT. RANI MAHRAJ KUNWAR.* 82 I. C. 832: 10. W. N. 710.

—Fraudulent intention—Carrying out the fraud—Suit for recovery of property—If maintainable.

Where in order to defeat his creditors, a debtor conveyed his property to another and when the same was attached by the creditors the transferee successfully objected to the same and got the attachment raised, the debtor cannot afterwards maintain a suit for recovering the properties on

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the ground the transfer was fictitious. A party guilty of entering into a fraudulent contract would be entitled to recover the property conveyed provided the fraudulent purpose has not been executed Case-law referred to. (*Wazir Hasan and Cuming, A. J. Cs.*) *RAUNAQ ALI v. NAZIR HUSAIN.* 78 I. C. 359: 11 O. L. J. 92: 1924 Oudh 321.

—Sale-deed in the name of wife—Presumption of advancement—Indian and English law, difference between—Test—Source of purchase money—Surrounding circumstances.

Benami transactions are by no means unusual in India. Where a transfer has been made ostensibly in favour of a wife or son, there will not, in dealing with Indians, be the same presumption of advancement as there would be in the case of English people.

No doubt the criterion in cases of benami transaction in India is to consider from what source the money comes with which the purchase is made. But this is subject to the qualification that it is to be accepted as the criterion "in the absence of all other relevant circumstances." 37 A. 557, Ref. to. (*Kendall and Pullan, A. J. Cs.*) *MT. RAJ KUNWAR v. MT. RANI MAHRAJ KUNWAR.* 82 I. C. 832: 10. W. N. 710.

BENAMIDAR—Decree—Suit against—Real purchasers when affected—Effect of non-joinder of real owner.

A suit against a benamidar binds the real purchaser, even though he may not have been made a party to the suit. But the plaintiff cannot be allowed by keeping the real purchaser out of the record to enforce a right against an ostensible vendee which he would not have been entitled to enforce against the real purchaser had he been brought on the record. (*Sulaiman and Kanhaiya Lal, JJ.*) *MT. RAM SAKHI KUAR v. LACHMI NARAIN LAL.* L. R. 5 A. 616: 80 I. C. 42: 1924 A. 802.

—Decree—Proceedings against—Real owner—Res judicata.

In a proceeding by or against the benamidar the person beneficially entitled is affected by the rules of *res judicata*. (*Moti Sagar and Martineau, JJ.*) *NANAK CHAND v. MUHAMMAD KHAN.* 75 I. C. 1048: 1924 Lah. 702.

—Position of—Admission of title in third party—Effect of—Conveyance.

An admission by a benamidar that the property standing *benami* in his name belongs to a person other than the beneficial owner does not convey any title to that person. (*Phillips and Venkatasubba Rao, JJ.*) *VISVANATHA AIYAR v. VENGAMA NAIDU.* 19 L. W. 567: 78 I. C. 52: 1924 Mad. 749.

—Right to sue—Ejectment.

Per Phillips and Venkatasubba Rao, JJ.—It is open to a benamidar-vendee having no beneficial interest in the property sold to sue for ejectment of a tenant on the expiry of his lease. 46 C. 566: 36 M. L. J. 68 referred to. (*Coutts Trotter, C.J., Ramasami and Wallace, JJ.*) *GOVIDA NAIDU v. CHENGALROYA MUDALI.* 35 M. L. T. (H. C.) 29: (1924) M.W.N. 738: 47 M.L.J. 415: 1925 Mad. 22.

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———*Right to sue for damages.*

A benamidar can sue for damages for breach of contract. (*Abdul Raoof, J.*) **BALMOKAND v. SHANKAR DAS.** 76 I. C. 125.

BENGAL ALLUVION AND DILUVION ACT (IX OF 1847), Ss. 1, 3 and 6—Scope and effect of—Assessment of charland—Suit to set aside—Limitation—Bengal Regulation II of 1819, Ss. 24 and 31.

Act IX of 1847 was framed with a view to substitute, in cases of assessment of alluvial lands a simpler procedure than that embodied in Regn. II of 1819, which was intended to apply in the main to resumption of lands held free of assessment, without the sanction of the proper authorities or under illegal or invalid tenures. The expression "any such new map" in S. 6 of Act IX of 1847 refers to the new map made according to "new survey" as contemplated in S. 3. That section provides for periodical surveys at intervals of not less than ten years after a revenue survey has been completed and approved. The object of the "new survey" is to ascertain the "changes" that may have taken place since the date of the last previous survey by alluvion or dereliction (not changes by possession). S. 6 then imposes upon the revenue authorities the duty to assess what may be called added land, whenever, on inspection of the new map, it appears that land has been added to an estate paying revenue directly to Government. There must consequently be a comparison between two maps made at an interval of not less than 10 years and each showing the revenue paying estate concerned. That estate must accordingly be in existence as a revenue-paying estate, if not before, at least on the date of the first of the two maps taken as the basis for compensation. It is only when on an inspection of the new maps it appears that land has been added, that there is legislative authority for the assessment of additional revenue. The procedure contemplated by Act IX of 1847 is fundamentally different from that provided by Regn. II of 1819. The change had been rendered feasible, chiefly by reason of the progress of the survey operations throughout the province. The survey operations conducted by Major Rennel had not been undertaken for revenue purposes, and it was only during the first half of the 19th century that surveys of different types (Khasra, Thakbust and Revenue) were systematically carried out with a view to define every estate on the Collector's rent roll, and to determine the relation of land to jama or revenue by the ascertainment of the areas and boundaries of estates or mahals. The system of assessment inaugurated in 1847 could not have been even contemplated in 1819. Two such systems, so radically distinct, cannot possibly be amalgamated.

A suit was instituted on 29-6-1915 for a declaration that certain land was not "added land" within S. 6 of Act IX of 1847 and that the assessment thereon was *ultra vires*. The revenue authorities had levied an assessment on the footing that the lands had been gained by alluvion from a river. The assessment was approved by the Board of Revenue on 28-11-1912 and a notice of the date 20-2-1913 was served on the plaintiffs on 15-3-1913 informing them of the assessment. A petition for review put in by the plaintiffs had

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been rejected on 29-6-1914. It was contended for the defendant (Secretary of State) that S. 24 of Regn. II of 1819 was applicable to the case and that the suit was barred either under that section or under Art. 14 of the Lim. Act. *Held*, that the suit was not based under either provision, as none of them was applicable to the case. 24 C.W. N. 813 dissented from. (*Mookerjee and Rankin, JJ.*) **PEARY LAL RAY CHOWDHURI v. SECY. OF STATE.** 39 C. L. J. 454: 1924 Cal. 913.

———**S. 3—Accretion and alluvion—Assessment of land revenue—Mode of—Diara survey map—Resurvey by super-imposition—Functions of Board of Revenue.**

Under Act IX of 1847, the Board of Revenue is the proper authority in all cases of accretion or alluvion and all matters of survey, measurements, boundaries, etc., of assessable land, and its decisions are final, provided that (1) there has been no fundamental irregularity in the proceedings indicative of defiance of, or non-compliance with, the essentials of legal procedure, (2) the onus of establishing such fundamental and essential violation, if any, of statutory requirements is upon the person alleging it, (3) any doubts on matters of fact such as inaccuracy or incompleteness of maps or surveys which are within the special province of the Board of Revenue should be promptly advanced before the Board in the course of the proceedings before it without which Courts of law will not entertain them. 19 I. A. 140; 32 M. L. J. 505, Ref. 48 I. A. 565, Applied. (*Lord Shaw*) **SECRETARY OF STATE FOR INDIA v. ROY JATINDRA NATH CHOWDHURY.**

51 C. 802 : 29 C. W. N. 1 : 80 I. C. 1023:

(1924) M. W. N. 588 :

35 M. L. T. (P.C.) 146 : 47 M. L. J. 48 (P.C.).

BENGAL ALLUVIAL LANDS ACT (V OF 1920), S. 3—Effect of—Alluvial lands recently formed—Breach of the peace—Jurisdiction of magistrate to take action under S. 145, Cr. P. Code, is not affected. 28 C. W. N. 783.

BENGAL CESS ACT (IX OF 1880), S. 17—Revaluation—Mode of enquiry.

When the cultivated area shown in a return is less than the area shown in the Settlement Register, and the decrease is not satisfactorily explained by the maker of the return, then the Revaluation Officer should add the deficit to Part I and value it accordingly. The proprietor is of course bound by the notice under S. 17 to state the whole area of his estate, and the fact that land is temporarily diluviated does not remove it from the area to be accounted for. On the other hand, the explanation is one that ought to be properly examined, and the assessment made on the facts ascertained. (*Morshead, M. C.*) **KESHO NARAIN SINGH v. EMPEROR.** 2 Pat. L.R. 48 (Cr.).

———**S. 54—Notice—Condition precedent to recovery of cess.** **MURLI MANOHAR v. RAJA NAND SINGH.** 1924 P. 205.

———**S. 95—Road cess return—Evidentiary value of.**

S. 95 restricts the provisions of S. 21, Evidence Act, and makes the exceptions to that section inapplicable to cess returns. A cess return cannot

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be used under any circumstances in favour of the person making it but it can be used by others for a purpose not directly connected with the statements made in the return. (*Suhrawardy and Chotzner, JJ.*) CHANDRA MOHAN MAITI v. KINARAM MAITI. 79 I. C. 412.

BENGAL COURT OF WARDS ACT—Manager—Lease for more than ten years—Grant of—Conditional acceptance of rent—Effect of—Subsequent suit by wards for ejectment.

In 1906 the General Manager of the Court of Wards granted a patta in respect of land measuring about 800 bighas in favour of the defendants. Before the grant the Manager wrote to the Collector proposing a settlement for a term of ten years with the defendants on condition that they should pay a progressive rent, construct and maintain embankments at their own expense. On a report made by the Collector, the Commissioner accorded sanction. The patta granted to the defendants by the Manager contained a clause authorising the defendants to acquire a right of occupancy in the land and giving the Court of Wards no power either to dispossess them from the land at will or to enhance the rent thereof without recourse to law. The patta also recited that the rights thereunder would vest in the heirs of the grantees. After the expiry of the term of ten years the General Manager of the Court of Wards, acting as guardian of the Wards, sued in ejectment.

Held, that the lease in so far as it purported to confer permanent rights of occupancy or to create a term exceeding ten years, was void as against the plaintiffs. The Manager had no authority to grant a lease so as to ensure for more than ten years and the lease was therefore void in so far as it exceeded that limit. The defendants however were entitled to compensation for the embankments they have constructed and the improvements they had effected. (*Richardson and Sham-sul Huda, JJ.*) MUKBUSOR RAHAMAN CHOWDHURY v. RAJ LAKHI DEBYA. 81 I. C. 744 : 39 C. L. J. 102.

———(IX OF 1879), S. 6 (e)—*Suit against disqualified proprietor—Personal covenant—Parties.*

A disqualified proprietor can make a personal covenant and in a suit to enforce the same, the Court of Wards need not be impleaded as representing him. (*Ross and Sen, JJ.*) LACHMI NARAIN GOURI v. SYED MAHOMED ABRAHIM HUSSAIN KHAN. 1924 P. H. C. C. 310.

———S. 51—*Manager of Court of Wards—Appointment of guardian ad litem of minor ward.*

Where the manager of the Court of Wards applies to be appointed guardian ad litem of the minor ward in execution proceedings, he should forthwith be appointed. (*Newbould and Ghose, JJ.*) KHAJEH SALALUDDIN v. AFZAL BEGUM. 28 C. W. N. 963 : 39 C. L. J. 590 : 1925 Cal. 23.

———S. 60-A—*Possession taken by Court of Wards—Execution of decree obtained against proprietor.*

Where the estate of a disqualified proprietor has been taken possession of by the Court of Wards a decree obtained against the former on a personal covenant cannot be executed against the proper-

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ties in the hands of the Court of Wards. A formal order under S. 35 is not necessary giving possession to the Court of Wards. (*Ross and Sen, JJ.*) LACHMI NARAIN GOURI v. SYED MAHOMED ABRAHIM HUSSAIN KHAN. 1924 P. H. C. C. 310.

———S. 70—*Rules under—R. 15—Powers of Commissioner to grant leases—Sanction of Board of Revenue.*

Under R. 15 framed under S. 70 of the Court of Wards Act, a Commissioner has powers to grant leases but if he decides not to do so without the sanction of the Board of Revenue, he cannot be compelled to sanction a lease. (*Jwala Prasad and Kylwant Sahay, JJ.*) RUDRA DAS CHAKRAWARTI v. KUMAR KAMAKHYA NARAYAN SINGH. 3 Pat. 968.

BENGAL CRUELTY TO ANIMALS ACT (I OF 1869), Ss. 2 and 5—Charge under—Plea of not guilty—Conviction on doctor's report.

The accused pleaded not guilty to a charge under Ss. 2 and 5 of the Bengal Act, I of 1869. The magistrate convicted him on the report of the Court doctor. *Held*, that the conviction on the report of the Court doctor without any other evidence was illegal. (*Newbould and Chakravarti, JJ.*) BUDHU KOIRI v. EMPEROR.

40 C. L. J. 563.

BENGAL ELECTORAL RULES, R. 31—Effect of—High Court's power under S. 45, Specific Relief Act. 1924 Cal. 454.

BENGAL EMBANKMENT ACT (II OF 1882), S. 87—Embankment—Disposal of land—Claim—Burden of proof.

S. 87 applies to all public embankments inclusive of the embankments enumerated in Sch. D to the Act of 1873 and the onus lies on the person claiming the abandoned embankment to establish that the site was originally taken from his estate of tenure. If the embankment was erected after the Permanent Settlement, it may be possible to raise a presumption in favour of the claimant that the site was taken out of his estate. But where nothing is known as to the time of the erection of the embankment, no presumption arises that the embankment stands on a site which was included within the estate of the depts. at the time of the Permanent Settlement. (*Mookerjee and Panton, JJ.*) BHUBAN MOHAN SARDAR v. DHANGOPAL GHOSE. 39 C. L. J. 577.

BENGAL ENCUMBERED ESTATES ACT, Ss. 3 and 12-A—Strict construction—Impartible estate—Execution of will—Estate not released from management at the time of his death—Legality of.

Where the owner of an impartible estate executes a will disposing of it at a time when it had not come under the operation of the Encumbered Estates Act, the will is valid and operative even though at the time of the death of the testator, the estate had not been released from the management. The expression "alienation" in Ss. 3 and 12-A of the Act refers to alienation *inter vivos* and not to alienation by will. The execution of a will does not amount to alienation within S. 12-A of the Bengal Encumbered Estates

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Act. The Encumbered Estates Act should be strictly construed inasmuch as it imposes disabilities on the subject. It restricts the power of disposal of the owner holder of an estate and interferes with his right to manage the estate as he pleases. The right to succeed to the holder is not affected by the Act. (*N. R. Chatterjea and Chotzner, JJ.*) *SIR PROTAP CHANDRA DEO DHO-BAL v. SRI RAJA JAGADISH CHANDRA DEO.*

82 I. C. 886 : 40 C. L. J. 331.

BENGAL ESTATES PARTITION ACT (V OF 1897), S. 7—Fractional sharer—Application for partition of mahal.

The appellants who were registered for 2 annas 8 dams in village Bhusaula applied for partition. The respondents were registered for 8 annas 16 dams in the same village and they objected on the ground of a private partition of this village. The Settlement Record showed an old accepted partition. *Held*, that the principles of S. 7 should be applied because the parties concerned having specific shares in this village would under a partition receive allotments in this village only, and the objections to the disturbance of the private partition are as strong as in a case in which the whole of the estate is concerned. (*Morshead, M. C.*) *SAHIB SINGH v. FAUJDAR SINGH.*

2 Pat. L. R. 89 (Cr.)

S. 7—Private partition—Large area left undivided—If bars partition by Collector.

Where at a prior private partition, a comparatively large area was left undivided, it does not bar a subsequent partition before the Collector. (*Das and Ross, JJ.*) *QAMAR HUSAIN v. ABBAS ALI.*

3 Pat. 614 : 78 I. C. 653 : 1924 P. 594.

S. 7—Private partition—Settlement records—Evidence—Bar to partition by Court.

Where lands of an estate have been divided by private arrangement formally made and agreed to by all the proprietors, and each proprietor has, in pursuance of such arrangement, taken possession of separate lands to be held in severalty as representing his interest in the estate, no partition of the estate should be made under Act V of 1897. But the burden of proving such a private partition is on the persons setting it up. The distribution disclosed by the Settlement Record must be shown to be the result of a formal partition and not the embodiment of a mutual arrangement. (*Morshead, M. C.*) *MAULVI MAHOMED v. BABU CHANDRA BANSI SAHAY.*

2 Pat. L. R. 116 (Cr.)

S. 25—Declaratory suit. NARSINGH THAKUR v. BISHUN PERGASH SINGH.

75 I. C. 1036 : 1924 P. H. C. G. 21 : 1924 P. 209.

S. 25—Scope of—Suit for declaration of prior valid private partition—If maintainable.

75 I. C. 1046 : 1924 P. 211.

S. 57—Evidence of partition. NARSINGH THAKUR v. BISHUN PRASAD SINGH

75 I. C. 1036 : 1924 P. H. C. G. 21 : 1924 P. 209.

Ss. 94, 95—Separate accounts—Effect of partition.

Separate accounts can have no further existence after a partition and if any further protection is

BENGAL LAND REGISTRATION ACT, S. 33.

required by way of separate account it must be freshly opened. (*Ross and Das, JJ.*) *BANARSI PRASAD v. MOHI-UD-DIN AHMED.* 78 I. C. 723 : 1924 P. 586.

Ss. 94 and 95—Partition—Effect of—Separate accounts—Contract Act, Section 56—Applicability of.

Ss. 94 and 95 would seem to imply that the separate accounts can have no further existence after a partition, because section 94 provides for the separate liability of the separate estate for the amount of land revenue specified in the notice to be issued under that section and requires the proprietor to enter into a separate engagement for the payment of such land-revenue, and section 95 enacts that from the date of the notice each separate estate shall be separately liable for the amount of land-revenue assessed upon it under the Act. If any further protection is required by way of separate account, it would seem that a separate account must be freshly opened. A partition of an estate does not have the effect of destroying separate accounts. (*Das and Ross, JJ.*) *BENARSI PRASAD v. MOHIUDDIN AHMAD.*

3 Pat. 581.

S. 99—Scope of—Co-sharer—Usufructuary mortgage of specific plots—Partition—Dispossession of mortgagee—Effect of.

A co-sharer held possession of specific lands under an arrangement with the other co-sharers and he usufructuarily mortgaged them. Upon a Collectorate partition the lands were allotted to the *wakhta* of another co-sharer who dispossessed the mortgagee. *Held*, that the case did not fall under S. 99, but under S. 68 (c) of the T. P. Act. (*Miller, C. J. and Kulwant Sahay, J.*) *RAMNANDAN PARBAT v. DEVI SAHL.*

5 Pat. L. T. 26.

BENGAL LAND REGISTRATION ACT (VII OF 1876)—Mutation of names—Decision of civil court—Value of.

Where the ground upon which the previous registration was allowed namely that the family was joint has since been set aside by the decision of civil court the right course is to register the petitioner who claimed a share. (*Morshead, M. C.*) *JAGDAM SAHAY v. RAM PRASHAD.*

2 Pat. L. R. 94 (Cr.).

Ss. 51 and 72—Finding of Dt. Judge—Validity of Kabola—Revision.

1924 P. 134.

BENGAL LAND REVENUE SALES ACT (XI OF 1859), Ss. 2, 3 and 33—Sale for revenue—Existence of arrear essential—Arrears of June kist—Improper revenue sale—Remedy of aggrieved party—Misdescription of property sold—Effect of.

If the Government revenue is payable in June according to the original settlement and kistbandi of the mahal it does not become an arrear of revenue until the 1st of July. The Collector should not put up an estate for sale unless there is an arrear of revenue in respect of that estate and unless the latest date of payment fixed by the Board of Revenue has expired and the default has not been made good. It is impossible to take the view that the 7th June, which is the latest date fixed for payment by the Board of Revenue

BENGAL LAND REVENUE SALES ACT (XI OF 1859), S. 2.

under S. 3 of the Act, is also the date upon which the kist or instalment was payable for June according to the original settlement and *kisbandi* of the mahal.

Whenever a person seeks to have a revenue sale set aside on the ground that there was no authority in the Collector to sell an estate having regard to the fact that the latest date fixed for payment by the Board of Revenue had not expired at the date when the property was put up for sale he should, in order to enable the Court to decide the point, give the dates of the revenue kists according to the original settlement and *kisbandi*. Where a revenue sale has been held contrary to the provisions of Ss. 3 and 6 of the Bengal Revenue Sales Law, no grounds of objection are open to the plaintiff in a suit to set aside the sale which have not been declared and specified in an appeal to the Commissioner.

Where the area in one of the villages sought to be sold was not properly described in the sale notification, the misdescription does not affect the existence of the jurisdiction in the Collector to sell the property but merely affects the exercise of his jurisdiction.

Though the view of the majority of the Judges in 2 Pat. L. J. 462 was erroneous still the Division Bench felt bound to follow the said opinion. (*Das and Macpherson, J.J.*) **JAGDISHWAL NARAYAN v. MD. HAZIQ HUSSAIN.** 1924 P. H. C. C. 142 :

77 I. C. 851 : 5 Pat. L. T. 473 : 1924 P. 537.

—S. 28—Amendment of sale certificate—Clerical error.

Where it was clearly the intention to sell the whole share of Nos. 17—G 3—C. 1—K, and there was no question of its not being understood throughout that that was the property transferred, it is not necessary to regard the case from a strictly legal point of view and the Board may legitimately order the correction of a clerical error that has misled nobody. (*Morshead, M. C.*) **RAM-SUNDAR MAHTON v. MT. KAMAL KUBER**

2 Pat. L. R. 68 (Cr.)

—S. 33—Applicability.

In order that S. 33 may come into operation it is necessary that there should have been a sale for arrears of revenue. (*Newbould and Ghose, J.J.*) **BILAST CHANDRA ROY v. RAJENDRA CHANDRA DAS ROY.** 51 Cal. 776 : 78 I. C. 661 :

1924 Cal. 839.

—Ss. 33 and 34—Revenue sale—Arrear of revenue—Legality of sale—Sale without jurisdiction.

S. 34 of the Bengal Rev. Sales Law applies only where a sale held under Act XI of 1859 is annulled by a final decree of a civil court; in other words, where a suit is brought under the provisions of S. 33 of the Act, and a civil court annuls the sale on any of the grounds mentioned in S. 33 of the Act an execution petition must be presented within 6 months after the date of the decree; but where the suit is not one under the provisions of S. 33 or Act XI of 1859, S. 34 has no operation whatever. There is a clear distinction between a case where a sale is annulled and a case where the Court authoritatively recognises

BENGAL MUNICIPAL ACT, S. 85 (b).

that there was no sale at all, and consequently disregards it and proceeds to give a decree for possession to plaintiff. Where the sale is authorised, but there is a direct violation of the statutory possession in conducting the sale, the suit must be one for annulment of the sale, and the Court has complete power to set aside the sale, provided the requirements of S. 33 are complied with. But where the sale is not authorised there is in law, no sale, and there being nothing to annul, all that the Civil Court does is to recognise that there is no sale and to pass a decree for possession in favour of plaintiff. S. 33 applies to a case where the sale is authorised, but is attended with some illegality or irregularity and S. 33 affords a complete protection to such sales, although they have been attended with illegality or irregularity, unless the conditions specified in S. 33 are fulfilled and the procedure indicated in that section is adopted. But where there is no authority whatever for the sale S. 33 has no operation; and the Court in dealing with a case where there is an entire absence of jurisdiction in the Collector to put up the property to sale does not annul the sale but recognises authoritatively that there was no sale at all. (*Das and Ross, J.J.*) **HAKIM MAHOMED IDRIS v. LACHMAN DAS**

1924 P. H. C. C. 25 : 5 Pat. L. T. 368 :

78 I. C. 303 : 1924 P. 504.

BENGAL MUNICIPAL ACT (III of 1884), S. 15—Rules made under—Candidate for Municipal election—Right to be present at polling station—Rule excluding such right—Suit for declaration and injunction.

The rights of candidates or electors are rights expressly given by statute and they do not carry with them any rights not given by the statutory law. Where a candidate for a Municipal election sued for a declaration that he was entitled to be present at the recording of votes and for an injunction restraining the presiding officer from excluding him, *Held*, that the plaintiff had not shown that he had the statutory right to be present at the place where the votes were recorded or that the rule forbidding his presence in that particular place was *ultra vires*. As the plaintiff had asked for further relief in the form of an injunction, the suit was not barred under section 42 of the Specific Relief Act. (*Newbould and Ghose, J.J.*) **THE CHAIRMAN OF THE COMMISSIONERS OF THE HOWRAH MUNICIPALITY v. HARIPADA ROY CHOWDHURY.** 28 C. W. N. 892 :

82 I. C. 345 : 1924 Cal. 1070.

—Ss. 85 (b), 279 (3) and 322—Co-sharer—Occupier—Rateable occupation—Water rate—Latrine fee.

The Bengal Municipal Act defines the term "owner" but not "occupier". Occupation for purposes of assessment of rates include actual possession as its primary element, for legal possession does not of itself constitute occupation. Every owner is not an occupier just as every occupier is not an owner. In order to constitute rateable occupation, there must be a use and enjoyment, which is, or is capable of being, beneficial. Consequently, a co-sharer not in actual possession and enjoyment of a holding

BENGAL N. W. PROV. AND ASSAM CIV. COURTS ACT.

within the jurisdiction of the municipality is not liable for water rate and latrine fee. (*Mukerji and Fletcher, JJ.*) *KHAJISAMSUDDIN v. PEARI LAL DAS.* 40 C. L. J. 295.

BENGAL NORTH-WESTERN PROVINCES AND ASSAM CIVIL COURTS ACT (XII OF 1887), S. 1—“Civil Court”—Honorary Munsif—Transfer of case from Small Cause Court—Appeal from decision.

An Honorary Munsif is a “Civil Court” within the meaning of the Act. Consequently even though a case is transferred to him from a Small Cause Court, an appeal lies from his decision to the Subordinate Judge. (*Boys, J.*) *MEGI MAL v. HIRA LAL.* 22 A. L. J. 880 : L. R. 5 A. 725 : 82 I. C. 292 (1) : 1924 A. 761 (2).

S. 8—Additional District Judge—Power of—Revocation of probate.

The powers of an Additional District Judge appointed under S. 8 of the Act are the same as those of a District Judge with respect to the cases transferred to him. In the case of a matter under the Probate and Administration Act transferred to him, he can revoke a probate granted. (*Jwala Prasad and Kulwant Sahay, JJ.*) *DAHO KUER v. TURAL DEI.* 2 Pat. 609 : 78 I. C. 701 : 1924 P. 593.

BENGAL CIVIL COURTS ACT, S. 20—Scope of.

S. 20 of the Bengal Civil Courts Act does not deal with rights of appeal from orders of the District Judge, but only with the forum of appeal, if any. (*Miller, C. J. and Foster, J.*) *BIBI WASHIKHAN v. MIR NAWAB ALI.* 3 Pat. 1018.

BENGAL PUBLIC DEMANDS RECOVERY ACT—Applicability of—Certificate procedure when to be adopted.

The certificate procedure is intended only for the recovery of sums regarding which there is no doubt of the liability of the debtor. Cases in which the debtor is likely, with some show of reason, to deny his liability should be referred with a view to the institution of civil suits. (*Morshead, M. C.*) *BHUKHUL MISSIR v. MAHARANI JANKI.* 2 Pat. L. R. 111 (Cr).

Ss. 29 and 65—Certificate sale—Setting aside—Limitation—Delay.

Where a pardanashin lady who had been affected by a certificate sale applied nearly seven years after the expiry of the sixty days prescribed by S. 29 (2) of the Act and the lower appellate Court set aside the sale on the ground that the lady was a pardanashin lady and might have been ignorant of the proceedings and of the requirements of the law, *Held*, that the questions of hardship and irregularity of the sale were not relevant unless there was a reasonable explanation for the delay. The lady had lost her remedy in the Civil Court by omitting to take any step for one year after she became aware of the sale and she could not re-open the sale under S. 29 of the Act. (*Morshead, M. C.*) *DEO SARAN PURI v. BAHURIA UTTIMRA KUER.* 2 Pat. L. R. 127 (Cr).

BENGAL REGULATION (VIII OF 1793), S. 5 (3)—Rent of Taluks held long before Zamindari—If liable to be enhanced.

BENGAL REG. (XVIII OF 1825), S. 4 (1).

The owner of taluks which were formed long before the zamindari, comes within the description of a taluqdar in S. 5 (3) of Regulation VIII of 1793 which was not repealed when the zamindari was created. The rent of such a taluk cannot therefore be enhanced. (*Newbould and B. B. Ghose, JJ.*) *BIRENDRA KISHORE MANIKYA BAHADUR v. ALI AHMED.* 1924 Cal. 1015.

(XVII OF 1806), S. 1—Foreclosure—Observance of formalities—Presumption—Proof.
MUNSHI RAM v. NAURANGA. 1924 Lah. 176.

S. 1—Foreclosure proceedings—Action of District Judge if judicial or ministerial.

Though the functions to be exercised by the Dt. Judge under the Regulation (XVII of 1806) are ministerial and not judicial, there can also be no doubt that a District Judge assumes judicial functions when he proceeds to determine whether he has or has not the jurisdiction to issue a notice. Consequently his order issuing a notice overruling an objection to his jurisdiction is open to revision by the High Court. (*Moti Sagar, J.*) *NAND KISHORE v. NARAIN SINGH.* 6 Lah. L. J. 137 : 78 I. C. 350 : 1924 Lah. 471.

(XII OF 1817), Ss. 20 and 34—Remuneration of patwari—Jurisdiction of Civil Court.

A patwari who has been registered under Regn. XII of 1817 can recover his dues under the Regulation only and a civil suit for the purpose is barred by S. 34. (*Morshead, M. C.*) *RAMCHANDAR LAL v. MAHABIR ROY.* 2 Pat. L. R. 112 (Cr.).

(XVIII OF 1825), S. 4 (1)—Diara lands—Accretion—Separate suit for rent—Howla tenure.

Land accreted to a rent-free tenure is liable to the payment of rent though the tenure to which it is accreted may be rent free. The rate of rent of land accreted to a rent-paying tenure may not be the same as that of the original tenure having regard to the quality of the land. Where the proprietor of an estate declines to take settlement from the Government, the accreted portion must be settled with some other person and such other person must necessarily bring a separate suit for rent for the accreted land held by the tenant. When the proprietor takes a settlement from the Govt. of the accretion as a separate estate and such estate is sold away to a third person such person would certainly be entitled to maintain a separate suit for rent for the accreted portion. These considerations show the difficulty of affirming a general proposition that in no case can a separate suit for rent be maintained for the accreted lands.

Where the accreted lands were formed subsequent to the creation of the parent howla tenure and they were not only constituted a separate estate between the Government and the proprietor but the diara lands were separated and formed into new tenancies recorded in the settlement khewats and the parties treated the accreted lands as separate tenures by suing for rents separately, *Held*, that a separate suit for rent for the accreted lands is maintainable. (*Chatterjee and Cuming, JJ.*) *KALI RANJAN CHOWDHURY v. RAJESWAR ROY CHOWDHURY.* 51 Cal. 396 : 1924 Cal. 946.

BENGAL REG. (XI OF 1832) S. 4.

— (XI OF 1832), S. 4—*Accretion to be slow and gradual.*

An accretion to be gradual, must be an accretion by gradual, slow and imperceptible means. Where a field received by alluvion an area which was considerable in proportion to the area of permanent field and came under cultivation afresh in one year the accretion is not gradual. (*Fremantle, J. M.*) GAYA CHAUBE v. MAHARAJA KESHO PRASAD SINGH. L. R. 5 A 90 (Rev.)

BENGAL TENANCY ACT (VIII OF 1885)—*Applicability—Lease—If for agricultural purpose or not—Test.*

To find out the exact nature of a lease, reference should be made to all its terms and the surrounding circumstances. Where though there was no statement that the lands were let out for an agricultural purpose, it recited a progressive increment in rent as more and more lands came under cultivation and there were irrigation facilities provided, the B. T. Act governs the case. (*Mookerji, J.*) MAHOMED SULAIMAN KHAN v. UMA CHARAN SIL. 79 I. C. 648.

—*Suit for rent against common Manager—Sanction of Dt. Court—If necessary.*

There is no provision in the B. T. Act which requires the previous sanction of the District Judge to be obtained in order to bring a suit for rent against a common Manager or to execute a decree obtained in such a suit. An execution Court is bound to execute such a decree without going into the question. (*Pearson and Graham, JJ.*) SARAT CHANDRA GHOSE v. RAJ KUMAR CHAKRAVARTI. 82 I. C. 327.

—S. 3—*Applicability of—Homestead—Agricultural land—Sub-tenancy.*

In the absence of a local custom or usage, the homestead portion of an agricultural holding is governed by the provisions of the Bengal Ten. Act, precisely in the same manner as the portion under actual cultivation. The question whether a case of this description is governed by the B. T. Act or the T. P. Act depends on the nature of the original tenancy and not on the character of the parcels included in the sub-tenancy. 15 C. L. J. 672; 21 C. L. J. 475, Rel. It is not necessary to investigate the actual origin of the tenancy: it is sufficient if it is established that at the time of the sub-lease, the holding, out of which the sub-tenancy was carved out, was an agricultural holding. (*Mookerjee and Rankin, JJ.*) RAMPADOO SARKAR v. ATORE DOME. 40 C. L. J. 307.

—Ss. 4, 20, 21, 51, 103-B, 116 to 120—*Status of tenant—Zerai dakhilkar—Zerai qaimi—Zerai lands—Tenants of—Acquisition of occupancy rights—Presumption—Onus of rebutting.*

The Bengal Ten. Act purports to deal principally with raiyati lands and to deal with the relationship between landlord and tenant. The private lands of the proprietor are wholly outside the scope of the B. T. Act and settlement of those lands are governed not by the B. T. Act but by the T. P. Act. Consequently where tenants have been let into possession of Zerai lands under registered leases for a term of years they cannot acquire occupancy rights in them during the continuance of the lease. After the expiry of

BENGAL TENANCY ACT, S. 7 (2).

the lease they hold over under the same conditions as a lessee holding over by virtue of the provisions of S. 116 of the T. P. Act. They became tenants from year to year. Such tenants cannot acquire occupancy rights and S. 116 of the B. T. Act applies to the case and the tenants are liable to ejectment in a suit brought within 12 years of the expiry of the lease. The entry of certain lands in the Record of Rights as "Zerai qaimi", "Zerai dakhilkar" and "Zerai gair dakhilkar" is to be deemed to be correct until the contrary is proved and the burden is on those impeaching the correctness of the entry. The expression "Zerai gair dakhilkar" would be descriptive of the status of a tenant who has acquired non-occupancy rights in respect of Zerai land. "Qaimi" means a "settled raiyat" and "Zerai" means a proprietor's private lands. The expressions "Zerai qaimi" and "dakhilkar" have been explained as descriptive of the status of a tenant who has acquired occupancy rights in respect of Zerai lands with the following note "as he (the tenant) can have only occupancy and settled rights in respect of such lands, the entry Zerai qaimi is not so correct from a technical point of view as Zerai dakhilkar". (*Jwala Prasad, A. C. J. and Kulwant Sahay, J.*) BABU RAMJI RAM v. BANSI RAUT. 1924 P. H. C. C. 337.

—Ss. 5 and 48—*Zarpeshgi lease—Rights of lessee—Mortgagor executing a Kabuliya to lessee—Status of.*

A Zarpeshgi is an instrument of mortgage and not a lease. The sum advanced by the Zarpeshgidar is not rent payable in advance for a certain period at the end of which the land was to be delivered up to the lessor. The profits after deducting the proportionate amount of rent payable to the landlord were to be taken as interest on the principal sum and even at the end of the term the Zarpeshgidar was to remain in possession upon the same conditions until the principal sum should be repaid; and the property was hypothecated for repayment of the loan in the event of the Zarpeshgidar being dispossessed. Held, that the Zarpeshgidar was not a tenant of the mortgagor and is not a raiyat within S. 5 (3) of the B. T. Act. If the mortgagor executes a Kabuliya in favour of the mortgagee the former does not become a tenant holding mediately or immediately under a raiyat within S. 48 of the B. T. Act. 2 C. W. N. 758; 10 C. W. N. 351; 15 C. W. N. 345; 23 A. 338; 47 C. 377, Rel. (*Miller, C. J. and Mullick, J.*) TILAKDHARI SINGH v. CHATURGUN BIND. 1924 P. H. C. C. 4; 78 I. C. 923; 3 Pat. 266.

—S. 6—*Applicability.*

Tenures which have been held from long before the Permanent Settlement fall within the scope of S. 6 of the Bengal Tenancy Act. (*Newbould and B. B. Ghose, JJ.*) BIRENDRA KISHORE MANIKYA BAHADUR v. ALI AHMED. 39 C. L. J. 605; 1924 Cal. 1015.

—S. 6 (a)—*Tenure holder—Enhancement of rent.* NURUL HUQ v. MAHARAJAH BIRENDRA KISHORE MANIKYA BAHADUR. 1924 Cal. 133.

—S. 7 (2)—*Enhancement of rent—Tenure holder—Fair and equitable rent—Trial of question.*

BENGAL TENANCY ACT, S. 12.

In a suit for enhancement of rent of a tenure under S. 7 of the B. T. Act, it is only when a Court finds that customary rent does not exist, that the rent can be enhanced up to such limit as it thinks fair and equitable. 49 C. 866, Foil. (*Suhrawardy and Cuming, JJ.*) JOGESH CHANDRA ROY v. IZZAT ALI. 40 C. L. J. 585.

—Ss. 12, 13, 15 and 16—*Purchaser of interest of Mokurraridar—Application for substitution—Registration if necessary—Commutation of rent.*

There is nothing in the Land Registration Act to require a *mokurraridar* to be registered or to prevent him from realising rent pending registration. The bar to realisation of rent imposed by S. 16 does not therefore affect purchasers of a *mokurraridar*'s interest pending commutation proceedings although as a matter of fact they had gone beyond the requirements of the law, and had actually gone through the procedure for service of notice through the Collector, as if they had acquired the tenure by succession. Where a commutation rate fixed under a compromise was not shown to be unfair, it could not be reopened. (*Morshhead, M. C.*) MAHESHWRI PRASAD SINGH v. BHAGIRATH MAHTON. 2 Pat. L. R. 87 (Gr.)

—Ss. 15 and 16—*Co-sharers—Landlords—Suit for rent—Collection by co-sharers—Costs.*

There is no objection on principles why a co-sharer landlord may not in the presence of the other co-sharers who are incompetent to realise their rent sue for his rent and recover it although there had been no separate collection before. The co-sharers may at any time start separate collection of their rent without any reference to the tenants and when a suit is brought for a share of the rent making all the co-sharers parties and the plaintiff's share in the property is established there is no reason why the plaintiffs in a suit properly framed should not get their shares of rent. The ordinary rule is that costs ought to follow the result of the litigation. (*Greaves and Chakravarti, JJ.*) NIBARAN CHANDRA ROY v. NABIN CHANDRA ROY. 40 C. L. J. 504.

—S. 20—*Occupancy right—"Land situate in any village"—Meaning of—Sunderbans.*

The word "village" means an area defined, surveyed and recorded as a distinct and separate village in one or other of three ways. The first refers to the general land revenue survey which had been made of the Province of Bengal. The second and third look forward to the future. In order that an occupancy right may be acquired the land must be held in a village for a period of 12 years and if the land has not been comprised in the statutory sense, the condition of acquisition of the occupancy right has not been complied with. Where in respect of lands situated in the Sunderbans no notice was issued by the Collector declaring the area as constituting villages until 1912 and the tenants claimed that they had remained in possession for more than 12 years before the date of suit in 1919, *Held*, that the tenants had not acquired any right of occupancy

BENGAL TENANCY ACT, S. 30.

under the B. T. Act or apart from it. (*Rankin and Ghose, JJ.*) JANABALI MOLLA v. THE PORT CANNING AND LAND IMPROVEMENT CO., LTD.

40 C. L. J. 167.

—S. 20—*Zerai land leased out—Lessee inducing a tenant on the land—Tenant's possession for 12 years completes occupancy right.*

Where the lessee of Zerai land has title and a tenant is duly inducted by him upon the land, the tenant holds the land as a raiyat, within the meaning of S. 20 and if he holds the same for a period of more than twelve years his occupancy right is complete and the suits for ejectment must fail. (*Mullick and Bucknill, JJ.*) SHEO GOBIND RAM SAHU v. MAHIPAT 1 USADH.

5 Pat. L. T. 653; 1924 P. 207.

—S. 22—*Merger.* 76 I. C. 382.

—S. 29—*Consolidation of occupancy holding—Enhancement of rent—Contrary to law*

In a suit for rent by the landlord where B. T. Act applies a consolidated rental of Rs. 61 worth of grain and before consolidation the defendants paid a lower rental for separate holdings, and the defendants contended that any enhancement is illegal under the Act, *Held*, that S. 29 is a bar to any enhancement and held further that mere acquiescence in the payment of enhanced rent cannot amount to an estoppel on the part the tenant to take objection that the claim contravenes S. 29. (*Dawson Miller, C. J. and Mullick, J.*) W. H. MEYRICK v. DIPAPANDEY. 3 Pat. 825.

—S. 29—*Rate of rent—Evidence of—Rent collection papers.* 1924 Cal. 370.

—S. 29—*Scope of—Enhancement—Realisation of enhanced rent for three years—Effect.*

The rule of law contained in S. 29, B. T. Act, is intended to be a strict one which the Courts should not allow to be defeated or evaded. Enhancement of rent in a manner not allowed by S. 29 is prohibited. Even when such enhanced rent has been illegally realised for three years, it does not thereby become validated. (*Foster, J.*) MEYRICK v. DIPAPANDEY. 75 I. C. 22; 1924 P. 820.

—Ss. 30 and 75—*Nagdi rent—Suspension of—Absence of irrigation facilities.*

Under the general law, the landlord is entitled to enhancement of rent if he provides irrigation facilities. But it cannot be argued that he is not entitled to any rent if he fails to maintain those water channels. To entitle the tenant to suspension of the *nagdi* rent on the ground that the landlord did not provide the necessary irrigation facilities some custom or contract must be proved. (*Das and Ross, JJ.*) PARTAB NARAIN SINGH v. NATHAN SINGH. 1924 P. H. C. C. 173;

79 I. C. 858; 5 Pat. L. T. 629; 1924 P. 605.

—S. 30 (a)—*Enhancement—Record of rights—Entries in—Presumption.* NAND LAL CHAUBE v. KESHO PRASAD SINGH.

78 I. C. 593; 1924 P. 245.

BENGAL TENANCY ACT, S. 30 (b).

—S. 30 (b)—*Enhancement of rent—No crops yielded—Effect.*

The fact that a certain holding consists of homesteads or parti lands or lands which yield no crop is no ground for disallowing enhancement of rent. (*Suhrawardy and Chotzner, JJ.*) **RAJA RESHEE CASE LAW v. AMBIKA DASSI.**

79 I. C. 567 (1).

—S. 36—*Enhancement of rent—Power of Court.*

In cases of enhancement of rent, the Court has power under S. 36 of the Act to make an order which will bear less hardly upon the tenants and to prevent the imposition of a higher rate with retrospective effect. (*Miller, C. J. and Foster, J.*) **RAMJI RAM v. RAMASRE RAUT.**

1924 P. H. C. C. 217 : 1924 P. 761.

—S. 40—*Commutation—Basis of—Previous collections by landlord—Slack collection.*

In commutation cases it cannot be held as a general rule that the landlord is not entitled to obtain more rent after commutation than he actually obtained as shown by the receipts granted by him to the tenants during the preceding years. If this is adopted landlords will be more inclined than they are at present to withhold receipts for produce rents. (*Foley, M.*) **MT. SONPHUL KUER v. MAHARAJ KUMAR GOPAL SARAN NARAIN SINGH.**

2 Pat. L. R. 157 (Cr.).

—S. 40—*Commutation of rent—Experimental cutting of crops—Notice to parties.*

In matters relating to commutation of rent, a crop-cutting experiment should not be made without due notice to the parties and the record must bear out that notice was so given. Something more than a "Partial" is required to show how these experiments were made, as for example, a report showing how the officer conducting the experiment made his selection and conducted his experiment. (*Morshead, M. C.*) **RAJA HARIHAR PROSAD NARAIN SINGH v. SAKAL SINGH.**

2 Pat. L. R. 4 (Cr.).

—S. 40—*Commutation—Rent—Basis of—Actual realisations—Experiment in crop cutting.*

In cases of commutation the landlord's actual realisations are the safest guide. Crop-cutting experiments need not necessarily be discredited because particulars had not been recorded in detail. A deduction of 10 per cent from actual realisation was not an unreasonable deduction for the incidental advantages of a fixed money demand in lieu of a fluctuating claim which had to be determined afresh each year. (*Morshead, M. C.*) **KANHAI MAHTON v. BISHUNDIAL SINGH.**

2 Pat. L. R. 15 (Cr.).

—S. 40—*Commutation proceedings—Date from which commutation takes effect.*

In commutation proceedings it is important to discourage any tendency whereby the proceedings, which are apt to be too protracted in any case, may be exposed to further delay in the interests of either party. This danger arises if resort to rent suits, whilst commutation proceedings are in progress, is recognised as a reason for postponing the date of commutation. Where

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proceedings are taken up in 1327 fasli, the year 1328 is a suitable one for giving effect to the commutation order. (*Morshead, M. C.*) **MISS SATONO v. REKHA SINGH.**

2 Pat. L. R. 46 (Cr.).

—S. 40—*Commutation of rent—Objection to—Grain required for service of idol.*

An application for commutation of grain rent into cash was made in March 1922 but it was not until January 1923 that the landlords filed a written statement, and in this there was no reference whatever to the requirements of any idol. The proceedings then went on with various interruptions, but without any contention even in the witnesses' statements, that commutation would affect the service of the idol. The ground was first emphasised and accepted in the Revenue Officer's final order and would appear to have been urged only at the latest stage of the proceedings. *Held*, that it was not an unreasonable inference that the objection was taken in the last resort, owing to the apprehension that commutation would result in a lower rate of rent than the landlords were willing to accept, and that commutation should be ordered. (*Morshead, M. C.*) **KANHAILAL v. SRI THAKUR LACHMI NARAIN.**

2 Pat. L. R. 64 (Cr.).

—S. 40—*Commutation of rent—Complicated system of irrigation—Objection.*

The villages in question were supplied with water from an unquestionably elaborate system of irrigation. Commutation had been disallowed after a personal enquiry by the Commissioner in other villages tied by the same system and the circumstances of the village concerned in these proceedings did not appear to be in any way distinguishable. *Held*, that there was a good case made out against commutation. It is not reasonable that landlords should, without good reason, allow the proceeding to go on indefinitely at the cost of trouble and expense to all concerned before putting forward this objection. (*Morshead, M. C.*) **BABU RAJPATI NARAIN SINGH v. PARTAB MAHTON.**

2 Pat. L. R. 66 (Cr.).

—S. 40—*Commutation of rent—Irrigation difficulties—Objection on the ground of.*

The objection to commutation of rent on the ground that the lands concerned depend on a complicated system of irrigation which distinguishes them from other pattis in the same village could be taken at any stage of the proceedings, though it would save parties trouble and expense if it had been taken earlier. (*Morshead, M. C.*) **RAMESHWAR DYAL v. ACHAIKAR SINHA.**

2 Pat. L. R. 120 (Cr.).

—S. 40—*Commutation—Landlord and tenant—Rent—Refusal of—Complicated system of irrigation.*

When a village is dependent upon a complicated system of irrigation there ought to be a very careful enquiry to make sure that any lands within the village covered by an application for commutation are or are not in fact dependent on the system. (*Morshead, M. C.*) **BABU BHAGWAN PRASAD v. LOCHAN GOPE.**

2 Pat. L. R. 98 (Cr.).

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———S. 40—*Commutation of rent—Principle to be borne in mind—Cash rents—Actual realisations.*

The law prescribes two factors, viz., actual realisations for the past 10 years and comparative cash rents to which the Revenue Officer is to have regard in making the commutation. It does not debar the consideration of other facts but it gives these two an unquestionable prominence. When a landlord has been content for 10 years or so to accept a certain sum, he is not entitled to come forward at the end of the period and say "It is true that I have only been able to collect so much all these years but I might have collected a great deal more had I looked after my interests better, instead of allowing the ryots or my servants to take advantage of me." The landlord must in ordinary cases be held to be bound by his own standard of collection. It does not matter what proportion of holdings is cultivated so long as it is known what the holding actually brought in. Of course the extent of cultivation may be a matter of considerable importance should there be evidence of systematic neglect by the raiyats to cultivate the land properly. (*Morshead, M. C.*) NAWAB CHOWDHURY v. HARIHAR PRASAD SINHA.

2 Pat. L. R. 147 (Cr.).

———S. 40—*Commutation of rent—Average—Fair rent—How fixed.*

Chauraha rents are essentially different from ordinary bhaoli rents. Cash rents and commuted bhaoli rent in the vicinity will be taken into account in commutation cases, but there is no reason why an average between them and the chauraha rents should be taken or indeed that the commuted chauraha rents need be reduced at all in consequence of a comparison. Under S. 40 of the Bengal Tenancy Act the Revenue Officer has not the power of fixing fair rents, but is bound to give the landlord what he thinks is the reasonable equivalent of what he has been receiving in produce rents. (*Foley, M. C.*) RAGHUBAR SINGH v. MAHABIR MAHTON.

2 Pat. L. R. 169 (Cr.).

———S. 40—*Commutation of rent—Basis of—Rents fixed for different lands—Consideration of.*

Where in a commutation case rent receipts were produced in respect of other lands, but the Court rejected them, the action of the Court is prejudicial to the applicant. Local inspection affords only doubtful guidance as to the comparative value of the lands where the inspection was made at a time when there were no crops on the land for comparing the lands under commutation with those whose rents had been previously commuted. (*Morshead, M. C.*) CHULHAN SINGH v. BISHUN MAHTON.

2 Pat. L. R. 173 (Cr.).

———S. 40—*Commutation of rent—Large extent of cultivable land left uncultivated—Effect of.*

Where in a commutation case it was found that the tenants had left a large extent of cultivable land uncultivated, held that commutation would give the tenants an unfair advantage and that commutation should be disallowed. (*Morshead, M. C.*) BUJHAWAN MISSE v. RAMGULAM SINGH.

2 Pat. L. R. 177 (Cr.).

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———S. 40—*Commutation of rent—Crop forecast—Crop cutting experiment—Dryage—Ridges—Other allowances.*

The object of the resort to crop cuttings in a commutation case is to estimate in the absence of reliable accounts what the average annual realisations of the landlord during the past 10 years may have been. In using the forecasts regard should be had not to the theoretical normal but to the actual normal of the preceding 10 years. Forecast estimates are of doubtful reliability and must not be rigidly applied. The rate of deduction on account of risk of season and cartage, etc., depend primarily on evidence in the case and a hard and fast rate is not one that can be safely prescribed. (*Morshead, I. C. S.*) KIRIT NARAIN SINGH v. CHANDARDHARI SINGH.

2 Pat. L. R. 191 (Cr.).

———S. 40—*Commutation of rent—Irrigation facilities—Experiments in crop cutting.*

On an application for commutation of rent in 1922 the trial of the case was long delayed. The Sub-divisional Officer refused to allow commutation on account of irrigation involved. His orders were set aside by the Commissioner on appeal from the order of the Collector who had confirmed it on the ground that it was too late to conduct crop-cutting experiments. Held, that the order of the Collector was unreasonable. The Commutation Manual was intended as a rough guide for Revenue Officers, not as a Code. Where an irrigation system consists only of a village or part of a village, commutation may generally be allowed. (*B. Foley, I.C.S.*) MAHARAJA CHANDRA MOULESHWAR PRASAD SINGH BAHADUR v. JHARO GOPE.

2 Pat. L. R. 213 (Cr.).

———S. 40 (4)—*Commutation of rent—Basis of crop-cutting experiments—Actual realisations—Scope of the enquiry.*

The law says that in commutation cases the commuting officer shall have regard amongst other things to the actual realisations but does not say that he may not have regard to other factors or that he is bound to base his commutation on the factors specified in S. 40 (4) only. The results of crop-cutting experiments can be taken into account. (*Morshead, M.C.*) INDERDEO NARAIN SINGH v. G. B. SOLANO.

2 Pat. L. R. 114 (Cr.).

———Ss. 40 (4) (b) and 69—*Commutation of rent—Basis of—Realisation—Khasra—Value of.*

As regards the question whether commutation should be based on the landlord's actual realisations or whether it should be based on what he might reasonably demand but has not actually realised, Held, that the landlord could not expect to get more than what he has been in the habit of realising unless he can make out some special justification for a higher rate. Rent receipts produced by the tenants and admitted by the landlord supply a fairly substantial basis. The landlord must show some reason beyond his own control for realising less than what he might have realised before he can be entitled to a higher rent. (*Morshead, M. C.*) RAMPRIT OJHA v. MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH.

2 Pat. L. R. 151 (Cr.).

BENGAL TENANCY ACT, S. 44.

———Ss. 44 and 47—*Suit in ejectment—Holding over—Effect.*

After the expiry of a lease, the tenant held over for some time and subsequently another lease was executed. In a suit for ejectment under S. 44, B. T. Act, on the ground the term had expired, held S. 47 would be a bar. (*Mukerji, J.*)
MAHOMED SULAIMAN KHAN v. UMA CHARAN SIL.
79 I. C. 648.

———Ss. 49, 89 and 178, sub-s. (1), cl. (1)—*Landlord and tenant—Consent decree—Tenancy for a term—Interpretation of decree—Under-riyati interest—Effect on.*

An under-riyati whose tenancy was for an unlimited time and not evidenced by any writing was sought to be ejected. The landlord and the under-riyati compromised the suit, the latter agreeing to pay a sum of Rs. 20 as premium in addition to the annual rent of Rs. 12-8-0 and a premium of Rs. 44 at the end of every nine years. In case of default in payment of the premium the tenant was liable to be ejected. Held, in a subsequent suit by the landlord to eject the tenant on the ground of default in the payment of premium, that the consent decree did not have the effect of transferring the tenancy which at its inception was for an unlimited time into a tenancy for a term governed by a written lease under S. 49 of the B. T. Act; and that the tenant could be ejected only after a notice as contemplated in S. 49 (b) and in execution of a decree. In view of the provisions of S. 178, sub-s (1), cl. (c) of B. T. Act the stipulation in the compromise for ejectment on default of payment of the premium was of no avail and it was not open to the landlord and tenant to contract themselves out of the provisions of S. 49 of the B. T. Act. Where a decree has been made by consent on the basis of a petition for compromise, the contract of the parties is not the less a contract and subject to incidents of a contract, because there is superadded the command of the Judge. This principle is in essence recognized in S. 147-A of the B. T. Act which deals with compromise of suits between landlords and tenants. (*Mookerjee and Suhrawardy, JJ.*)
GANESH CHANDRA PAL v. CHANDRA MOHAN DATTA.
28 C. W. N. 984.

———S. 49-K—*Sale in contravention of—Validity—Application to set aside—Limitation.*

The sale of a tenure held by an aboriginal in execution of a money decree in contravention of S. 49-K is a nullity and not merely an irregular sale.

The sale being a nullity neither Art. 12 nor Art. 166 applied to an application to set it aside. (*Chatterjee and Pantou, JJ.*)
JOGESHWAR MAHATAB v. JHAPAL SANTAL.
51 Cal. 224 :
28 C. W. N. 556 : 82 I. C. 848 : 1924 Cal. 638.

———Ss. 50, 101, 102 and 115—*Record of rights—Entry in—Tenure holders—Enhancement of rent—Uniform payment of rent for 20 years.*

When the record of rights was being prepared in the year 1903 there was a dispute under S. 103-A of the B. T. Act, that is, after the draft record was published but before final publication and the result of that dispute was that the Assistant

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Settlement Officer directed that the defendants, the tenure holders, should be entered in the record of rights as tenure holders and nothing more. They were so entered and no entry was made as provided in S. 102 as to whether they were permanent tenure holders or not or whether the rent was liable to enhancement during the continuance of the tenancy. The whole question was apparently left open. The particulars referred to in S. 102 were not in fact entered in the record of rights. In the decision which was come to in that dispute under S. 103A the Assistant Settlement Officer stated that there was no evidence of the rent being fixed for ever and under the circumstances he merely ordered the defendants' names to be entered as tenure holders. Held that the decision of the Assistant Settlement Officer could not be regarded as a substantive part of the record of rights and the record of rights could not be read as if it stated that the defendants (tenants) were not in fact tenure-holders at a fixed rate. The presumption arising under S. 50 only ceases to apply by reason of S. 115 when the particulars required by the order of the Local Government directing the survey and record of rights to be prepared have been in fact recorded. It would not be right to presume that the entry in the record of rights meant to record anything more than what was actually recorded and where the question is left open as to whether they are permanent tenure-holders or whether the rent is liable to enhancement or not there is nothing in the record itself to throw light on the matter.

Where for the last 20 years and before the defendants (tenants) have been paying the same rent, it may be presumed that their rent is not liable to enhancement especially where they are recorded as tenure-holders. (*Dawson Miller, C. J. and Mullick, J.*)
KAMALUDDIN AHMAD v. KUMAR RAMANAND SINGH.
3 Pat. 120 :

78 I. C. 605 : 1924 P. H. C. G. 1 :
1924 P. 443.

———Ss. 50, 115—*Publication of record of rights—Presumption thereafter.*

After the publication of a record of rights the presumption under S. 50, B. T. Act, will not apply in favour of tenants and if they rely on a tenancy at fixed rate, they must prove the same from the date of the Permanent Settlement. (*Dawson Miller, C. J. and Foster, J.*)
RAMSARAN MAHTON v. MD. ARADUT HUSSAIN.
80 I. C. 926.

———S. 50—*Settlement of fair and equitable rent—Enhancement—Plea that defendant is a fixed rate riyat—Evidence.* NARENDRA LAL CHOWDHURY v. BENODE BEHARI SADHUKHAN.
1924 Cal. 143.

———Ss. 50 (2), 102 (b), 111A and 115—*Fixity of rent—Presumption—Qaimi tenure—Record of rights—Payment of same rent for years.*

In a suit for enhancement of rent under S. 7 of the B. T. Act, record of rights with regard to the tenancy was finally published on 2-8-5 1918. The record was that it was a Qaimi tenure but not Mokarrari. Held, that having regard to the provisions of S. 115 of the B. T. Act as it had been recorded under Ch. X of the Act, that the

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tenancy was not Mokarrari, the presumption under S. 50 cannot apply to the tenancy. It cannot be held in a case brought under the B. T. Act that any presumption arises as to the fixity of rent from mere payment of the same rate of rent for a number of years apart from the presumption arising under S. 50 of the Act. To hold otherwise would be to require every landlord to enhance the rent of every tenant under him at certain intervals of time which he might not himself desire to do. (*Newbould and Ghose, JJ.*) *URAJA DAS ROY v. BANKIM CHANDRA BHUIG.*

51 Cal. 454: 1924 Cal. 680.

S. 50 (2)—Presumption under.

75 I. C. 556: 28 C. W. N. 752.

Ss. 50 (2) and 102—*Hajabadi tenancy*—*Remission or abatement of rent in years of flood*—*Uniform rent—Presumption.*

Sec. 50, cl. (2) lays down that the presumption under it would arise if it is proved in any suit or other proceeding that a tenant and his predecessor-in-interest have held at a rent or rate of rent which has not been changed during the 20 years immediately before the institution of the suit or proceeding. It is not necessary to prove actual payment of rent provided the tenancy is held at a uniform rent or rate of rent for 20 years before the suit. It is difficult, however, to see how it can be said that a particular rent is payable when that rent is not payable according to custom in the years of flood.

In cases of pure *hajabadi* tenancies no rent is paid at all in years of flood not because the landlord does not realise it, but according to some custom he cannot realise it. The expression "rent" is defined in the Act as something lawfully payable or deliverable to the landlord for the use and occupation of the land. Under the custom the rent lawfully payable for a particular year in which there is flood is not the full rent but a lesser sum, in respect of the mixed tenancies. The landlord cannot sue the tenant in a Court of law for rent in respect of the *hajabadi* tenancies nor the full rent of mixed tenancies in the years of flood. Sec. 50, cl. (2) was intended to apply to cases like these where under a custom a tenant gets an abatement of rent from the landlord. (*Chatterjee and Panton, JJ.*) *BIJOY CHAND MAHATAB v. AKHIL BHUIA.*

51 Cal. 314:
28 C. W. N. 529: 81 I. C. 564:
1924 Cal. 648.

S. 50 (2)—Presumption under—*Purchase from tenant—Alteration of rent.*

Where a transferee for value from the original tenant of the holding produced their dakhilas of the faslis 1299, 1311 and 1323 and the rent specified in them was the same, the mere fact that there were two intervening periods of twelve years between the dates of these dakhilas is no ground for denying to the transferee the benefit of the presumption under S. 50 (2). (*Walmsley and Mookerji, JJ.*) *PURAN CHANDRA SOW v. KANTA MOHAN MULLICK.*

39 C. L. J. 437:
1924 Cal. 875.

S. 50 (2)—*Sub-division of tenure—Effect*—*Presumption of fixity of rent.*

BENGAL TENANCY ACT, S. 52 (1) (b).

Where after a tenure is divided, the different parts into which the tenure is divided are held at a proportionate rent and the aggregate rent equals the original rent, the tenure-holder is entitled to the benefit of the presumption under S. 50 (2), Bengal Tenancy Act. (*Suhrawardy and Cholsner, JJ.*) *GOUR KRISHNA SARKAR v. NILMADHAB SAHA.*

78 I. C. 744.

S. 52—*Abatement of rent—Diluvion—Permanent tenure—Contract—Specification*

In the case of a permanent tenure the parties to a lease can make a contract the result of which would be to deprive the tenant of the benefit of S. 52. Where in a *kabuliyat* it was stated that "there shall never be any decrease or increase of the rent fixed in the *kabuliyat*," held that was a condition usually expressed in a permanent lease at a fixed rate of rent and that it did not deprive the tenant of his statutory advantage of an abatement of rent on diluvion. (*Newbould and Ghose, JJ.*) *UMESH CHANDRA CHAKRABARTY v. MOTI LAL BASU ROY.*

39 C. L. J. 431:
1924 Cal. 880.

S. 52—*Abatement of rent—Suit for*—*Proof.*

In a suit for abatement of rent under S. 52, B. T. Act, plaintiff has to prove a diminution in area since the Settlement Officer settled a fair rent for the holding. (*Dawson Miller, C. J. and Multick, J.*) *MAHARAJA BAHADUR KESHO PRASAD SINGH v. BHAGWAT SARAN PANDE.*

1924 P. H. C. 18: 75 I. C. 670:
5 Pat. L. T. 98: 1924 P. 511.

S. 52—Rent claimed on basis of excess in area—*Burden of proof.* *MANINDRACHANDRA NANDI v. KAULAT SHAIK.*

28 C. W. N. 264:
79 I. C. 852: 1924 Cal. 374.

S. 52 (1) (b)—*Rent—Abatement of—Reduction of area—Settlement.*

Where the lands in the occupation of the defendants during the years in question are identical with the lands held by them in 1899, that is, *prima facie*, a fatal obstacle in the way of the defendants, for in order to bring their case within S. 52, sub-section 1, clause (b) they must establish a deficiency in the area of their holding as compared with the area for which rent had been previously paid by them. Where there was no proof of any diminution of area, and further at the time of the original settlement the rent was fixed at a specified rate per unit of measurement or at different rates according to the quality of the land, and it was also not proved that the tenant was to pay at a specified rate or rates for all the land of which he was put in possession according to its true area but the circumstances of the case showed that the rent fixed was a consolidated one the fact that the area of the tenancy as stated in 1899 was found to be less in 1918 did not, by itself, justify the conclusion that the tenant held at fixed rate which had to be applied to area ascertained by measurement in order to determine the rent payable by them. (*Mookerjee and Rankin, JJ.*) *ALI NAWAZ v. KARIM BAKSH CHOUDHURY.*

40 C. L. J. 62: 1924 Cal. 1044.

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—S. 52 (b)—*Lease of land within specific boundaries—Reduction of rent—Claim for—If can be allowed.*

Where a certain quantity of land within definite boundaries is let out and the area is fixed not with reference to actual measurement but by approximate estimate and the rent fixed is a lump sum for the land within the boundaries, S. 52 (b) will not apply as no question of deficiency of area can arise. (*Suhrawardy and Chotzner, JJ.*) SHEIKH ABDUL MANNAF v. SHEIKH MUSLIM.

79 I. C. 978.

—S. 70—*Decree of Revenue Court—Power of Civil Court to depart from—Order under S. 70 of the B. T. Act—Effect of.*

Where in respect of certain faslis the Revenue Court had decided the amount of rent payable under S. 70, the Civil Court has no jurisdiction to pass a decree for the same period. To find out whether an order of the Revenue Court purporting to be passed under S. 70 of the B. T. Act is a final order enforceable as a decree, the order must be read as a whole. Where the takbmina papers were considered by the Sub-divisional Officer and the division was approved, and with regard to the landlord's share a further direction was given that if he did not accept it then it should be sold and the money deposited in the treasury, *Held*, that the money so deposited was the sale proceeds of the landlord's share and consequently it was his money; no further direction was necessary and the landlord would be entitled on that order to withdraw the money. That was clearly a final order enforceable as a decree and the provisions of S. 70 of the Act were fully complied with. (*Das and Ross, JJ.*) BINODE BEHARI BOSE v. TOKHI SINGH.

78 I. C. 465 : 1924 P. H. C. C. 211 : 1924 P. 604.

—S. 70—*Suit for rent—Civil Court—Jurisdiction of—Final order of Revenue Court on division of crops.*

Where in prior proceedings for division of crops in a Revenue Court, a final order under S. 70, B.T. Act, had been passed for certain faslis, a civil court has no jurisdiction to pass orders relating to rent for the same period. (*Das and Ross, JJ.*) RAY BINODE BEHARI BOSE v. TOKHI SINGH.

78 I. C. 465.

—S. 74—*Abwab—Dak and bhett expenses—Construction of lease.*

A *Kabuliyat* must be construed as a whole to see if a certain item therein is an *abwab*. Where it provided for rent at a certain rate and a certain amount for *dak* and *bhett* expenses and the total payable in instalments, the latter are not *abwabs*. (*Suhrawardy and Page, JJ.*) NALINI BHUSAN GUPTA v. ALI MIA.

51 Cal. 643 :

79 I. C. 346 : 1924 Cal. 877.

—S. 85—*Sub-lease by ryot—Stipulation for renewal—Heirs if can execute fresh lease.*

A stipulation in a lease granted by a *raiyyat* to an *under-raiyyat* that after the expiry of the period a renewal would be granted is valid. The original lessee's heirs can execute the renewal *kabuliyat*. (*Suhrawardy and Chotzner, JJ.*) SRIMATI SHULACHANA v. KALI BIBI.

79 I. C. 317.

BENGAL TENANCY ACT, S. 103-B.

—S. 86 (6) and (7)—*Surrender by tenant—Prior transfer of portion of non-transferable holding—Landlord's right* MT. SHEORAJI KUAR v. DHANI MIAN. 75 I. C. 790 : 3 Pat. 1 : 1924 P. 1.

—S. 87—*If exhaustive—Abandonment—What amounts to—Mortgage by tenant.*

Apart from S. 87 there may be abandonment of a holding but in such a case it must be proved either that the tenant has transferred his whole interest in the property and ceased to take any further interest therein by means of a sale or that he has abandoned the right to retake possession in future or has either left the village without any intention of returning or done some other act which would clearly indicate that he has no longer retained the *spes recuperandi*. The fact that he has mortgaged the property under a usufructuary mortgage and given entire possession to the mortgagees continuing himself to remain in the same village affords in itself no evidence from which abandonment can be inferred. (*Dawson Miller, C. J. and Mullick, J.*) RAM LAL MANDER v. KULDIP NARAYAN TEWARI.

5 Pat. L. T. 407 : 75 I. C. 841 :

3 Pat. 126 : 1924 P. 440.

—S. 87—*Non-transferable occupancy holding—Transfer of—Lease by transferee to raiyyat—Landlord's right to eject—Section if exhausted.*

A non-transferable occupancy holding was sold in execution of a decree against the raiyyat and the latter took a sub-lease from the purchaser, remained in possession and did not pay rent to the landlord. The landlord sued the purchaser in ejectment. *Held*, there was no abandonment or repudiation of the tenancy by the raiyyat and the suit in ejectment did not lie as he has no right to present possession but in a proper suit the landlord could get a declaration that the purchaser had obtained no rights as against him.

Quære, if S. 87 is exhaustive? (*Rankin and Mukherji, JJ.*) RAMESH CHANDRA MITRA v. DAIBA CHARAN DAS.

28 C. W. N. 602 : 78 I. C. 497 :

39 C. L. J. 356 : 1924 Cal. 900.

—Ss. 102 and 115—*Record of rights—Entry in—Status of tenants.*

If the entries in the record of rights do not record particulars under the provisions of S. 102, cl. (b), then the presumption under S. 50 of the Act applies and of course if the particulars to be recorded under S. 102, cl. (b) have not been rightly recorded equally then the presumption under S. 50 arises and S. 115 has no application. The entry of the defendants as settled ryots in the record of rights under S. 102, cl. (b) is a compliance with that section and consequently the presumption under S. 50 does not arise. The provisions of S. 102 are not mandatory. (*Greaves and Graham, JJ.*) MOFIZUDDIN CHOWDHURY v. RAJENDRA NATH SAMYAL.

40 C. L. J. 248.

—S. 103-B—*Presumption under—Non-agricultural land.*

Although strictly speaking the presumption under Sec. 103-B is not applicable to non-agricultural land to the extent to which it is applicable with regard to agricultural lands, still such entry raises some presumption with regard to

BENGAL TENANCY ACT, S. 103-B.

the fact recorded in it. (*Newbould and Ghose, JJ.*) *CHAND MIA MUNSHI v. LUKAMIA.*
28 C. W. N. 516 : 80 I. C. 805 :
1924 Cal. 667.

———S. 103-B—Record of rights—Presumption of correctness—Evidence in rebuttal of.

Evidence of facts, documentary or oral, of a date prior to that of the publication of the Record of Rights is admissible and should be taken into consideration in determining whether the presumption under S. 103-B as amended has been rebutted or not.

The Provincial Settlement Records must be considered of very high value in determining the status of the tenants and the Provincial Settlement Record is sufficient to rebut the presumption of correctness that must attach to the Revisional Settlement Records in this case because it was conceded that there was no oral evidence in the case on the point. (*Das and Adamu, JJ.*) *RAGHUNATH MISRA v. RAM BEHARA.*

5 Pat. L. T. 140.

———S. 103-B (2)—Entry in Record of Rights—Rate of rent—Non-agricultural land.

An entry in the Record of Rights as to the rate of rent of non-agricultural land is admissible evidence in a suit for rent and can form corroborative evidence in the case, the weight to be given to it depending on the circumstances of the case. (*Suhrawardy and Page, JJ.*) *RAKIMJAN v. AMAR KRISHNA CHOWDHURY.*

78 I. C. 169.

———S. 103-B—Record of Rights—Entry giving raiyats abatement of rent on inundation—Local custom—Presumption of correctness.

An entry in the record of rights that if inundation takes place the raiyats are to get a rateable deduction of rent is an entry of local custom and under S. 103-B is presumed to be correct till the landlord proves no such custom exists. Such a custom is neither vague nor unreasonable. (*Rankin and Mukherji, JJ.*) *UMESH CHANDRA DURBAR v. CHOWDHURY JAMINI NATH MULLICK.*

78 I. C. 836.

———S. 104-H—Enhancement of rent—Settlement of fair and equitable rent—Record of rights—Limitation.

Where the plaintiff sues for recovery or confirmation of possession of a portion of a tenancy wrongly left out in the record of rights by the settlement officer the suit has to be brought within 6 months from the date of the final publication of the record of rights and if that period expires on a holiday the suit may be brought on the re-opening day. S. 104-H only contemplates a case where a person has been aggrieved so far as an entry of rent is concerned. (*Woodroffe and Suhrawardy, JJ.*) *SECRETARY OF STATE FOR INDIA v. SARAT CHANDRA HAJRA.*

40 C. L. J. 235.

———S. 105—Malguzars—If can maintain suit.

Malguzars are agents of the proprietors and can maintain suits under S. 105, B. T. Act. (*Suhrawardy and Duval, JJ.*) *RAMJUDDIN v. RAI RADHA KANTA AICH BAHADUR.*

80 I. C. 987.

BENGAL TENANCY ACT, S. 111.

———S. 105—Settlement of rent—Application filed by all landlords, but signed by some—Maintainability. 3 Pat. 67 : 2 Pat. L. R. 169 : 79 I. C. 5 : 1924 P. 104.

———Ss. 105 and 107—Fair and equitable rent—Decision of revenue officer—When conclusive.

Under S. 105 (6) when the parties agree amongst themselves by compromise or otherwise as to the amount of the fair rent, it is incumbent upon the revenue officer to satisfy himself that the amount agreed upon is fair and equitable and it is only if he is so satisfied that he can record the amount agreed upon as the fair and equitable rent ; if he is not so satisfied he has to settle a fair and equitable rent as provided in sub sections (4) and (5). The decision of the Revenue Officer operates as a decree of a Civil Court in a suit between the parties ; and it has the force and effect of a final decree which decides two vital elements of relationship between the parties ; first that the defendants hold the land subject to the payment of rent ; and that the fair rent is that fixed by the Revenue Officer. (*Mookerjee and Rankin, JJ.*) *DHARANI MOHAN RAI v. ASHUTOSH MUKERJI.*

40 C. L. J. 34 : 82 I. C. 396 : 1924 Cal. 907.

———S. 106—Suit under—Withdrawn with liberty to sue afresh—Suit in civil court—Maintainability.

The statutory provisions of S. 106 should be strictly enforced and not whittled down. Where a landlord who had sued in the revenue court for correction of an entry in the record of rights as to the status of his tenant, withdrew the suit with liberty to sue again and did not institute a fresh suit under S. 106, Held, that a suit in the civil court for the same relief was not maintainable. (*Mookerjee and Walmsley, JJ.*) *DINO NATH SIKDAR v. ANADI KRISHNA DUTT.*

28 C. W. N. 703 : 1924 Cal. 854.

———S. 109—Question of area—Determination—Civil Court if can question—Settlement Officer's proceedings.

In a suit for abatement of rent the Settlement Officer's determination of the area actually held cannot be re-agitated in the Civil Court since the same has once been determined under S. 105. (*Dawson Miller, C. J. and Mullick, J.*) *MAHARAJA BAHADUR KESHO PRASAD SINGH v. BHAGWANT SARAN PANDE.*

5 Pat. L. T. 98 :
75 I. C. 670 : 1924 P. H. C. G. 18 : 1924 P. 511.

———S. 111—Scope and effect of—Suit for rent—Preparation of Record of Rights—Stay.

Plaintiff instituted a suit on the 14th April 1919 for recovery of rent at an enhanced rate under S. 30 as well as for additional rent under S. 52 of the Act against the defendant who was a tenant. The defendant put in his written statement on 2nd June 1919 and subsequently on 4-7-1921 he raised an objection that the suit could not be proceeded with having regard to the provisions of S. 111 of the B. T. Act as an order had been made in June 1920 under S. 101 directing the preparation of a record of rights. Held, that under the circumstances the proper course for the trial court was to adjourn the trial of the suit until after the final publication of the record of rights.

BENGAL TENANCY ACT, S. 111-A.

The expression "shall not entertain" includes the cases not only not already instituted but cases where suits have already been instituted but not tried. The object of the legislature is to avoid conflicting decisions of the Civil and the Revenue Courts on the same matters. That is why the trial of the suit or application in civil court is prohibited by the section as soon as the order for the preparation of the record of rights has been made. (*Chatterjee and Pantou, JJ.*) **PROMODE NATH ROY v. BASIRUDDIN QUAZI.**

51 Cal. 230 : 28 C. W. N. 631 : 81 I. C. 993 :
40 C. L. J. 177 : 1924 Cal. 704.

—S. 111-A—*Suit for declaration—Cause of action—Entry in record of rights—Non-agricultural land.*

There was a record of rights of the mouzah in which a tank was situated, under Chap. X. The tank was recorded as within the tenancy of the plaintiffs, but it was also recorded that the defendants would be entitled to rear fishes and use the water of the tank. But the plaintiffs said that the defendants have no right to rear fishes in the tank and the record of rights was erroneous to that extent. The suit has been brought for a declaratory decree as provided in the proviso to Sec. 111-A. The defendant No. 1 contested the suit and he pleaded that he and his predecessors before him were the proprietors of 6-annas share of the tank and another person was the proprietor of the remaining 10-annas share and he further pleaded that he and his ancestors have been exercising possession over the 6 annas share of the tank for the last 50 years by using its water and rearing and catching fishes. The lower Court dismissed the suit entirely, holding against the plaintiffs that they had no cause of action. *Held*, that the record, if allowed to stand, restricted the absolute ownership of the plaintiffs and disentitled them from excluding the defendants from exercising some acts of possession. They had therefore the right to complain against the entry in the record of rights and this gave them a good cause of action. (*Newbould and Ghose, JJ.*) **CHAND MIA MUNSHI v. TUKAMIA.**

28 C. W. N. 516 : 80 I. C. 805 : 1924 Cal. 667.

—Ss. 115 and 50—*Scope and effect of—Presumptions as to fixity of rent—Entry in record of rights.* 76 I. C. 401.

—S. 115—*Thereafter—Meaning of.*

The word "thereafter" refers to a period subsequent to the publication of a Record of Rights. (*Muller, C.J. and Foster, J.*) **RAMSARAN MAHTON v. MD. ARADAT HUSSAIN.**

80 I. C. 926.

—S. 147-A—*Compromise decree not complying with terms of the section.*

1924 P. 204.

—S. 148—*Assignee of property with back and future rents—Right to execute decree for arrears of rent.*

An assignment of properties with all back and future rents does not entitle the assignee to execute a decree for rent subsequently obtained by the landlord when the decree itself had not been assigned to him. S. 148 does not assist the as-

BENGAL TENANCY ACT, S. 153.

signee, for, if at all, those provisions impose on the transferee of a rent decree a further disability which must be removed before he can apply for executing the decree as a rent decree. (*Walmsley and Mukerji, JJ.*) **MATHURAPUR ZEMINDARI CO., LTD. v. BHASARAM MANDAL.**

28 C. W. N. 626 : 39 C. L. J. 373 : 80 I. C. 881 :
51 Cal. 703 : 1924 Cal. 661.

—S. 148-A—*Suit by co-sharer—Pleadings—Construction—Rent decree.*

The question in the case turned upon whether or not the decree in execution of which the defendants made their purchase was a rent decree. The suit was by a co-sharer landlord and the plaintiff recited the rent payable for the whole 16 annas share and the amounts payable to the different sharers, the amounts payable to the plaintiff together with damages, and the amounts payable to the other sharers. The plaintiff also alleged that the other co-sharers landlords had concealed from him what was due to plaintiff, and plaintiff asked for a decree for the amount due to himself alone and in the alternative also prayed that if the other landlords also wanted to recover what was due to them, they might be transposed from the category of defendants to plaintiffs. *Held*, that the decree in the suit was a rent decree and there was sufficient compliance with S. 148-A. (*Walmsley and Suhrawardy, JJ.*) **JAGA BANDHU NANDI v. ABDUL HAMID MEA.**

28 C. W. N. 757 :
1925 Cal. 82.

—Ss. 148-A and 167—*Rent decree—Annulment of incumbrances—Form of action.*

Having regard to the fact that the special provision of S. 148-A of the B. T. Act enable the purchaser at a rent sale to defeat the right of a person who was no party to the rent, substantial compliance with the terms of the section would not be enough to give the auction purchaser a title to annul the incumbrance, but the terms of the section should be strictly complied with. In order that a suit might comply with S. 148-A of the B. T. Act the first requisite is that the co-sharer landlord should sue for recovery of the rent due to all the landlords, and, secondly, if he is unable to find out the dues to the other co-sharers he would be entitled to proceed with the suit for his share only. (*Newbould and Ghose, JJ.*) **GANGAMANI BISWAS v. RABJA ALI CHAUDHARI.**

40 C. L. J. 512 : 51 C. 935.

—S. 153—*Explanation—Appeal when lies.* 77 I. C. 520.

—S. 153—*Order passed in execution—Scope of—"Has decided a question of title."*

An order passed in execution must itself decide in order to be appealable a question relating to title to land or to some interest in land as between parties having conflicting claims thereto. The words "has decided a question of title" in S. 153 qualify both decree and order. (*Suhrawardy, J.*) **JOYMANGALSEN v. SARAFAT ALI.**

78 I. C. 236.

—S. 153—*Question relating to amount of rent—Second appeal—If lies.*

Where the question which arises in a rent suit is one relating to the amount of the rent payable

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the case is excepted from the provisions of S. 153, B. T. Act, and a second appeal lies. (*Dawson Miller, C. J. and Mullick, J.*) MAHARAJADHIRAJ SIR RAMESHWAR SINGH v. WAZUL HAQUE.

78 I. C. 463.

———S. 153—Rate of rent—Dispute as to—Second appeal.

The defendant held under the plaintiff a parcel of land and certain fruit trees thereon. The case for the plaintiff was that the land was settled first at the rate of Rs. 5 a year and that the trees were settled thereafter at the rate of Rs. 2 a year. The plaintiff accordingly claimed rent for the suit year at the rate of Rs. 7 for the land and the trees. The defendant contended that there was no separate settlement in respect of the trees and that the rent of Rs. 5 covered both the land and the trees. *Held*, that the decision on the question related to the amount of rent annually payable and that a second appeal lay. (*Mookerjee and Rankin, JJ.*) JONARDI MANDAL v. ANADI NATH RAY.

39 C. L. J. 334 : 81 I. C. 567 : 1924 Cal. 838.

———S. 160 (b)—Auction purchase at a rent sale—Howladar and tenants—Annulment of incumbrances—Suit for recovery of possession.

77 I. C. 1044.

———Ss. 161 and 86 (6)—Incumbrancer—Who is—Purchaser of portion of holding. MT. SHEORAJI KUBER v. DHANI MIAN.

3 Pat. 1 : 75 I. C. 790 : 1924 P. 1.

———S. 167—Annulment of incumbrance—Notice essential.

1924 Cal. 396.

———S. 167—Incumbrance — Annulment—Burden of proof—Service of notice—Pendency of suit.

The fact that a mortgage suit or any other suit has been instituted by the incumbrancer cannot deprive the auction purchaser of his right to annul the incumbrance under the Bengal Tenancy Act if the application is made within the time prescribed by the section, that is to say, within one year of the date of the sale or the date on which the purchaser first had notice of the incumbrance. Under S. 167 (3) once the Collector has issued the notice the incumbrance must be deemed to have been annulled. This does not mean that the validity of the decree and the consequent annulment of the incumbrance cannot afterwards be called in question. The effect of the section is to cast the burden of proof upon the person questioning the validity of the notice. It is incumbent on the plaintiffs (mortgagees of the occupancy holding) to prove that the landlord had in fact notice of the incumbrance more than 12 months before he made the application to the Collector. (*Dawson Miller, C. J. and Mullick, J.*) NAND KISHORE CHAUDHURI v. MAHARAJADHIRAJ SIR RAMESHWAR SINGH BAHADUR.

2 Pat. L. E. 19 : 78 I. C. 476 : 1924 P. 515.

———S. 167—Rent decree—Sale in execution—Incumbrances—If annulled.

The mere sale of property in execution of a rent decree does not in itself without further steps being taken by the purchaser, annul any incum-

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brance there may be existing on the property sold. (*Dawson Miller, C. J. and Mullick, J.*) RAM LAL MANDER v. KULDIP NARAYAN TEWARI.

5 Pat. L. T. 407 : 75 I. C. 841 :

3 Pat. 126 : 1924 P. 440.

———S. 170 (3)—Right to apply to set aside sale—Transferee of non-transferable holding.

Where a holding has been sold in execution of a decree for rent obtained by the landlord, a transferee of a non-transferable holding who has not been recognised by his landlord cannot make a deposit of the decretal amount under S. 170 (3). 16 C. L. J. 548, Not Foll. (*Newbould and Ghose, JJ.*) BARADA PRASAD ROY CHOWDHURY v. FOJNUDDI HALDER.

39 C. L. J. 428 :

28 C. W. N. 845 : 1924 Cal. 1005.

———S. 173—Applicability of S. 47, C. P. Code and Art. 166, Lim. Act.

An application under S. 173, B. T. Act, is cognizable under S. 47, C. P. Code, and that being so the operation of Art. 166, Lim. Act. will be attracted. (*Pearson and Graham, JJ.*) HARIPADA HALDAR v. BARADAPROSAD ROY CHOWDHURY.

82 I. C. 322 : 51 Cal. 1014.

———S. 173 (2)—Purchase by judgment-debtor in execution—Sale if void.

1924 P. 318.

———S. 173 (3)—Sale to benamidar of judgment-debtor—If void—Discretion to set aside—Interference in revision.

A sale to a benamidar of the judgment-debtor is not necessarily void but only voidable and it is within the discretion of the Court which ordered execution to determine whether the sale should stand or not. In the absence of prejudice, the High Court will not interfere in revision. (*Suhrawardy and Duval, JJ.*) BROJENDRA NATH MUKERJEE v. JADUNATH PALTA.

80 I. C. 708.

———S. 174—Appeal—Order refusing to set aside sale.

There is no appeal against an order dismissing for default an application to set aside a sale in execution of a rent decree by an unregistered purchaser of the holding. (*Mukerji, J.*) DEBRANI DEBYA v. KUMAR SARAT KUMAR ROY.

39 C. L. J. 522 : 1924 C. 791.

———S. 174—Applicability.

75 I. C. 278.

———S. 174—Setting aside sale—Deposit of amount—Validity of deposit—Mistake. MIR DILDAR ALI v. KUSUM KUMAR.

1924 P. 256.

———S. 178—Occupancy rights—Dispute—Compromise giving up rights—If valid.

Where there was a bona fide dispute between the landlord and tenant as to whether the latter had occupancy rights and that was settled by a compromise decree to the effect there was no such right it does not contravene the provisions of S. 178, B. T. Act, and is binding on the parties. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) MACDONALD v. TEKNARAIN RAI.

75 I. C. 997.

———S. 183—Under-raiyat—Status of—Acquisition of occupancy rights—Transfer of under-raiyati interest—Legality of—Consent of landlord—Estoppel.

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The B.T. Act has taken away the under-raiyat's right of acquiring a right of occupancy under any condition except by local usage or custom. He is no better than a tenant at will with no tangible interest in the land except that of holding it till the end of the agricultural year. The right of an under-raiyat is not heritable or transferable. 18 C. L. J. 262; 42 C. 751; 43 C. 164; 32 C. L. J. 46; 46 C. 43, Ref. The right of an under-raiyat is so unsubstantial that it gives him no title to recover possession even from a trespasser. An under-raiyat's interest is not transferable even with the consent of the raiyat. Even if it is so transferable, a consent by the raiyat given long after the transfer cannot be said to have been made with the landlord's consent. (*Suhrawardy and Graham, JJ.*) **JANENDRA NATH MUSTAPHI v. DUKHIRAM SANTRA.** 28 C. W. N. 865; 82 I. C. 386; 40 C. L. J. 90; 1924 Cal. 850.

—S. 188—*Sadar Malguzars—Position of—Agent—If includes more than one.*

Sadar Malguzars appointed under Regulation VII of 1822 constitute the entire body of landlords within the meaning of S. 188, B. T. Act, and the tenants must be deemed to be holding under them. The rights of the proprietors are in abeyance so long as the *Sadar Malguzars* are in management. The word "agent" in S. 188 includes also a plurality of agents. (*Suhrawardy and Duval, JJ.*) **RAMJUDDIN v. RAI RADHA KANTA AICH BAHADUR.** 80 I. C. 987.

—S. 189—*Record of Rights—Entry in—Boundaries of neighbouring estates—Cadastral survey map—Value of.*

The entry in the record of rights operates in the same way between landlord and tenant, as between landlords of the same or of neighbouring estates or between tenant and tenant. The entry must be presumed to be correct until it is shown by the evidence to be incorrect. A Cadastral survey map is a map of very great importance. As is well known the first stage in the preparation of the record of rights is the Cadastral survey and demarcation of boundaries. The procedure for a survey though directed to be made under the provisions of the Act must be that laid down in the Bengal Survey Act and it must be conducted with all the publicity and notice to all the parties concerned as laid down in that Act. (*Das and Ross, JJ.*) **MAZHARUL EKBAL v. RAJAGOPAL LAL.** 1924 P. H. C. C. 213; 1924 P. 719.

—Sch. III, Art. 3—*Applicability of—Essentials of—Shorter period of limitation.*

The shorter period of limitation prescribed by Sch. III, Art. 3 applies on proof that the plaintiff is a raiyat and that he was dispossessed by the landlords. Where the plaintiff had purchased a portion of the tenant's holding in execution of a money decree and had never obtained delivery of possession, the article does not apply. 2 Pat. L. J. 567, Dist. (*Ross and Sen, JJ.*) **HARI MOHAN PRASAD CHAUDHURY v. MD. RASHIDUL HAQUE.**

6 Pat. L. T. 616; 1924 P. H. C. C. 268; 1924 P. 780.

—Sch. III, Art. 3—*Landlord and tenant—Settlement of land by tenant with other persons—Dispossession by landlord—Suit for recovery of possession—Limitation.*

BERAR INAM RULES.

A person to whom 1,100 bighas of nakdi Jote land had been let for cultivation settled the land with tenants. He sued for recovery of possession alleging dispossession by the landlord. *Held*, that the suit was governed by Sch. III, Art. 3. To find out whether a person is a raiyat or not within the meaning of Sch. III, Art. 3 the test is not the use which the tenant has made of the land but the purpose for which the land is leased. (*Dass and Ross, JJ.*) **GAYAN. DAS v. DWARKA MANDAR.** 3 Pat. 540; 82 I. C. 79; 1924 P. H. C. C. 269; 1924 P. 557.

—Sch. III, Art. 3—*Landlord claiming title by auction purchase—Dispossession of raiyat—Suit for possession by raiyat—Limitation.*

A landlord claiming title by purchase in execution of a rent decree against a third person whom he alleged to be the tenant dispossessed plaintiff (the raiyat) of a part of his holding. It was found that the decree and sale were fraudulent and the plaintiff continued in possession even afterwards. In a suit by plaintiff for possession, *Held*, that the suit was not governed by the 2 Years' rule of limitation under Sch. III, Art. 3. 24 C. W. N. 382; 17 C. W. N. 317, Ref. (*Suhrawardy and Page, JJ.*) **KEDAR NATH BISWAS v. KAMINI SUNDARI DASYA.** 28 C. W. N. 482; 78 I. C. 514; 1924 Cal. 623.

—Sch. III, Art. 3—*Non-transferable occupancy holding—Purchaser—Recognition by some of the landlords—Dispossession by landlord not recognising—Limitation for suit.*

Art. 3 of Sch. III relates only to a suit brought by a raiyat or under-raiyat against his landlord and not to a suit by a tenant against third parties who are trespassers. 15 C. 317; 17 C. 926 Ref. All the landlords, other than the contesting defendants accepted the plaintiff who had purchased a non-transferable occupancy holding as their tenants. The contesting defendant took possession not only of his share but of the entire holding. More than three years after the dispossession plaintiff sued for possession. *Held*, that the suit was not barred by limitation under Sch. III, Art. 3. (*Mookerjee and Panton, JJ.*) **ABDUL KADER SARKAR v. SHAIKH LAL MAHOMED.**

39 C. L. J. 581.

—Sch. III, Art. 3—*Special period of limitation—When applies.*

The special period of limitation in Sch. III, Art. 3 is available not only to the landlord but also to persons claiming under him. The question of its applicability can be enquired into even if the landlords are not parties or having been made parties did not contest the suit or the appeal. (*Suhrawardy and Chotzner, JJ.*) **HAMID ALI v. RAM CHARAN GOLDAR.** 79 I. C. 569.

BERAR INAM RULES—*Deshpande allowance—Nature of—Succession to.*

Deshpande allowance is an "inam" governed by the Berar Inam Rules, 1859. Whether a certain person is entitled to succeed to it depends on the question whether they are the direct lineal heirs of the present incumbent or the incumbent to whom the inam is directed to be continued hereditarily when the rules were made. (*Kolwal, A. J. C.*) **CHANDRABHAGA v. GANESH KESHEO.**

75 I. C. 932; 1924 Nag. 234.

BERAR INAM RULES, R. 5.

—R. 5—*Devolution of Inam estate—Madatmash—Alienation of—Validity.*

The devolution and incidents of an inam estate in Berar are regulated by the Berar Inam Rules subject entirely to the Sanad or certificate evidencing the special terms of the grant.

Madatmash is a grant for maintenance or subsistence under R. 5 and any permanent alienation or a transaction likely to result in a permanent alienation can only be acted on during the lifetime of the then certificate holder and at his death by the order sanctioning the appointment of another *inamdār* the land passes to him free of any incumbrances imposed on the land by the last holder. (*Prideaux and Kinkhede, A.J.Cs.*) BALIRAM SINGH v. RAMCHANDRA.

78 I. C. 77 : 1924 Nag. 393.

BERAR LAND REVENUE CODE, S. 205—*Agreement to sell—Specific performance decreed—Pre-emption—Right of.*

An agreement to sell land does not give rise to a right of pre-emption, but where on the basis of the agreement specific performance has been decreed, the right of pre-emption can be enforced. (*Kotwal, A.J.C.*) TUKARAM v. UKANDA.

76 I. C. 374 : 1924 Nag. 327

—S. 205—*Mehernama for no fixed amount is not within the section.* 76 I. C. 668.

—S. 209—*Pre-emption—Joint Hindu family—If a co-occupant.*

A joint Hindu family is a "co-occupant" within the meaning of S. 209 for the purpose of claiming rights of pre-emption. The cumulative effect of the definitions of the expression "occupant", "holder", "holding," etc., in the Code is that a person in whom the right to possession, enjoyment or disposal of unalienated land vests, or a class of persons or where there are more holders than one any one of such holders is an occupant and when there are more occupants than one in a single holding, each is a co-occupant. (*Kinkhede, A. J. C.*) KISAN v. SITARAM. 81 I.C. 1009.

—S. 211 (2)—*Pre-emption—Sale in lieu of debts—Consideration.*

Where property is sold to a creditor and old debts are wiped out, the consideration for the purposes of a pre-emption suit is not the nominal value of the debts, but their market value. (*Prideaux, A.J.C.*) AMIRKHAN v. SHANKAR.

78 I. C. 218.

BERAR LAND REVENUE ACT, S. 220—*Civil Court—Jurisdiction—Suit for declaring land reserved for grazing cattle.*

A suit for declaring that certain land is reserved for cattle grazing and as such cannot be let out is cognizable by a Civil Court, as it does not fall under S. 220. (*Baker, J. C.*) RAMBUX v. MOTI.

20 N. L. R. 70 : 78 I. C. 872 : 1924 Nag. 256.

RID—*Auction sale—Right of bidder to withdraw—Nature of offer.*

A bidder at an auction sale can withdraw his bid before the fall of the hammer. Every bidder is ordinarily taken to make his offer on condition it would be accepted or rejected within the period during which such sales ordinarily last and it

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cannot be supposed he consented to keep it open for the unusual period of 6 weeks. (*Walmsley and Mookerji, JJ.*) TULARAM BHUTUNIA v. PURNENDRA NARAIN RAI DEB VERMA. 78 I. C. 710.

BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (IV of 1914), S. 29 (2)—*Application to set aside sale—Limitation—Notice.*

The proprietors of a property sold, instead of applying at first under S. 29 to have the sale set aside, resorted to the Civil Court, making the Secretary of State a party. Hearing of the legal advice given upon a statement of facts compiled on behalf of the Secretary of State in regard to the suit they made a belated resort to S. 29. The Certificate Officer then acted on the advice given to the Secretary of State. Held, that it was not a judicial proceeding of the nature contemplated in S. 29 of the Act, and was without jurisdiction.

A Certificate Officer is not concerned in a proceeding under S. 29 with advice tendered to Government as an interested party in a civil suit. It is his business to determine the application on the merits after giving an opportunity to all the parties affected to appear. (*Morshead, M. C.*) JUGAL KISHORE NARAYAN SINGH v. UDHO SINGH. 2 Pat. L. R. 91 (Cr).

—Ss. 10 and 45—*Non-service of notice—Burden of proof—Sale held more than a year before the Act—Limitation.* 1924 Pat. 183.

—Sch. II, R. 43—*Purchase by judgment-debtor—Validity.*

The prohibition in R. 43 against a certificate debtor bidding for or purchasing the tenure applies only to sales for arrears of rent due and not for other dues such as cess. Even such a purchase does not render the sale void but only voidable. (*Jwala Prasad and Kulwant Sahay, JJ.*) MASUDANLAL v. RAM GULAM SAHU.

3 Pat. 458 : 5 Pat. L. T. 447 : 78 I. C. 807 : 1924 P. H. C. C. 240 : 1924 P. 547.

BILL OF LADING—"At merchant's risk"—*Meaning of—Exemption from general average contribution—Insertion to be conspicuous.*

The object of a bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry and it is not concerned with liabilities to contribution in general average. The question whether an exemption clause covers the liability to contribution in general average in a case of proper jettison depends on the intention of the parties. If the shipowner wishes to relieve himself, he must do so in clear words.

The words "At merchant's risk" will not exempt a shipowner from liability to contribution in the case of a proper jettison but would exempt him from liability in the case of an improper jettison. It will also cover a case of loss caused by a collusion or stranding owing to the negligence of master or crew.

If the shipowner wishes to introduce into the Bill of Lading a novel clause exempting him from general average contribution, he must make it clear in words pointed conspicuously so that a person of ordinary capacity and care could not fail to see it. (*Aston, A. J. C.*) DHARAMDAS THAWERDAS v. PERSIAN GULF STEAM NAVIGATION CO., LTD. 78 I.C. 972.

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— — — *Exemption clause—Perils of the sea—Burden of proof—Negligence—What is—Damage by sea water—Liability for.*

Where a bill of lading contains the usual exemption clause as regards the liability for acts of God, King's enemies and the perils of the sea, in a suit by the consignee for damages for loss of goods, etc., the defendant ship-owner must plead and prove "perils of the sea" if that is his defence. If he makes out a *prima facie* case plaintiff can rebut it by proving negligence on the part of the defendant.

In deciding what amounts to negligence, the mere fact that the accident might have been avoided by greater foresight does not make it negligence. If reasonable care is taken, the perils of the sea while not including the effects of mere ordinary wear and tear will include the consequences of any kind of accident ending in damage by sea water. (*Ramesam and Jackson, JJ.*) ESUFALI MAHOMEDBOY ALLIBHOY v. THAHA UMMAL. 47 M. 610 : 20 L. W. 91 : 80 I. C. 154 : (1924) M. W. N. 648 : 47 M. L. J. 150 : 1924 M. 773.

— — — *Terms of—Binding nature—Knowledge—Presumption.*

Parties to a Bill of Lading are bound by all the conditions contained therein even if they have not read the same. The acceptance of the document without protest amounts to a tacit acceptance of the same. Where the Bill of Lading stipulates that no other cargo is to be shipped even for the purpose of ballasting other cargo should not be shipped in lieu of ballast. (*Fawcett, A.J.C.*) THE STANDARD OIL COY. v. HARIDAS VALJI. 79 I. C. 456.

BOMBAY CITY MUNICIPAL ACT (III OF 1888), ss. 257 and 471—*Storage tank—Water-closet—Notice issued to owner of premises requiring him to fill up storage tank—Non-compliance with—Offence.*

A Commissioner is not entitled to give a notice under S. 257 (1) directing the landlord to maintain the water closets in the house in good order by pumping a sufficient quantity of water into the cistern and non-compliance with the requisition contained in the notice is not punishable under S. 471. (*Macleod, C.J. and Shah, J.*) EMPEROR v. SALE MAHOMED HAJI. 26 Bom. L. R. 178 : 81 I. C. 616 : 25 Cr. L. J. 988 : 1924 Bom. 337.

— — — **S. 296—Land acquisition—Recoupment—Acquisition of land outside street proposed to be reformed.**

It is not only open to the Municipality to acquire land for the purpose of making a street but they may also acquire, if it seems expedient, land outside the regular line of such street for purposes of recoupment provided the land is contiguous. 47 C. 500, Foll. (*Lord Dunedin.*) KHANDERAO VITHOBA KORE v. THE MUNICIPAL CORPORATION OF BOMBAY. 48 Bom. 185 : 19 L. W. 1 : 22 A. L. J. 11 : (1924) M. W. N. 77 : 26 Bom. L. R. 193 : 33 M. L. T. (P.C.) 462 : 2 Pat. L. R. 108 : 28 C. W. N. 375 : 10 O. & A. L. R. 121 : L. R. 5 P. C. 53 : 39 C. L. J. 201 : 51 I. A. 14 : 1 O. W. N. 114 : 79 I. C. 948 : 46 M. L. J. 169 : 1924-P. C. 3.

BOMBAY DT. MUN. ACT, S. 48 (f).

— — — **S. 515—Nuisance—Abatement—Power of Magistrate to order, MUNICIPAL CORPORATION OF BOMBAY v. MALLANDAINE.** 48 Bom. 241 : 1924 Bom. 241.

BOMBAY COTTON DUTIES ACT, Ss. 16 and 25—Demand by Inspector of Cotton Excise to inspect godown—Refusal of access—Obstruction.

An Inspector of Cotton Excise went to a Cotton Mill and called upon its owner to open the store room with a view to inspect the records of sale, accounts, and samples, etc., of the cotton goods produced and issued in and from the Mill. The owner of the Mill refused to give access to the Inspector to the godown. Later on the owner of the Mill wrote to the Inspector offering to open the godown for his inspection and it was also found that all the accounts in the possession of the owner had been already produced. The accused was prosecuted for intentional obstruction of the Inspector in the exercise of his duty. *Held*, that the owner of the Mill was guilty of the offence charged inasmuch as there was an obstruction on his part to the free access to the godown by the Inspector even though the purpose for which it was wanted was not established by the complainant. (*Shah, A. C. J. and Fawcett, J.*) EMPEROR v. MUKUNDLAL BANSILAL. 26 Bom. L. R. 721 : 82 I. C. 353 : 25 Cr. L. J. 1281 : 1924 Bom. 492.

BOMBAY DISTRICT MUNICIPAL ACT (III OF 1901), Ss. 3 (12) and 96—Notice—New building—Street—Leaving of vacant space—Bye-law No. 132.

The petitioner, the owner of a large plot of land, left its middle portion vacant for passage and built a one-storeyed house on one side of the passage. He began to build a chawl on the other side and applied for permission to the municipality to build another storey on the existing house. As no reply was received from the Municipality for one month the petitioner commenced to add the storey. Afterwards the Municipality refused permission and when the building of the storey was nearly completed, the Municipality prosecuted the petitioner for breach of their bye-law No. 132 providing that the height of the building should not exceed the width of the street. *Held*, that the petitioner was not guilty of having contravened bye-law No. 132 since the vacant space between the two buildings was not a street within S. 3 (12). (*Macleod, C.J. and Shah, J.*) EMPEROR v. TYABALLI MULLA. 26 Bom. L. R. 216 : 82 I. C. 52 : 25 Cr. L. J. 1188 : 1924 Bom. 365.

— — — **S. 24 (2)—Applicability—Chairman of Committee.**

The Chairman of a Committee of Management is not an official President and is not precluded from voting. (*Kennedy, J.C. and Aston, A.J.C.*) SANTDASS MANGHARAM v. SECRETARY OF STATE. 80 I. C. 951.

— — — **S. 48 (f)—Bye-law—Legality of—Bombay Primary Education Act (I of 1918)—Census of school going-children.** 1924 Bom. 47.

BOMBAY DT. MUN. ACT, S. 48 (j).

—S. 48 (j)—*Octroi duty—Refund—Application for—Compliance with bye law.*

Where octroi duty is levied from a person for keeping goods more than a fixed time within Municipal limits, and an application for refund is dismissed because it was not made within the time fixed in the bye-laws, the action of the Municipality is correct, even though the duty in applying is due to the Municipality levying octroi duty late. (*Raymond and Kennedy, A. J. Cs.*) *FIRM OF NARUMAL BHAGCHAND v. SEHWAN MUNICIPALITY.* 78 I. C. 432 : 1924 S. 149.

—S. 90—*Such streets—Scope of.*

The expression "such streets" in S. 90 refers to all public streets and not new public streets alone. The test to see whether the power of stopping up a public street under S. 90 (1) has been reasonably and validly exercised is whether the deprivation of the right of the public to proceed along that street is accompanied by an equivalent advantage not to private individuals but to the public. (*Raymond and Aston, A. J. Cs.*) *HYDERABAD MUNICIPALITY v. KAZI FAHRUDIN.*

81 I. C. 134 : 25 Cr. L. J. 646.

—S. 96 (5)—*Municipality bye-law—Privy—Erection without permission—User—Offence.*

The applicant applied for permission to build a house and a privy. It appeared that there was an old privy on the spot. The Municipality, however, granted permission to build the house, but refused permission to erect a privy. Some time thereafter, the applicant put up the privy in question on the site of the old privy. It was found that this was substantially a reconstruction of the privy. The applicant was prosecuted by the Municipality for having committed a breach of bye-law No. 9 of the Municipal Bye-laws, which was in these terms:—"After the completion of the privy the owner shall communicate the same to the Chairman of the Managing Committee and no person shall commence to make use of the privy unless he obtains a written order to that effect from the Chairman of the Managing Committee." *Held*, that the communication required by the bye-law in question had reference to a privy in respect of which an application had been made under Rule 7 and for which permission had been granted under Rule 8. There was in this case no obligation on the part of the applicant to communicate the fact of the completion of the privy to the Chairman, nor was he under any obligation not to commence to make use of the privy before obtaining the written order to that effect from the Chairman of the Managing Committee. (*Shah, A. C. J. and Fawcett, J.*) *EMPEROR v. EZEKIEL MOSSES.*

26 Bom. L. R. 715 : 82 I. C. 362 : 25 Cr. L. J. 1290 : 1924 Bom. 484.

—Ss. 101 (1) and 107 (1)—*Distinction is difficult to make.*

A notice served upon the respondent by which he was called upon to repair two sinks on the first store so as to discharge waste water into the drainage-cesspool falls under S. 101 (1) and not under S. 107. It is difficult to lay down with precision the scope of S. 107, sub-section 1 and it may

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not be always easy to draw the dividing line between orders coming under S. 101 (1) and those under S. 107. (*Shah and Kajiji JJ.*) *EMPEROR v. RAMCHANDRA.* 81 I. C. 972 : 25 Cr. L. J. 1148 : 1924 Bom. 70.

—S. 120—*Powers of Municipality—Private wells.*

S. 120 only gives the Municipality power to regulate an actually existing well with a view to prevent the supply of water from being dangerous, stagnant or insanitary. It confers no right to annex a private well and turn it into a public one. If a private well has been filled up, the owner cannot be required to excavate it. If the public have the right to take water, the municipality has power to see it is not in a dangerous or insanitary state. (*Kennedy and Rupchand Bilaram, A. J. Cs.*) *ALLAHDINO v. THE SHIKARPUR MUNICIPALITY.* 79 I. C. 409 : 1924 S. 139.

—Ss. 179, 186 (a)—*Committee of Management—Powers of.*

A Committee of Management under S. 179, Bombay District Municipal Act, is not precluded from exercising the power of the Municipality under S. 186 (a). The Committee is not bound to follow every letter of the Act in its entirety but should keep the spirit of the Act in view. (*Kincaid, J. C. and Aston, A. J. C.*) *SANTDASS MANGHARAM v. SECRETARY OF STATE FOR INDIA.*

80 I. C. 951.

PRIMARY EDUCATION ACT (I OF 1918), Ss. 7, 10—Instruction—Meaning of—Attendance at an unrecognised Primary School—Conviction. *NEMCHAND NATH v. EMPEROR.* 25 Cr. L. J. 338 : 77 I. C. 226 : 1924 Bom. 105.

BOMBAY DISTRICT POLICE ACT, Ss. 25-A and 26—Notification altering previous notification not legal.

The Government have no power under Ss. 25 and 26 to call upon A to pay for B as an agent of B. Where plaintiffs were regarded as agents, but the effect of the notification in law was clearly to impose a new tax on the plaintiffs. *Held*, so long as in substance it is a tax or rate on another class of persons living within the area concerned, it is within the legal authority of the Government. An obligatory provision in the statute cannot be allowed to be ignored without adequate grounds. Where the tax or rate may be legal its recovery by the Collector cannot be illegal. At least where it is partially legal for the Collector to collect, for the rest the direct reference to the Collector is in the nature of an irregularity, which cannot affect the legality of the tax. The express provision as to finality would apparently exclude the application of S. 21 of the General Clauses Act. It is difficult to reconcile this provision as to finality with the idea of the Collector being able to vary it from time to time. S. 25-A does not provide for any enquiry as to orders under S. 25 A (1) (b). The words "after such inquiry as he deems necessary" are to be found in sub-section (1), clause (a) and do not govern clause (b). The omission to hold an inquiry which was only departmentally arranged is not sufficient to vitiate the direction given by him

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under S. 25 A (1) (b). The provisions of S. 79 of the District Police Act would condone such an irregularity in procedure.

With the previous sanction of the Commissioner and subject again to revision by him the District Magistrate may pass a fresh order.

Per *Kemp, J.*—In effect he thus obtains the revision of the reviewing authority. The scheme of the section is to make the Commissioner and not the Court the reviewing authority. The finality provided for in an order under S. 25-A, clause (4), of Bombay Act IV of 1890 means to give a final effect to the ultimate order that the District Magistrate with the previous assent of the Commissioner may, subject to revision by the Commissioner or in accordance with any such revision, pass. Cl. (4) is not intended to exclude the powers which by S. 21 of the Bombay Act I of 1904 are included in a power to issue an order. S. 25-A does not require the rate for compensation to be assessed on property although the word "rate" would seem to imply the ownership of property. S. 25-A is not intended to permit the Court to enquire into the question of who were the persons really responsible for doing the objectionable acts. (*Shah, A. C. J. and Kemp, J.*) BHAGCHAND DAGADUSHA v. SECRETARY OF STATE FOR INDIA.

48 Bom. 87; 26 Bom. L. R. 1: 1924 Bom. 1.

—Ss. 80 and 81—Order to recover amounts not covered by the sections.

Where the order practically directed the Collector to recover the particular amounts from a class of persons. *Held*, that does not appear to be an order to any particular class of persons to perform any duty or act or to conduct themselves in a particular manner. Besides S. 81 provides an additional remedy which the party concerned may follow; but it does not bar a suit which may be otherwise open to the party to file. (*Shah, A. C. J. and Kemp, J.*) BHAGCHAND DAGADUSHA v. SECRETARY OF STATE FOR INDIA.

48 Bom. 87; 26 Bom. L. R. 1: 1924 Bom. 1.

BOMBAY HEREDITARY OFFICES ACT (III OF 1874), S. 5—*Ghadi vatan*—Mortgage by valandar—Rights of mortgagee—Adverse possession.

The Government granted certain lands to a person in respect of *ghadi* services to be rendered by the grantee to the village community. The holder of the lands mortgaged them in 1900 and died in 1912. Subsequently in 1920 the widow of the holder sued to redeem the mortgage on the ground that with the death of the last male owner the mortgage had come to an end. *Held*, that the mortgagee's possession of the lands during the life-time of the last holder was not adverse to him and that the suit by the widow was not barred by limitation. (*Shah, A. C. J. and Fawcett, J.*) SHIVAPPA MALLAPPA v. AYALI LUMANNA.

26 Bom. L. R. 814: 1924 Bom. 521.

BOMBAY HEREDITARY OFFICES AMENDMENT ACT (X of 1923), S. 2—If retrospective.

Bombay Act X of 1923 has not been given retrospective effect. (*Macleod, C. J. and Shah, J.*) ADIVEVA FAKIRGOWDA PATIL v. CHANMALL-GOWDA.

26 Bom. L. R. 360: 81 I. C. 1018: 1924 Bom. 393.

BOM. KHOTI SETTLEMENT ACT.

BOMBAY HIGH COURT RULES, Rr. 253 and 266—Receiver—Charges for brokerage—Accounts—Amendment of decree.

77 I. C. 171: 1924 Bom. 166.

BOMBAY KHOTI SETTLEMENT ACT (I OF 1865), Ss. 37 and 38—*Khoti tenure*—Incidence of—Execution of *Kabuliyat* to Government—Liability of *Khot*.

Khoti tenure is a customary tenure which dates back from the time of the 18th century or earlier and its incidence as prescribed by custom are nowhere defined and differ in different villages. The origin of the tenure was probably due to the difficulty experienced by the Government of the time in collecting the revenues of the villages in the Konkan. Consequently the Government entered into agreement with certain persons that they should collect the revenue, and the agreement was to be according to the custom of the country. When the British Government took possession of the Konkan about the year 1818, agreements were entered into between the Government and the farmers or *khots* with regard to the payment of the assessment by the *khot* to the Government. At first the agreements merely stated that the *khot* was responsible for the assessment since the main object of the Government was to secure for themselves the land revenue of the village. Later on in order to provide for the due administration of the village and to protect the tenants against the exactions of the *khots*, it was found necessary to amplify the terms of the agreement but the fact remained that it became an established custom for each *khot* to enter into an annual agreement with the Government of Bombay, Act I of 1865, especially Ss. 37 and 38, were particularly applicable to *khoti* villages. In 1915-16 the Government offered to the *plff.* a *khot* of a village in the Kolaba District, a *Kabuliyat* differing in certain respects from the annual *Kabuliyat* that had been previously executed. One of the clauses contained in the *Kabuliyat* tendered by the Government empowered a permanent tenant of *Khot nisbat* land to compel the *khot* either to consent to a transfer or to take up the land himself and another clause required the *khot* to keep the land at the disposal of a *dharekari* who had deserted. The *khot* having refused to pass the *Kabuliyat* in the new form, the Government attached the *khoti* village. Thereupon the *khot* sued the Government for a declaration of his right and for mesne profits, *held*, that the clauses sought to be inserted by the Government in the *Kabuliyat* were of an objectionable nature and that the attachment of the village for the refusal of the *khot* to execute such a *Kabuliyat* was illegal and that the *khot* was entitled to a declaration of his right and mesne profits. *Dharekari* lands are in the occupation of tenants having permanent heritable and transferable rights paying to the *khot* the Government assessment only. Non-*Dharekari* lands are generally spoken of as *Khoti* lands which are either *Khoti-nisbat* or *Khoti-khasgi*. *Khoti-nisbat* lands may be held by permanent tenants who have hereditary but not transferable rights, or by non-permanent tenants, all of whom pay to the *Khot* in addition to the assessment, *Fayda* which is fixed according to the terms of the

BOM. LAND REV. CODE, S. 63.

Kabuliyat. Koti-khasgi lands are the private property of the Khot either by being entered in his own name in the original survey, or by acquisition since the survey by purchase or other lawul-transfer otherwise than in his capacity as Khot or being brought into cultivation at the Khot's own expense though entered in the original survey in the Khot-nishat Khata. (*Macleod, C. J. and Shah, J.*) *GANPATI GOPAL RISLEND v. SECRETARY OF STATE FOR INDIA.* 26 Bom. L. R. 754 : 48 Bom. 599 : 1925 B. 44.

— (I OF 1880), S. 9—*Rights of occupancy tenant—Transfer—Consent of managing khoti.*

The managing khot is entitled to give consent to the transfer of a permanent tenancy which is an act required by the statute to be performed by the khot in order to validate the transfer (*Macleod, C. J. and Shah, J.*) *IBRAHIM MOHIDIN v. KRISHNAJI LAXMAN.* 26 Bom. L. R. 421 : 80 I. C. 458 : 1924 Bom. 459.

BOMBAY LAND REV. CODE, Ss 63 and 64—*Alluvion—Lands sold by Government—Assessment—Right of landlord to charge rent for the alluvion.*

Defendant was a mulgeni tenant of certain lands from the plaintiff. Some alluvion having formed and accreted to the lands in question the government granted the alluvion to the plaintiff for a price subject to the payment of annual assessment acting under S. 64. *Held*, that the plaintiff was entitled to charge a proportionate rent from the defendant for the alluvion which must be treated as a separate piece of land by reason of the operation of Ss. 63 and 64 (*Macleod, C. J. and Shah, J.*) *MANJAYA SUBRAYA v. TIMMAYA VASUDEO.* 26 Bom. L. R. 520 : 80 I. C. 427 : 1924 Bom. 449.

— S. 65—*Application to use agricultural land for non-agricultural purpose—Procedure—Decision of Collector—Refusal without enquiry—Effect.*

Where a person wants to use agricultural land for non-agricultural purposes, he has to apply to the Collector for permission. The Collector under the Code has to acknowledge the receipt of the application and after due inquiry communicate the result in 3 months. If the applicant does not receive any reply within 3 months he can presume it is granted.

Where on such an application being put in the Collector without inquiry refused it, but the applicant did not receive a reply after due inquiry within 3 months, he can take it that permission was granted. (*Macleod, C. J. and Shah, J.*) *SHIVPALSINGH BHAGWAT SINGH v. SECRETARY OF STATE.*

26 Bom. L. R. 371 : 81 I. C. 491 : 1924 Bom. 369.

— S. 83—*Duration of tenancy—Presumption as to—Commencement of the tenancy.* *NARAYAN RAM CHANDRA v. PANDURANG BALAKRISHNA.* 76 I. C. 71.

— Ss. 86 and 87 (4)—*Civil suit lies to recover money if levied in excess by superior holder but not to cancel or amend Collector's order.*

The object of Ss. 86 and 87 is to enable superior holders to recover rent or land revenue expeditiously when their title is clear by written

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application to the Collector, but the orders passed on such applications are neither decrees nor have they the force of a decree. Such an order is purely an executive order, and under S. 87 (4) the party dissatisfied with it can file a suit in the Civil Court not to set aside his order but the superior holder may sue to recover such amount as may be still due to him, and the inferior holder to recover the amount "levied" from him in excess of what was due. The latter's suit therefore becomes one "for the recovery of moneys had and received" and his cause of action arises when a sum in excess of what he contends is due is levied from him. It is only at this stage permissible to him to have recourse to the Civil Courts not for cancelling or amending the order of the Revenue Officer but for the refund of the amount levied from him in excess of what was actually due. (*Kennedy, J. C. and Raymond, A. J. C.*) *HOTKHAN SHERKHAN v. PAHLUMAL UKERMAL.* 80 I. C. 955 : 15 S. L. R. 82 : 1924 S. 87.

— S. 121—*Order of Survey Officer—No question as to boundary—Decision as to title—Jurisdiction of Civil Court.*

A suit to set aside an order passed by a Survey Officer as to the title to some of the lands which does not involve any question of boundary line between two villages is maintainable in the Civil Court. (*Shah, A. C. J. and Kincaid, J.*) *NARSANGJI MEHRAMANSANG v. BAI ACHRAT.* 26 Bom. L. R. 1264.

— S. 135—*Record of rights raises no presumption as to ownership.*

All that section 135 lays down is that an entry in the record of rights shall be presumed to be true until the contrary is proved, but it does not raise any presumption as to the ownership of the land. (*Kennedy, J. C. and Raymond, A. J. C.*) *SANT SINGH v. KARIBAL.* 76 I. C. 408 : 1924 S. 17.

BOMBAY MAMLATDAR'S COURT ACT (II OF 1906), S. 23—*Order of Mamlatdar—Powers of Collector in revision.*

A Collector acting under the powers given by S. 3 can set aside an order made by the Mamlatdar if he considers that it is illegal or improper. Where the Collector set aside such an order on the ground that the Mamlatdar had entered upon complicated questions which were entirely outside the province of the Act and which ought to have been referred to a Civil Court. *Held*, that the decision of the Collector practically deprived the Mamlatdars of the power to decide who should be in possession of the disputed property until the questions in dispute have been finally determined by the Civil Court : that the Mamlatdar was entitled to give possession to one party or another however complicated the questions may appear to be ; that the Collector exceeded his powers under the Act and that the High Court should interfere in the ends of justice. (*Macleod, C. J. and Crump, J.*) *JAGANNATH DEOKARAN v. DHONDU ANANDA.* 48 Bom. 384 : 26 Bom. L. R. 265 : 80 I. C. 266 (1) : 1924 Bom. 352.

BOMBAY PLEADERS' ACT (XVII of 1920), S. 23—*Execution proceedings—Pleader's fees—Bombay Regulation (11 of 1827), S. 52.*

BOM. PREVENTION OF GAMBLING ACT.

The Bombay Pleaders' Act applies to the taxation of pleader's fees in execution of a decree in an appeal which was pending when the Act came into force. (*Macleod, C. J. and Shah, J.*) *BAI JAYAGAVRI v. RAMANLAL.*

48 Bom. 355 : 26 Bom. L. R. 187 : 79 I. C. 749 : 1924 Bom. 302.

BOMBAY PREVENTION OF GAMBLING ACT (IV OF 1887), S. 3—Common gaming house—What is.
25 Cr. L. J. 531 : 77 I. C. 995 : 1924 Bom. 184.

BOMBAY PREVENTION OF PROSTITUTION ACT (XI OF 1923), Ss. 3 and 10 (1)—*Woman loitering in a public street for purposes of prostitution—Arrest by police-officer not specially authorised without complaint—Legality of trial.*

The accused was charged with the offence of "loitering in a public street for the purpose of prostitution" an offence under S. 3 of the Bombay Prevention of Prostitution Act, 1923. She was arrested at 8 P. M. in a public street in Bombay by a police constable who was not specially authorised in this behalf by the Commissioner of Police, under S. 10 (1) of the Act. Nor had the police constable received any complaint about her. She was placed before the Additional Presidency Magistrate for trial. *Held*, that the arrest was illegal and that the Presidency Magistrate had no jurisdiction to try the woman for the offence under S. 190 of the Cr. P. Code without a complaint under S. 4 (h). (*Marlen and Fawcett, JJ.*) *EMPEROR v. CHANDRA BANOO.*

26 Bom. L. R. 1225.

BOMBAY REGULATION (V OF 1827), S. 14—Effect and scope of—Tender—Mortgage debt if included—Partial tender—Validity of. *NADER SHAW SHERIARI v. SHIRINBAI.* 1924 Bom. 264.

—**Cl. 15 (3)**—*Suit for sale by mortgagee—Usufructuary mortgage.*

Unless there is a special agreement between the parties when the bond is entered into, to the effect that the property shall not be brought to sale by the mortgagee, the mortgagee has a right to institute a suit for the purpose of bringing the property to sale. (*Macleod, C. J. and Shah, J.*) *NILKANTH BALWANT v. SHRI VIDYA SHANKAR.*

26 Bom. L. R. 455 : 80 I. C. 393 : 1924 Bom. 367.

BOMBAY RENT ACT (II OF 1918), S. 9—Scope and object of. 48 Bom. 257 : 81 I. C. 843 : 1924 Bom. 99

—**S. 9**—*Standard rent—Statutory tenant—Full standard rent—Liability to pay.*

A tenant who holds over after notice to quit by the landlord and elects to remain in possession under S. 9 is liable to pay the standard rent to the full extent allowed by the Act. (*Macleod, C. J. and Crump, J.*) *KALIANMAL TILOKCHAND v. DHARAMSAY JETHA & Co.*

26 Bom. L. R. 141 : 80 I. C. 253 : 1924 Bom. 330.

BOMBAY REVENUE JURISDICTION ACT, S. 4 (f)—*Order for compensation for additional police by the District Magistrate not within the section.*

The section refers to cess or rate authorised by Government and not to cess or rate authorised by the District Magistrate with the previous sanction

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of the Commissioner. The provision cannot apply where the legality of the order of the Government is questioned. It would apply to a cess or rate which is authorised, that is legally authorised, by the Government. (*Shah, A. C. J. and Kemp, J.*) *BHAGCHAND DAGADUSHA v. SECRETARY OF STATE FOR INDIA.*

48 Bom. 87 : 26 Bom. L. R. 1 : 1924 Bom. 1:

—**S. 12**—*Reference under.*

28 C. W. N. 906 : 77 I. C. 100 : 48 Bom. 1.

BOMBAY VATAN ACT, S. 2—*Daughters—Succession.* 76 I. C. 559.

BOMBAY VILLAGE POLICE ACT, S. 3—*Pagis—Appointment of—Nomination by Talukdar—Liability of Jivaidar for salary—Contract Act, S. 69.*

The Chief Talukdar of a village was entitled to half of its revenue, while the remaining half belonged to the Jivaidars. The District Magistrate called upon the Jivaidar to appoint two Pagis for the village. They failed to do so and the District Magistrate appointed the Pagis nominated by the Talukdar. In a suit by the Talukdar to recover the wages paid by him to the Pagis, *Held*, that the Pagis were validly appointed by the District Magistrate and that the Jivaidars were liable to reimburse the Talukdar. (*Pratt and Fawcett, JJ.*) *ACHAL SINGH v. DOLAT SINGH.*

26 Bom. L. R. 678 : 1924 Bom. 470.

BROKER—Commission—Right to—Completion of transaction—Failure of one of the parties to complete the contract—Effect of. *MEHTA v. CASSUMBHAI KESHAVJI.* 75 I. C. 193.

—**Commission—When due—Transaction falling through on account of defect of title.**

A person authorised another to find a lessee for him on certain conditions within 8 days and he was to receive a fixed amount as commission. The broker brought in a lessee within the time fixed, but the transaction fell through on account of defect of title. *Held*, it was only an agreement to introduce a lessee and the broker was entitled to his commission. (*Chandhuri, J.*) *RAGHUNANDAN LAL SARMA v. MADANMOHAN DAS.* 76 I. C. 333.

—**Right to commission—Sale of land—Inability of purchaser to complete within stipulated period—Vendor and purchaser directly dealing with each other afterwards—Effect of.**

Ordinarily a broker for sale is entitled to a percentage on the money which he succeeds in realising for his principal, but where the transaction cannot be completed because the purchaser introduced by the broker could not pay within a reasonable time and the principal realises nothing the broker could not be said to have earned his brokerage. Where a broker had been asked to find a purchaser who would pay ready money on or before a certain date without delay or trouble and the purchaser introduced by the broker was hopelessly unable to pay, the mere fact that subsequently the vendor and purchaser enter into separate arrangement for deferred payment in terms as to furnishing security does not give the broker a right to the commission. It is the duty of a broker to introduce a person willing

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and able to complete the purchase. (*Heald and May Oung, JJ.*) *FOUCAR & Co. v. M. C. T. MUDALIAR*, 2 Rang. 45 : 79 I. C. 750 : 1924 R. 232.

—Sub-broker receiving money from constituent and misappropriating—Payment to broker for other transactions—Sui's for money *MORARJI PREMJI GOKULDAS v. MULJI RANCHHOD VED & Co.*, 1924 Bom 232 : 77 I. C. 266 : 48 Bom. 20.

BUDDHIST LAW—Applicability of—Shan Buddhists of Burma, *MA SHWE YIN v. MAUNG BA TIN*, 76 I. C. 620

—Burmese—Adoption—Essentials of—Proof. *MA THAN THAN v. MA PWA THAN*, 76 I. C. 63 : 46 M. L. J. 834 (P.C.).

—Burmese—Adoption—Adopted son whether entitled to claim as orasa.

Quaere: Whether under the Burmese Buddhist Law an adopted son (*Killima*) is entitled to claim an one-fourth share as orasa? (*Heald and May Oung, JJ.*) *MAHOMED AHMIN v. MA KYAN*, 3 Bur. L. J. 108 : 1925 Rang. 41

—Burmese—Gift to children—Effect only after death—Validity—T. P. Act, S. 123. *MA THIN MYAING v. MAUNG GYI*, 75 I. C. 166 : 1924 Rang. 13.

—Burmese—Gift—Delivery of possession is not essential. See T. P. Act, Ss. 123 AND 129. 2 Rang. 131.

—Burmese—Husband and wife—Mya Nge—What is.

The expression "Mya Nge" is an extremely loose one and is indiscriminately applied by a Burmese woman (generally as an abusive epithet) to any other woman with whom her husband may have sexual intercourse. It does not necessarily mean a lesser wife and where such a claim is put forward, proof of the relationship of husband and wife is required. (*Heald and May Oung, JJ.*) *MAHOMED AHMIN v. MA KYAN*, 3 Bur. L. J. 108 : 1925 Rang. 41.

—Burmese—Inheritance—Pungyi—Rights of—Giving up vows—Effect.

A *pungyi* cannot inherit from any of his lay relatives after his ordination. By becoming a lay man after the death of his relations, he does not acquire any property. Property passes by succession on the death of the original owner and the rules as to succession under Burmese Buddhist Law have reference to the state of affairs in existence at the time of the death of the person whose estate is in question. Where property once becomes vested in that way, they do not become subsequently divested. (*Brown, J. C.*) *MAUNG NI v. MAUNG THET SHE*, 76 I. C. 161.

—Burmese—Inheritance between children and grandchildren by different marriages.

The general rule is that in a division between children and grandchildren, the latter take only $\frac{1}{4}$ of the share to which their parent would have been entitled, if alive, is applicable when the children on the one hand and the grandchildren

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on the other are the offspring of different marriages. It is impossible to suppose that the children of the second marriage would be entitled to a larger share than they and their father together would have taken had their father been alive. *Held* also that separate residence of the grandchildren cannot disentitle claim to inheritance. (*Carr, J.*) *MA MAN SHWE v. MA SERU AND ONE*, 2 Rang. 514.

—Inheritance—Shares of husband, issue of first marriage and issue of second marriage—Mother's property.

Held, that the husband is entitled to half and the issue of first marriage is entitled to the other half and that the parent would exclude the share of the issue by second marriage *May Oung's Leading Cases on Buddhist Law* referred to. (*Young and Carr, JJ.*) *MAUNG PAW THUT v. MA E YIN*, 2 Rang. 521 : 3 Bur. L. J. 225.

—Burmese—Marriage—Divorce—Right of husband and wife—Misconduct.

Under the Burmese Buddhist Law, where both husband and wife had been married before, the husband is not entitled to divorce his wife without proving at least such misconduct on her part as would entitle him to a divorce by mutual consent. There is no right of divorce at the mere caprice of the other party to a Burmese Buddhist marriage against the will of the other party and without proof of misconduct or default on the part of the other party. Cases reviewed. (*Heald and Lentaigue, JJ.*) *MA HMON v. MAUNG TIN KAUK*, 1 R. 722 : 79 I. C. 705 : 1924 Rang. 182.

—Burmese—Lettetpwa property—Payin property—Conversion of. *MAUNG TUN GYAW v. MAUNG PO THWE*, 77 I. C. 923.

—Burmese marriage—Polygamy—Rights of junior wives—Presumption—Proof. *MAUNG THA DUN v. MO THEIN YIN*, 1924 Rang. 37.

—Burmese—Monk—Effect of becoming—Remuneration—Effect *MA SHWE THE v. MAUNG KAN*, 76 I. C. 672 : 1924 Rang. 101.

—Burmese—Monk—Poggalika property—Ownership of.

A *pungyi* may own a Kyaung (monastery) as his poggalika property and he can in his life-time validly transfer it by gift. (*Lentaigue and Carr, JJ.*) *U. PANDAWUN v. U. SANDIMA*, 2 Rang. 131 : 1924 R. 309.

—Burmese—Pre-emption—Sale of undivided share by co-heir.

The Buddhist Law of pre-emption applies to a sale by one of several co-heirs of his share of undivided ancestral property. (*Young, J.*) *MAUNG PO GYI v. MAUNG PO SAING*, 3 Bur. L. J. 21. 80 I. C. 259 (2) : 1924 Rang. 266.

—Burmese—Right of pre-emption—Purchase of property by mother and stepfather—Subsequent remarriage by the latter—Sale—Can children of the deceased mother claim pre-emption.

A Burmese Buddhist widow who had two children married a second husband and died leaving

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two other sons by her second marriage. During her coverture she and the second husband purchased properties jointly, and the latter remarried after her death. After remarriage he sold the lands. *Held*, that the sale was invalid as the vendor was not the exclusive owner of the land, and had no right to sell, and that the 4 sons of the deceased by her first and second marriage have a right of pre-emption. (*Young and Carr, JJ.*)
MAUNG PO THAUNG AND ONE v. MAUNG E. PE.
2 R. 529.

—Burmese—Succession—Grandchildren.
MAUNG PO THU DAW v. MAUNG PO THAN.

1924 Rang. 73.

—Burmese—Succession—Letters of administration—Wife living apart from husband for 8 years. MAUNG MAUNG TIN v. MA HLA U,
75 I. C. 200.

—Burmese—Succession—Orasa daughter—Necessity for joint residence. 76 I. C. 814.

—Burmese—Succession—Partition—Let-tetpwa property—Right of sons of first marriage. MA TOKE v. MA U LE.
76 I. C. 838:
1924 Rang. 71.

—Burmese—Succession—Rights of wife—Superior and inferior—Distinction between. MA THEIN YIN v. MAUNG THA DUN. 2 Rang. 62:
79 I. C. 501: 1924 Rang. 105.

—Burmese—Succession—Children of second marriage—Rights of.

The ordinary rule of Burmese Buddhist Law is that the widow succeeds to her husband's estate to the exclusion of all her children (except the auratha if there is an auratha) and that so long as the mother is alive and remains unmarried no child of hers (except the auratha) can claim any share of the property left by their father. There is an exception to that rule in cases where the father has been twice married, and in such a case not only the children of the first marriage but also the children of the second marriage can claim a share, at any rate in the property brought by the father to the second marriage. (*Heald and Po Han, JJ.*) MA E HMYIN v. MAUNG BA MAUNG.
2 Rang. 123: 1924 Rang. 298.

—Burmese—Succession—Inheritance to the estate of deaf-mute—Contest between younger and elder brothers—Right of Pothudan to inherit.

In a competition between two brothers to succeed to the property of a deceased deaf-mute Buddhist, the brother who supported the deceased during his lifetime succeeds in preference. A Pothudan is not disentitled from inheriting property under the Burmese-Buddhist Law. (*Duckworth, J.*) MA SAWWIN v. MAUNGVI.

2 Rang. 328: 1925 Rang. 34.

—Burmese—Succession—Younger child though eldest son has no orasa status.

A younger child, although the eldest son, does not acquire the status of orasa and does not become entitled to the privileged position allotted to the eldest or first-born son. (*Mr. Ameer Ali.*) KIRWOOD v. MAUNG SIN,
1924 P. C. 238:
51 I. A. 334: 48 M. L. J. 1.

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—Burmese—Succession—Children by first marriage have no share after partition.

If after the death of the husband, the wife partitions the property with her children and marries again taking her share with her, on her death the children of her former marriage cannot claim from their stepfather any property which she took to the second marriage; because they have already obtained their shares.

The same rule applies when after the death of the wife, the husband marries again after having given the children their respective shares. U Gaung's Digest of Buddhist Law, p. 273, Ref. (*Mr. Ameer Ali.*) MA THAUNG v. MA THAN,
51 Cal. 374: 19 L. W. 477: 51 I. A. 1:
1924 P. C. 88: 80 I. C. 1031:
(1924) M. W. N. 662: 46 M. L. J. 618 (P. C.).

—Burmese—Succession—Half blood and full blood—Competition.

Under the Burmese Buddhist Law of Succession a younger half brother or half sister takes in preference to the son of an elder brother. 4 U. B. R. 20: 2 U. B. R. 53, Foll. (*Heald, J.*) MAUNG K. HLAING v. MAUNG TUN LIN. 3 Bur. L. J. 187:
1924 Rang. 367.

—Burmese—Succession—Orasa—Son—Rights of.

On the death of the father, one-fourth of the joint estate vests immediately in the orasa son. He is not bound to demand partition but may do so at any time within the statutory period of limitation. And within that period the mother has no power of disposal of this one-fourth share. It would be contrary to the principles of justice, equity and good conscience to hold that on the death of the mother within the period of limitation and before partition, the son is divested of his already vested share. (*Lentaigne and Carr, JJ.*) ARUNACHELAM CHETTY v. MAUNG SAN NGWE.
2 Rang. 168: 1924 R. 323.

—Squatter land—Oral gift—Pongyi—Trust—Validity.

A female lay devotee made an oral gift of squatter land and house to a pongyi who in his turn gifted it orally to another. After her death, her husband sued for possession. *Held*, it was not religious property and in the absence of a registered deed the oral gifts failed. (*Heald and May Oung, JJ.*) MG. LO THET v. MG. MIN DIN. 3 Bur. L. J. 7:
80 I. C. 255: 1924 Rang. 260.

—Testamentary power.

Held, that a nomination of a Burman Buddhist to receive after his death the amount standing at the credit in the account of Provident Fund and a mutual help association amounts to a testamentary disposal and is invalid in law as a Buddhist has no power to make a will. *Held*, also that the nomination did not more than constitute the appellant a trustee for the heirs of the deceased. (*Lentaigne and Carr, JJ.*) MANU v. MAGUN.
2 Rang. 388: 1925 Rang. 8.

—Chinese—Applicability of—Burmese woman marrying Chinese-Buddhist husband.

Where a Burmese woman married to a Chinese Buddhist husband adopted her husband's form of religion becoming to all intents and purposes a

BURDEN OF PROOF—Admission.

Chinese Buddhist, and after the husband's death regarded herself as a Chinese Buddhist in various ways, succession to her estate would be governed by the Chinese Buddhist Law. (*Heald and Lentaigne, JJ.*) *MA SEIN v. MA PAN NYUN*
2 Rang. 94 : 80 I. C. 749 : 1924 Rang. 219.

—Chinese—Inheritance—Step-children and step-grandchildren—Exclusion of collaterals—Conduct of parties.

Upon the death of a Chinese Buddhist, his or her step-children and step-grandchildren are entitled to inherit the property of the deceased to the exclusion of his or her collaterals. 2 U.B. R. 66 appr. (*Lord Dunedin.*) *MAUNG DWE v. KHOO HAUNG SHEIN.* 47 M. L. J. 853.

BURDEN OF PROOF—Admission—Effect of.

In a suit for recovering money paid by mistake to defendant, an admission of the defendant in a prior suit as to receipt of money shifts the burden of proof on him to prove want of consideration or other invalidating circumstance. (*Broadway and Campbell, JJ.*) *WASAKHI RAM v. HUSSAIN KHAN.* 75 I. C. 1027 : 1924 Lah. 650.

—Alienation by mutawalli—Necessity—Alienee to prove, 79 I. C. 360

—Benami transaction—Onus on plaintiffs.

The burden of proving that a bond, a suit brought thereon, and an execution sale under the decree obtained in the suit, were all benami for the plaintiff lies upon him (*Woodroffe and Ghose, JJ.*) *SHAM LAL RAI CHOWDHURY v. RADHA CHARAN RAI.* 81 I. C. 774 : 39 C. L. J. 98.

—Benami transaction—Suit by defeated claimant—Onus on him to prove reality of his transfer. 34 M. L. T. 20 (H. C.).

—Bond—Provision as to interest—Interpretation.

Where a stipulation to pay interest is found in a bond, the execution of which is proved or admitted the onus of proving that the covenant to pay interest found its way into the bond without the consent of the debtor ordinarily lies on the debtor. (*Le Rossignol, J.*) *KEWAL RAM v. ALLAH DIYA.* 79 I. C. 55 : 1925 Lah. 64.

—Collusion—Consent decree.

Where in execution of a consent decree, the party proceeded against sets up that the decree was obtained collusively, the burden of proving collusion rests on him. (*Kendall, A. J. C.*) *HARIPRASAD v. MAHABIR PANDEY.*

1 O. W. N. 487 : 79 I. C. 1055 : 11 O. L. J. 689 : 10 O. & A. L. R. 893.

—Consideration—Want of—Onus on defendants. 1924 Lah. 39.

—Custom in derogation of general principle.

Where a person sets up a custom in derogation of a general principle of succession prevailing in a locality, he has to prove the same. (*Pipon, J. C.*) *GHULAM KHAN v. GHULAM HAIDER KHAN.* 75 I. C. 214.

BURDEN OF PROOF—Lost bond.

—Custom—Money lent to effect divorce between husband and wife—Absence of custom See Contract Act, S. 23. (*Kinkhede, A. J. C.*) *NARAYAN v. LAXMAN.* 80 I. C. 885.

—Deed—Bill of Exchange—Material alteration proof.

20 N. L. R. 76.

—Dedication—Hindu religious endowment—Burden of proof of dedication on donee—Registration of deed of gift—Effect of.

5 Pat. L. T. 305.

—Discharge—Payment—Sale of goods.

Where in a sale of goods the plaintiff pleads the sale and no payment and the defendant replies pleading payment the burden is on him to prove his case. (*Young, J.*) *RASU v. KATTARA.*

2 Rang. 202 : 82 I. C. 658 : 1924 Rang. 349.

—Ejectment—Tenancy—Sub-tenancy—Plea of.

In a suit by the recorded tenant to eject the sub-tenant, where the latter pleads that there was no relationship of landlord and tenant between him and the recorded tenant, the burden is on the defendant to show that he did not hold the land from the plaintiff. (*Fremantle, S. M.*) *ISWAR DIN v. DHANI.* L. R. 5 A. 212 (Rev.).

—Ejectment—Suit—Tenant.

The plaintiff, an occupancy tenant, sued to eject a sub-tenant. Held, that since the plaintiff was still recorded as occupancy tenant the burden of proof certainly was on the defendant who asserted that his occupancy right had been extinguished. (*Fremantle, S. M.*) *ASAD ALI v. AJODHIA.*

L. R. 5 A. 97 (Rev.).

—Entry in papers as tenants and sub-tenants—Onus on sub-tenants to prove entry is incorrect. When a tenant and sub-tenant are recorded in the papers as such, the onus of proof is on the sub-tenant to show that the papers are wrong. (*Fremantle, S. M.*) *UMMAD ALI v. SADA ULLAH.*

L. R. 5 A. 233 (Rev.).

—Fraud on registration law. *MR. SURJA v. BIJAI BAHADUR SINGH.*

26 O. C. 336 : 1924 Oudh 136 (2).

—Notice—Plea of purchase without notice of prior agreement—Onus. *MAUNG CHIT U. v. BANSI SHAR BAZAZ.* 75 I. C. 328.

—Fraud—Onus on plaintiff—Cessation of fraud—Knowledge of transaction—Shifting of onus. 20 N. L. R. 23.

—Hindu Law—Joint family—Alienation by father—Suit by sons to set aside—Onus on them to prove that debts were not binding.

L. R. 5 A. 286.

—Immaterial—Evidence adduced on both sides—Suit in ejectment. L. R. 5 A. 354.

—Legal representative—Assets—Receipt and due application of—Burden of proof on legal representative. 19 L. W. 119.

—Lost bond—Suit on—Admission of execution—Loss of bond not proved—Effect of.

BURDEN OF PROOF—Materiality of.

In a suit on a bond alleged to have been lost in a fire, the execution of the bond by the defendant was proved but the Court dismissed the suit on the ground that the loss of the bond had not been proved. *Held*, that as the defendant had never set up any plea of discharge but had merely denied execution of the bond, the suit ought to have been decreed. (*Neave, A. J. C.*) **BENI MADHO v. RAMLAKHAN.** 81 I. C. 570 : 10 O. & A. L. R. 389.

Materiality of—How to discharge.

The question of burden of proof in a case depends on facts proved and to be proved and goes on shifting as the trial proceeds. Where both sides have adduced evidence on the points at issue the question of burden of proof is not material. The onus of proof can be discharged by cross-examining the other party's witnesses. (*Kinkhede, A. J. C.*) **BALIRAM v. KAMALJI.** 78 I. C. 330 : 1924 Nag. 367.

Materiality of—Evidence let in fully—Effect.

Where evidence has been given on both sides, the question of onus is of no great importance (*Rankin and Mukerjee, JJ.*) **UMESH CHANDRA DARBAR v. CHOWDHURY JAMINI NATH MULLICK.** 78 I. C. 836.

Materiality of—Whole evidence let in.

The question of burden of proof is not very material after all the evidence has been let in by both parties. (*Prideaux, A. J. C.*) **MT. SARASWATIBAI v. YADORAO.** 78 I. C. 887.

Materiality of—Whole evidence taken.

Where parties have led evidence and the Court has, on that evidence, material to go upon for deciding any disputed point the question of the burden of proof is not very pertinent. 47 I. A. 76, *Foll.* (*Prideaux, A. J. C.*) **SONAJI v. DAULAT.** 75 I. C. 782.

Question when material. NIHAL CHAND v. GURDITTA MAL. 5 Lah. L. J. 451.**Mesne profits—Extent of—Onus on trespasser.** 20 N. L. R. 52.**Mesne profits—Plaintiff to prove prima facie the amount—Shifting of onus.**

Where mesne profits are claimed by a person out of possession, he must in the first instance give some evidence proving *prima facie* that the profits were somewhere about the sum he alleges, and then the burden of proving that they were less shifts to the other side. (*Hallifax, A.J.C.*) **JAILALSAO v. LAL FATEH SINGH.** 20 N. L. R. 52 : 75 I. C. 826 : 1924 Nag. 117.

Minority—Suit on bond executed by person claiming to be minor.

Where in a suit on a bond executed by the defendant, the latter pleads minority at the time of execution, the burden is upon him of proving the assertion. 45 Cal. 999, followed. (*Daniels and*

BURDEN OF PROOF—Promissory Note.

Datal, JJ.) **NARAIN SINGH v. CHIRANJI LAL.** 22 A. L. J. 461 : L. R. 5 A. 353 : 79 I. C. 945 : 46 A. 568 : 1924 A. 730 (2).

—Mortgage — Redemption — Burden of proving specific mortgage set up by him on plaintiff—Admission by defendant of some other mortgage—Not sufficient. 10 O. & A. L. R. 298.

—Notice—Bona fides—Suit for specific performance.

"Ordinarily when a party claims exemption from a general provision of law the onus lies on him to prove that he comes within the exemption." In a suit for specific performance against the vendor and a subsequent purchaser of the property from him, the burden of proving a *bona fide* purchase without notice of the prior contract in favour of the plaintiff, lies on the subsequent purchaser. (*Suhrawardy and Duval, JJ.*) **HEM CHANDRA DE SARKAR v. AMIYABALA DE SARKAR.** 40 C. L. J. 184 : 1925 Cal. 61.

—Pardanashin lady—Gift deed—Burden on person claiming under deed to show knowledge.

Where a person relies on a document purporting to be a gift and is making a claim against a *pardanashin* woman, based upon a document of this kind, it is incumbent upon him to give satisfactory evidence that the document has been explained and understood by the lady. (*Lindsay and Sulaiman, JJ.*) **AISHA BIBI v. MAHFUZ-UN-NISSA.** 22 A. L. J. 205 : L. R. 5 A. 97 : 78 I. C. 180 : 46 A. 310 : 1924 A. 362.

—Partition—Hindu Law—Presumption of completeness.

The presumption of Hindu Law being that a partition is complete, when a party says some lands were kept joint, the burden of proving it lies on him. (*Baker, J. C.*) **JAGANNATH v. BABU.** 81 I. C. 1039.

—Payment—Discharge.

Where receipts for money paid are taken in the shape of promissory notes, the burden of proof of payment is on the person setting it up, (*Lentaigne and Carr, JJ.*) **HOR MOE v. J. M. SEEDAT.** 2 Rang. 349 : 1925 Rang. 22.

—Permanent tenancy—Onus on tenant—Circumstances justifying inference of permanent tenancy. 39 G. L. J. 526.

—Pre-emption—Suit for—Vendee to prove consideration for sale.

In a suit for pre-emption the onus is on the vendee to prove that the consideration stated in the sale deed was really paid and there was an actual payment. (*Pipon, J. C.*) **AHMADJIKHAN v. GULMIR.** 75 I. C. 271.

—Promissory-note—Execution admitted—Proof of consideration.

Where the execution of a promissory note is admitted, the burden of proving absence of con-

BURDEN OF PROOF—Record of Rights.

consideration is on the party who sets it up. (*Kendall, A. J. C.*) *HARIHAR PRASAD v. MAHABIR PANDEY.* 1 O. W. N. 487 : 79 I. C. 1035 : 10 O. & A. L. R. 893 : 11 O. L. J. 689.

—Record of Rights—Entries in—Correctness—Presumptin of. See RECORD OF RIGHTS. 82 I. C. 204.

—Release deed—Binding nature of—Consideration.

In a suit to set aside a release deed on the ground it was obtained by misrepresentation, and that there was no consent, when the defendant pleads that there was consideration and that the arrangement come to was reasonable, the onus is on him to prove it. (*Das and Ross, J.J.*) *HEM SINGH v. BHAGIVAT SINGH.* 80 I. C. 67.

—Sale—Execution admitted—Consideration—No possession given—Effect.

When the execution of a sale-deed is admitted it is on the party who pleads no consideration passed, to prove it. But where the vendor remained in possession and a suit is filed by the vendee on the last day, twelve years after the sale, a Court can infer that the sale was without consideration and cast the onus on the vendee to prove payment. (*Kinkhede, A. J. C.*) *RAJARAM v. BALU.* 20 N. L. R. 154 : 79 I. C. 598 : 1924 Nag. 173.

—Railway Company—Consignment of goods—Risk-note B—Suit for damages—Willful negligence. 78 I. C. 449.

—Will—Capacity of testator—Undue influence, etc.

The onus of proving capacity to execute a will lies on the person who wants to propound the will. If a caveator impugns a will on the ground that it was obtained by undue influence, excessive persuasion or moral coercion, it lies on him to establish it. (*Mr. Ameer Ali.*) *MRTIBAI HORMUSJEE KANGA v. JAMSETJEE HORMUSJEE KANGA.* 19 L. W. 437 : 34 M. L. T. (P. C.) 4 : 26 Bom. L. R. 579 : (1924) M. W. N. 178 : 2 Mys. L. J. (B. & C.) 1 : 22 A. L. J. 98 : 80 I. C. 777 : L. R. 5 P. C. 165 : 29 C. W. N. 45 : 1924 P. C. 28 (P. C.).

—Will.

The burden of proving a will lies on those by whom it is propounded. (*Kinkaid, J.C. and Raymond, A. J. C.*) *MT. BHAGBHARI v. MT. KHATUN.* 80 I. C. 118.

BUNDLEKHAND LAND ALIENATION ACT (II OF 1903), S. 9—Decree on mortgage—Lease for a term by Collector without objection by decree-holder—Review—Rent of sir if recoverable.

Where the decree of a Civil Court had been transferred by the Civil Court to the Collector for execution, he leased the land to the mortgagee decree-holder for 4 years and an appeal by the judgment-debtor was rejected by the Commissioner. Later on the decree holder applied for review of the order of the Collector alleging that the profits on the basis of which the term of 4

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years was fixed included rent for the judgment-debtor's sir but rent was not paid. *Held*, that the transfer being by way of lease rent on sir could not be claimed and that the decree-holder's remedy was by way of appeal and not by review. (*Burn, J.M.*) *SETH BRINDABAN v. JUGAL KISHORE.* L. R. 5 A. 207 (Rev.).

BURMA ANTI-BOYCOTT ACT (V OF 1922), Ss. 3 and 9—Offence under—Sanction—Nature of. *NGA AUNG HONAN v. EMPEROR.* 25 Cr. L. J. 193 : 76 I. C. 561 : 1924 Rang. 65.

—S. 4, Cl. (a)—Prosecution for offence—Sanction of Government granted for offence of a particular kind—Prosecution for different offence—Legality of the charge.

Where the Government in their order sanction the prosecution of certain Buddhist monks for an offence under Burma Act V of 1922 and specifically refer to a particular offence, it is not competent to the prosecution to prosecute the accused in respect of an analogous offence found to have been committed by the accused. 37 Cal. 467 : 44 M. L. J. 166, 2 B. L. J. 196 : explained. (*Brown, J.*) *U. PATHADA v. EMPEROR.*

3 Bur. L. J. 178 : 1924 Rang. 371.

—S. 4—Offence under—Notice board refusing to recognize certain non-members of a society.

The accused were pongyis residing in a Kyaung in a village. At the gate of the Kyaung compound was hung a notice board on which was written in Burmese. "Those who do not belong to the Thanga Thamagyi Society are not recognized : those who are not recognized by the Mung-thanu, are not recognized." *Held*, that this was an offence under S. 4 of the Anti-Boycott Act and the petitioners were guilty of an offence under S. 4 of the Burma Act V of 1922. A notice posted on the gate of a Kyaung saying that certain persons are not recognized was in the state of feelings existing in the village a direct instigation to the villager to boycott. (*Brown, J.*) *U NANDIYA v. EMPEROR.* 3 Bar. L. J. 186 : 1924 Rang. 379 (2).

BURMA CO-OPERATIVE SOCIETIES ACT (BURMA ACT II OF 1912), S. 42 (6)—Suit by one member against another—Liquidator transferring credit due to one member to another—Jurisdiction of Civil Court.

Where the liquidator of a Co-operative Society erroneously credits money due to one member to another, a suit by the person aggrieved against the other member for recovery of the money is not taken away from the jurisdiction of the Civil Court. Such a suit is not one for an account between the members of the Co-operative Society but is merely one for money had and received. (*Duckworth, J.*) *MAUNG PO MAUNG v. MAUNG AUNG PAW.* 3 Bur. L. J. 191 : 2 Rang. 325 : 1925 Rang. 38.

BURMA COURTS ACT (IX OF 1922), Ss. 2 (f) and 7 (b)—Case transferred from District Court to Sub-divisional Court—Enlargement of Jurisdiction—Suit for accounts—Appeal—Forum.

It is open to the plaintiff in a suit for accounts to value the suit at any figure he pleases and

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once he does so, the value for the purpose of jurisdiction is automatically fixed by S. 8 of the Suits Valuation Act. The expression "value" in S. 2 (f) of the Burma Courts Act means the value of subject-matter of the suit 13 C. W. N. 493 ; 15 B. 1021 ; 43 C. 650, Ref. Where the value had been fixed by plaintiff at Rs. 3,100 the Sub-divisional Court could try the case but could not pass a decree for more than Rs. 5,000. An appellant could not alter the forum of appeal by increasing the value of his claim. (*Robinson, C. J. and Brown, J.*) *HARDAYAL v. RAM DOO.*

3 Bur. L. J. 207 : 2 Rang. 408 :
1924 Rang. 354.

BURMA FERRIES ACT (II OF 1898), Ss. 25 and 27—Scope of—Carrying goods within ferry limits. *MAUNG THA GYAW v. EMPEROR.*

76 I. C. 646 : 25 Cr. L. J. 214.

BURMA FOREST ACT (IV OF 1908)—Breach of rule—Use of hammer by servant of licensee—Contrary to rule—Liability of master. *MAUNG TWE BWA v. EMPEROR.*

76 I. C. 867 :
25 Cr. L. J. 275 : 1924 Rang. 171.

—S. 65—*Contravention.*

A contractor who removes firewood without paying royalty to the licensee commits an offence under R. 65, notwithstanding the fact that there is a dispute about the amount of royalty. (*Heald, J.*) *U THA v. MG. TUN PRU.*

3 Bur. L. J. 198 : 1924 Rang. 382.

BURMA GAMBLING ACT, Ss. 11 and 12—*Game of chance—Gonnyin—Sloping ground.*

The game of "Gonnyin" is a game of pure skill. There is of course a certain element of luck in all games but it does not follow that because the ground in the particular case happened to be somewhat sloping the game could be said to be within the purview of Ss. 11 and 12 of the Gambling Act. (*Brown, J.*) *MAUNG PAW v. EMPEROR.*

3 Bur. L. J. 166 :
1924 Rang. 378 (1).

—S. 12—Offence under—Evidence necessary to prove. *NGA SAN DUN v. EMPEROR.*

75 I. C. 357.

BURMA HABITUAL OFFENDERS RESTRICTION ACT (II OF 1919), S. 7—*Conviction under—Disobedience of order—Prosecution for disobedience under S. 18—Whether Court can go behind the conviction under S. 7 in proceedings under S. 18.*

Where an offender has been convicted under S. 7, H. O. R. Act, and an order has been made restricting his movements the validity of the conviction cannot be questioned in any subsequent proceedings launched against him for disobedience of the order under S. 18 of the same act. To hold otherwise would be entirely subversive of the principle of the finality of judicial orders. (*Carr, J.*) *ON PE v. EMPEROR.*

3 Bur. L. J. 27 : 82 I. C. 471 :
25 Cr. L. J. 1303 : 1924 Rang. 295.

—S. 10—Evidence—Policeman. *NGA PAN YIN v. EMPEROR.*

25 Cr. L. J. 245 : 76 I. C. 709 :
1924 Rang. 22.

BURMA VILLAGE ACT, S. 12.

BURMA INSOLVENCY RULES—R. 189—Scope of. *Nasee, in the matter of.*

76 I. C. 669.

BURMA LAND AND REVENUE ACT (II OF 1876), S. 69—*Waste land—Rubber trees planted—Subsequent notification declaring land to be grazing land—Order for removal of trees—Conviction.*

The applicant applied for the grant of an area of 13 acres of state waste land for rubber cultivation and the application was duly notified. In anticipation of sanction he brought a part of the land under cultivation. Two years after the application had been made the Deputy Commissioner refused the grant and ordered that steps should be taken to reserve the land as a grazing ground. The land was notified as a grazing ground in 1919. In 1920 the applicant objected to the notification on the ground that he had been actually assessed to revenue on his cultivation and had paid revenue to the Government but his objection was overruled. In Sept. 1920 when the applicant applied for a refund of the revenue paid by him, he was informed that he would be paid if he cleared the land of trees and delivered vacant possession. In 1923 the applicant was prosecuted for an offence under R. 69 of the Rules under Act II of 1876. *Held*, that the conviction was unjustifiable. The mere fact that trees which the applicant had planted before the grazing ground was ever constituted or thought of, remained on the ground after he had been ejected could not possibly constitute occupation of the grazing ground by him. (*Heald, J.*) *MAUNG PE v. EMPEROR.*

3 Bur. L. J. 73 : 82 I. C. 272 :
25 Cr. L. J. 1264 : 1924 Rang. 289.

BURMA LAWS ACT—Alienation of land leased from Government.

Where land is leased from the Government, in the absence of any provisions for forfeiture and re-entry, the transfer or legacy of the grant is not void. The transferee or legatee may perhaps be ejected by the Government but it does not follow that the transferee or legatee acquires title to the land. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) *HARIHAR PRASAD v. KESHO PRASAD.*

5 Pat. L. T. Supp. 1 : 1925 Pat. 68.

—BURMA MOTOR VEHICLE RULES, R. 26 (3)—Liability of owner.

25 Cr. L. J. 196 :
76 I. C. 564 : 1924 Rang. 63.

BURMA OPIUM LAW AMENDMENT ACT (VII OF 1909), S. 3—*Living by unlawful sale of opium—Action against.*

A person who earned his living wholly or in part by the unlawful sale of opium, within the meaning of S. 3, Burma Opium Law Amendment Act, can be proceeded against under the Habitual Offenders' Restriction Act. (*May Oung, J.*) *EMPEROR v. NGA KYAUNG.*

2 Rang. 61 : 3 Bur. L. J. 17 :
81 I. C. 546 : 25 Cr. L. J. 980 :
1924 Rang. 244.

BURMA VILLAGE ACT, S. 12—*Thugyi—Order for reaping—Disobedience.* *PAN BU v. EMPEROR.*

77 I. C. 419 : 25 Cr. L. J. 371.

BURMA VILLAGE ACT, S. 19.

— S. 19—Disobedience of order of headman—Whether an offence. 76 I. C. 1039 (2) : 25 Cr. L. J. 319 (2).

CALCUTTA HIGH COURT RULES (Appellate Side), Ch. IX, R. 25—Costs—Preparation of paper book—Appeal memorandum of objections—Common portions of the record—Apportionment of costs. 39 C. L. J. 342.

— (Original Side) Rule 36—Power of High Court to make the Rule—Order dismissing suit under Rule 36—Appellability—Letters Patent, Clause 15.

Rule 36 of Chapter X of the Original Side Rules of the Calcutta High Court is perfectly *intra vires* and the Court has jurisdiction to make such a rule both under Section 129 of the C. P. Code and Clause 37 of the Letters Patent of 1865. The provisions of Section 129 of the C. P. Code should ordinarily be read as referring to the Letters Patent of 1865 which were in force when the new Code was passed. An order of a Judge on the Original Side dismissing a suit for want of prosecution under Rule 36 of the Original Side Rules is a judgment within the meaning of Clause 15 of the Letters Patent and is appealable. (Sanderson, C. J. and Walmsley, J.) **UDOY CHAND PANNALAL v. KHETSIDAS**.

28 C. W. N. 916 : 81 I. C. 1048 : 51 Cal. 905 : 1924 Cal. 1025.

— Ch. X, R. 36—Power to vacate or modify order before it is perfected—Dismissal for default.

A Judge in the Original Side may ordinarily rehear and vacate an order made by him before it is drawn up and filed so as to become effective. This power can be exercised even with reference to orders of dismissal for default. Once the order is drawn up and completed the jurisdiction comes to an end. (Buckland, J.) **SARUPCHAND HUKUMCHAND v. MADHO RAM RAGHUNATH**.

28 C. W. N. 759 : 1925 Cal. 83.

— Ch. XXXVI, R. 14 and 32—Attorney paying money to counsel as fees—Taxation—Finality of.

Under Rule 14 of Chapter XXXVI of the Calcutta Original Side Rules, when a bill is carried on for the purpose of taxation as between party and party it should be lodged for taxation as between party and party and also as between attorney and client. Such taxation is conclusive subject to an application or reference to Court not only as between the parties to the litigation, but also as between attorney and client.

Where attorney pays over money as fees to counsel, with the consent of the client who was expressly told it might not be allowed on taxation, the amount may in a special case be allowed as between attorney and client. (Sanderson, C. J. and Richardson, J.) **ROMESH CH BASU v. JADAB CH. MITRA**.

28 C. W. N. 597 : 51 Cal. 829 : 1924 Cal. 758.

CALCUTTA IMPROVEMENT (APPEALS) ACT (XVIII OF 1911), S. 3—Decision of Improvement Tribunal—Appal, competency of.

Where the matter in dispute relates to the principle upon which prospects and possibilities of future development should be valued in deter-

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mining the compensation to be paid for land compulsorily acquired, there is an appeal to the High Court from the decision of the Calcutta Improvement Tribunal. (Mookerjee and Rankin, JJ.) **MANMATHA NATH MULLICK v. SECRETARY OF STATE**. 28 C. W. N. 461 : 1924 Cal. 574.

— Market value of land—Awards in land acquisition proceedings—If admissible in evidence.

In awarding compensation for land acquired in connection with the operation of the Calcutta Improvement Trust, it is open to the claimant to set in evidence awards in land acquisition proceedings of neighbouring lands as regards the value of the lands. (Newbould and Ghose, JJ.) **MADAN MOHAN BURMAN v. THE SECRETARY OF STATE FOR INDIA**. 78 I. C. 557.

CALCUTTA MUNICIPAL ACT (III OF 1899), Ss. 157 and 557, cl. (d)—Presumption—Applicability of—Acquisition of part of holding—Valuation of building before and after acquisition.

The provisions of S. 557 (d) of Cal. Mun. Act provide for a presumption and advantage could only be taken of that presumption when facts are proved which make that clause applicable. The presumption, however, only applies to holdings which have been acquired. It cannot be applied either to the original holding or the part of it which has not been acquired.

Having regard to the provisions of S. 151 and the legal presumption that official acts are properly performed, the annual valuation made by the municipality must apparently be equivalent to the profit which the owner of the land would obtain from it. Where there is no evidence to show that the difference in the annual value of the land was due to any other cause than the reduction of its area by acquisition of a part of it, the appellant is entitled to the benefit of that inference. (Newbould and Ghose, JJ.) **MAHENDRA NATH SRIMANI v. SECRETARY OF STATE**.

28 C. W. N. 779 : 81 I. C. 1004 : 1925 Cal. 65.

CALCUTTA POLICE ACT, S. 62-A—Carrying kiran more than nine inches long—Offence.

25 Cr. L. J. 1116 (2) : 81 I. C. 940 (2) : 1924 Cal. 231.

CALCUTTA PORT ACT (III OF 1890), Ss. 83 and 84—Erection of structures on private land below low water mark—Legality of.

Erection of structures by a private owner on his land below the high-water mark of the river Hughli and on the foreshore is an offence under S. 83 of the Calcutta Port Act. (Newbould and Ghose, JJ.) **RADHA KISSEN CHAMARIA v. EMPEROR**. 51 C. 1030.

CALCUTTA RENT ACT (III OF 1920), Ss. 2, 4 and 15—Applicability of—Furnished premises—Hire of furniture—Powers of rent controller—Standardisation of rent—Contract rate if recoverable.

A flat or house is certainly within the definition of "premises" in the Calcutta Rent Act but furniture is not. A furnished flat or house is not necessarily a distinct, concrete, indivisible thing, though it may be so treated either by statute or by agreement of parties. The contention that no

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order can be made by the Rent Controller standardising the rent of "premises" where the "premises" are comprised in furnished flat cannot be maintained. This is equally true with regard to the certification by the controller of the standard rent in cases where S. 2 (1) (i) and (2) apply and to cases where he fixes it under S. 15 (3). The Controller has no power to fix the hire of furniture. Though the controller or tribunal may make an order standardising the rent to be paid in respect of premises when such premises have been let at a sum which includes payment for the use of furniture, the parties to the agreement remain under their original liability, whatever effect such order may have as between other parties or in other circumstances. (*Buckland, J.*) ELLEN EVELINE WELLS v. JOHN DICKINSON & CO., LTD.

28 C. W. N. 774 : 81 I. C. 853 : 1924 Cal. 868.

—Ss. 2, 5 and 15—*Premises let at low rent owing to want of repairs—Standard rent—Meaning of—Rent not raised since November 1913—Effect of.*

Where the Controller of Rents has enquired into the question whether the building was let for residential purposes or for the purposes of a shop or an office, and he has come to the conclusion on ample evidence that the letting was not for the purposes of a factory, the decision must stand. The state of mind of the tenant at the time as to what he intended to try to do in future is by no means conclusive on this point. It is not for the Court to say whether or not the evidence of that witness was fully and effectively appreciated by the President and the High Court is not entitled to revise his decision even if on going through the evidence it should think that he has devoted an insufficient amount of attention or attributed an insufficient importance to one element of a question of fact. In order that it may be a question at large how much the standard rent should be, there has, first of all, to be a finding within one or other of the sub-divisions of cl. (3) of Sec. 15. It is suggested by the language of the second part of the proviso to S. 15 of the Calcutta Rent Act that where rent has not been increased since the 1st day of November 1913, as in the present case, the rent must be unduly low. That, however, is not an enactment but only a suggestion arising out of the provision dealing with the details of the subject and whether that suggestion is well founded in any particular case is purely a question of fact. The legislature has not thereon enacted a presumption which binds the hands of the Controller when considering whether the rent on the 1st November 1918, was or was not unduly low. The test throughout the Act is intended to be the actual rent, that is to say, the rent at which the premises were let in fact on the 1st day of November, 1918. Under cl. (d), the Controller has to ask himself whether that rent at that date was unduly low and the reference there is not to a hypothetical or notional state of normal repairs but to the actual condition of the premises as compared with the actual rent paid or agreed to be paid. The rent at which premises were let on 1st November 1918 cannot be treated as "unduly low" within S. 15 (3) (d) merely on the ground that the premises would have been let at a higher rent on that date if the repairs of the premises had not been pre-

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viously neglected. (*Rankin and Page, JJ.*) BASANTI CHARAN SINHA v. RAJANI MOHAN.

28 C. W. N. 467 : 1924 Cal. 629.

—S. 4 (iii)—*Standardisation of rent—Rent payable under lease—Lease before the Act—Option of renewal—Rent Controller—Decision of—Interference in revision.*

Early in January 1920 petitioner took an agreement of lease of certain premises in the City of Calcutta at a monthly rental of Rs. 400 for a period of 3 years with a covenant for renewal of the lease for a like period. Without executing the lease petitioner entered into possession and though the previous rent of the premises was Rs. 150 petitioner paid rent for same time at the rate of Rs. 400. He then applied to the Rent Controller to fix a standard rent and the latter dismissed the application holding that the lease was for a period of 6 years.

Held, that the lease was only for 3 years and the existence of an option of renewal did not make it a lease for more than 5 years within the meaning of S. 4 (iii) of the Calcutta Rent Act. The order of the Rent Controller was set aside by the High Court in revision. (*Greaves and Ghosh, JJ.*) BASANTI CHARAN SINHA v. RAJANI MOHAN CHATTERJEE.

39 C. L. J. 85.

—S. 15—*Application by tenant for standardisation of rent—Effect of ceasing to be tenant—Suit if abates—Parties.*

Where a tenant applied for standardisation of rent and before the matter came on for hearing was ejected by decree of Court, the proceedings under the Rent Act do not determine. The new tenant who has come in is not a necessary party, but can apply to be heard in fixing the rent. (*Sultrawaray and Page, JJ.*) BELLOW v. ELK.

78 I. C. 874 : 51 Cal. 577 : 29 C. W. N. 30 : 1924 Cal. 715.

—S. 18—*Applicability of Act—Premises let as brothel—Effect.*

Where a contract of tenancy of a house is void, as relating to a house let out for immoral purposes, the Calcutta Rent Act does not apply.

The mere fact that the tenanted house is occupied by prostitutes as sub-lessees does not necessarily affect the validity of the contract between the landlord and his tenant. (*Pearson and Graham, JJ.*) RADHA KANTA DAS v. PANKOJINI DEVI.

80 I. C. 682 : 51 Cal. 1005.

CANTONMENT LAND—*Army regulations—Transfer of property—Restriction on—How far binding—Position of transferees and purchasers.*

The rules set forth in Appendix IV, Volume II, of the Indian Army Regulations which regulated the conditions upon which the land in cantonments was granted prior to Cantonment Code of 1892, have no force as law, and cannot invalidate a transfer which is good under the ordinary law. When, however, a person takes a grant of Cantonment land subject to those rules he would be bound by them.

A house was situated within the Cantonment where the Army Regulations were in force under which originally a house could not be sold to a civilian at all. Later on it could be sold only with the sanction of the Commanding Officer,

CARRIER—Liability of.

Held, that it was fair to presume, in the absence of any direct evidence as to the actual terms on which the house was originally occupied, that the permission was subject to the reservation about sanction.

Each subsequent transfer made with the previous assent of the proper military authority amounted merely to the admission of a new licensee upon the conditions prevailing at the time with respect to the transfer of the houses in the Cantonment.

A transfer made without such sanction being in violation of the conditions of the license, was not binding upon the Secretary of State for India and furnished a sufficient cause of action for a declaration to that effect.

Army Regulations relied upon were held to have no statutory authority and not to have the force of law. (*Lindsay and Sulaiman, JJ.*) *RAGHUBAR DAYAL v. SECRETARY OF STATE FOR INDIA.* 46 A. 427 : L. R. 5 A. 242 :

78 I. C. 642 : 22 A. L. J. 354 : 1924 A. 415.

CARRIER—Liability of—Carriage of goods by sea—Requisition by Government—Refund of freight—Liability for—Goods carried by carrier at his expense—Right to recover compensation—Contract Act, S. 70.

The appellants, carriers by sea, agreed to carry certain cargo consigned to the respondents from London to Cochin. The total freight in question was paid as advance freight in England and the goods were put on board one of the steamers of the appellants. The ship duly arrived in the Bombay harbour, but when it arrived there, it was commandeered by the Government of India for purposes of war and consequently the ship's voyage with cargo had to be terminated there and all its cargo was discharged in that port. After some correspondence the appellant carried the cargo and delivered it to the respondent at Cochin on the payment of further freight and other charges from Bombay to Cochin. The bill of lading expressly provided for exemption from liability for omission to carry the goods on account of "the restraints of rulers". In a suit by the respondents against the appellants for recovery of the excess freight, *held*, (1) that under the terms of the bill of lading the appellants were relieved from all obligation to carry the goods from Bombay to Cochin by reason of the action of the Government in commandeering the ship and that the appellant was not under a liability to refund a proportionate share of the freight from Bombay to Cochin. Even if the appellant had no authority to carry the goods from Bombay to Cochin yet having regard to the correspondence between the parties, the appellant was entitled to compensation under S. 70 of the Contract Act for the services rendered by them for the respondent. (*Krishnan, J.*) *CLAN LINE, LTD. v. SRINIVASA PAI.* 20 L. W. 378 : 80 I. C. 892 : 1924 Mad. 835

CARRIERS ACT (III OF 1865), S. 2—"For all persons indiscriminately"—Meaning of—Carrier's liability.

So far as the words "for all persons indiscriminately" are concerned these simply mean that persons so engaged in and catering for business satisfy the demands or applications of customers

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as they come and are not at liberty to refuse business. This arises from the public employment in which they are engaged. Apart from danger arising, say, from the nature of the goods received, the carrier is by his office bound to transport the goods as clearly as if there had been a special contract which purported so to bind him, and he is answerable to the owner for safe and sound delivery. (*Lord Shaw.*) *THE INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD. v. THE DEKHARI TEA COMPANY.* 51 Cal. 304 : 26 Bom. L. R. 571 : 22 A. L. J. 173 : 19 L. W. 277 : 34 M. L. T. (P. C.) 53 : (1924) M. W. N. 158 : 51 I. A. 28 : 28 C. W. N. 302 : 80 I. C. 1038 : 1 O. W. N. 267 : 10 O. & A. L. R. 591 : L. R. 5 P. C. 121 : 1924 P. C. 40.

S. 6—Limitation to liability.

What is required to limit the liability in the case of a person who answers the definition under the Indian Carriers Act, *viz.*, of transporting for hire goods from place to place for all persons indiscriminately, is that the nature of the contract entered into must either have the limitation of the liability under the Indian Carriers Act made expressly and in writing or the facts must be such that for the contract in question the contractor was departing from his usual business and engaging in different type of business from that of common carrier.

The special circumstance that goods were to be carried by a through route does not decategorise carriers from being common carriers under the statute, nor does it relieve them from their legal obligations as such. In order to effect such a result the particular contract would require to come up to this, that *quoad* that transaction another and different type of business had been entered on. (*Lord Shaw.*) *THE INDIA GENERAL NAVIGATION AND RAILWAY CO. v. THE DEKHARI TEA COMPANY.* 51 Cal. 304 : 26 Bom. L. R. 571 : 22 A. L. J. 173 : 19 L. W. 277 : 34 M. L. T. (P. C.) 53 : (1924) M. W. N. 158 : 51 I. A. 28 : 28 C. W. N. 302 : 80 I. C. 1038 : 1 O. W. N. 267 : 10 O. & A. L. R. 591 : L. R. 5 P. C. 121 : 1924 P. C. 40.

CASTE DISABILITIES REMOVAL ACT (XXI OF 1850), S. 1—Convert or outcaste from Hindu religion—Rights of.

A convert or outcaste from Hindu religion retains his right of inheritance whether the right accrues before or after the conversion to another religion or exclusion from caste. 33 A. 356, Ref. (*Jwala Prasad and Ross, JJ.*) *RAM PARGASH SINGH v. MT. DHAN BIBI.* 3 Pat. 152 : 1924 P. H. C. 85 : 5 Pat. L. T. 203 : 78 I. C. 749 : 1924 P. 420.

CATTLE TRESPASS ACT, S. 10—Right of seizure—Extent of.

In the case of cattle which trespass on a man's land, his right to seize them exists only while they are trespassing. If they have left the land, he has no right to go to the owner and take them away to the cattle pound. (*Kinkhede, A. J. C.*) *BHAGWANTRAO v. CHAMPAT RAO.* 81 I. C. 716 : 25 Cr. L. J. 1004.

S. 21—Agent authorised to file a complaint.

CAUSE OF ACTION.

For a complaint by an agent to be valid, it is not necessary that the agent must know all about the matter from what he has seen himself and not from what he has been told by others; that is, the agent need not be a person who is capable of giving what is called direct evidence of all the circumstances and not of a part of them only. (*Hallifax, A. J. C.*) *TUKARAM v. GANPAT.*

1923 Nag. 156.

CAUSE OF ACTION—Promissory-note inadmissible—Decree on the basis of loan. 28 O. C. 361 : 1924 Oudh 249.

— Suit on a bond before due date—If lies. *MT. BIBI NASIBAN v. EKNAM NARAIN SINGH.*

1924 P. 135.

C.P. LAND REVENUE ACT, Ss. 80 and 83—*Applicability*—*Entries made contrary to order of Settlement Officer.*

When an entry is made contrary to the orders of the Settlement Officer, S. 80 does not apply and hence a suit will not be barred under S. 83. (*Baker, J. C.*) *JAGANNATH v. BABU.*

81 I. C. 1039.

— (II OF 1917), S. 80—*Settlement Puroha*—*Presumption of correctness.*

Under S. 80 there is no presumption of correctness of an entry in a Settlement *purcha*. (*Kinkhede, A. J. C.*) *TULARAM v. MT. SUMRATI.*

79 I. C. 621 : 1924 Nag. 422.

— S. 109—*Protected thekedar*—*Position of*—*Tenure impartible.*

In the case of a protected thekedar the tenure is impartible but that does not take away the ownership of any person who has a share in it nor his right to joint possession. (*Hallifax, A. J. C.*) *KHEDU SINGH v. BHAGWAN SINGH.*

79 I. C. 400 : 1924 Nag. 163.

— S. 169 (1)—*Limitation for suit.*

If the Deputy Commissioner elects to proceed under S. 169 (1) and enquires summarily into the merits of the question and passes orders thereon, his order is conclusive subject to a suit to be filed within 6 months to have the order set aside. (*Kinkhede, A. J. C.*) *LABHUA SAO v. CHATAN.*

20 N. L. R. 145 : 79 I. C. 161 : 1924 Nag. 275.

— (XVII OF 1881), S. 137—*Amendment by Act II of 1917—Remuneration of lambardar—Fixing of—Jurisdiction of Civil Court.*

A lambardar whose appointment was made before the new Act came into operation does not lose the right given to him by S. 137 to claim remuneration at the rate specified in the rules framed thereunder. The fixation of the remuneration by the Revenue Officer is not a condition precedent to his maintaining a suit for its recovery in a Civil Court. S. 220 of the new Act does not preclude the Civil Court from entertaining a claim by a lambardar for the recovery of arrears of remuneration payable to him. (*Kinkhede, A. J. C.*) *JAN RAO v. BALIRAM.*

20 N. L. R. 142.

— S. 182—*Transfer of occupancy holding—Consent of lambardar.*

C. P. MUNICIPALITIES ACT, S. 31.

Where an absolute occupancy holding is transferred without the consent of the *lambardar* he can sue to eject the transferee. (*Prideaux, A. J. C.*) *VITHAL v. WAMAN.*

82 I. C. 495.

— S. 188—*Lambardar—Rights of leasing property.*

A *lambardar* has no power to lease property already appropriated to the individual or separate use of the co-sharers. (*Kinkhede, A. J. C.*) *SHEIKH DANGA v. NARAYAN.*

7 N. L. J. 241.

— S. 188—*Powers of lambardar.*

S. 188, C. P. Land Revenue Act, while it gives authority to the *lambardar* to manage the village on behalf of the proprietors does not authorise him to sell the proprietary rights of other co-sharers without their consent.

Purchase of a part of proprietary rights by an occupancy tenant does not result in a merger. (*Baker, J. C.*) *MT. RANGABAI v. MADHORAO.*

81 I. C. 276.

— S. 203—*Abadi site—Sale by landlord—Rights of tenant.*

The occupation of an *abadi* site on which there is no building makes the occupant a licensee and when the landlord sells the same, the license is put an end to under S. 59, Easements Act. Unless an adverse title is prescribed for in the interval by the assertion of a hostile title, the vendee can recover possession. (*Baker, J. C.*) *PUNJARAJSA v. CHAGANLALSA.*

82 I. C. 182.

— (II OF 1917), S. 203—*Scope of—Abadi—Contract between proprietor and holder—Presumption.*

S. 203 merely stated the existing law and made no change in it. It does not override the provisions of the *Wajib-ul-arz* or any existing established custom. S. 203 (8) prevents that as in any case where there was no express contract an implied contract would undoubtedly have to be presumed from the existence of the custom.

S. 203 (5) speaks only of the classes of persons who hold suits on the *abadi* not of the capacity in which they hold them and still less of the capacity in which they originally acquired them. (*Hallifax, A. J. C.*) *ABDUL AZIZ KHAN v. BHAI-RODAN.*

75 I. C. 925 : 1924 Nag. 225.

— S. 220 (n)—*Jurisdiction of Revenue Court—Limitation.*

The exclusive jurisdiction of Revenue Officers is restricted by S. 220 (n) only to the matter of "the partition or union of *mahals* or parties" while the liability otherwise of such property to be partitioned can be the subject-matter of a suit for declaration in a Civil Court. (*Kinkhede, A. J. C.*) *LABHUA SAO v. CHATAN.*

20 N. L. R. 145 : 79 I. C. 161 : 1924 Nag. 275.

C. P. MUNICIPALITIES ACT (XVI OF 1903), S. 31

— *Auction sale—To be in writing.*

A sale by auction is a "contract" and under S. 31 in order to be binding it must be in writing, the word being used in Ss. 30 and 31 in its ordinary meaning. (*Baker, J. C.*) *ABDUL AZIZ KHAN v. MUNICIPAL COMMITTEE, KHANDWA.*

78 I. C. 1052 : 1924 Nag. 227.

C. P. MUNICIPALITIES ACT, S. 105.

—S. 105 (1)—*Bye-Laws under Bye-Law No. 7 and S. 139.*

Bye-Law No. 7 does not apply to the case of a refusal to vacate land held for some years and subsequently found to be *nazul*. (*Hullifax, A. J. C.*) *SHRIPATHI MARATHA v. SECRETARY, M. C., NAGPUR.* 1923 Nag. 157.

C. P. TENANCY ACT, S. 2—*Landlord—Assignee of fractional rights.*

A mortgagee of a fractional share in a village is not a "landlord" within the meaning of the Tenancy Act, and cannot sue either in ejectment or for rent. His right is only to a proportional share of the rent accruing due to his mortgagor proprietor. (*Kinkhede, A. J. C.*) *HARBAX v. LACHMAN.* 82 I. C. 201.

—S. 41—*Absolute occupancy holding—Transfer of—Consent of landlord—Right of re-entry.*

A transfer without the consent of the landlord of a part of an absolute occupancy holding, even though defined and demarcated, will not give the landlord a right of re-entry under Section 41, Tenancy Act, 1898.

Consent of the landlord to the transfer of an entire holding is *a fortiori* a consent to the transfer of any part of it.

In consenting to the mortgage by conditional sale, the landlord would have to be regarded as having consented to the sale as well as to the mortgage. If the landlord agreed that the mortgagor agreed to make the transfer (through Court), he agreed *a fortiori* to his doing it voluntarily, as transfer under compulsion is obviously something more than a voluntary transfer, not something less and consent to the latter naturally includes consent to the less. (*Hullifax, A. J. C.*) *BAPUJI v. RAM RAO.* 7 N. L. J. 99: 81 I. C. 664 : 1924 Nag. 139.

—S. 41—*Absolute occupancy holding—Transfer of a part—Gift—Delivery of possession—Right of landlords to eject.*

Where there is a transfer by gift and delivery of possession of a portion of an absolute occupancy holding by the tenant without the consent of the landlord to such transfer, the latter can eject the transferee in possession. (*Prideaux, A. J. C.*) *GANPAT v. MANOHAR.* 7 N. L. J. 105 : 78 I. C. 834, 1924 Nag. 264.

—S. 45—*Sir land—Mortgage—Sanction—Award and decree—Assignment of—Fresh sanction not necessary.*

Where sanction had been granted by the Revenue Officers for mortgaging *sir* lands and on account of disputes an arbitration took place as regards the amount due and this was made into a decree of Court, no fresh sanction is necessary for an assignment. (*Baker, O. J. C. and Prideaux, A. J. C.*) *GANPATRAO v. MT. TULSABAI.* 78 I. C. 853 : 1924 Nag. 419.

—S. 46—*Occupancy holding—Mortgage of—Validity.*

A mortgage of lands in an occupancy holding is invalid and is not binding even between the parties to the transaction. (*Baker, J. C.*) *OMRAO v. RAMDHAR.* 81 I. C. 873.

C. P. TENANCY ACT, S. 49.

—S. 46 (5)—*Tenant acquiring share of patti in occupancy land—Transfer if valid—Estoppel.*

The acquisition by a proprietor of occupancy rights and the acquisition by an occupancy tenant of proprietary rights amount to the same thing, as in either case the occupancy and proprietary rights are, after transfer combined in the same person. When the rights of a co-sharer and an occupancy or absolute occupancy tenant coalesce in the same person, he is an occupancy or absolute occupancy tenant, according to the nature of the tenancy. The mere fact that the mortgagors described the property as *khuakhasht* in the mortgage deed and the plaintiff accepted the description would not raise an estoppel inasmuch as the misrepresentation, if any, is of law and there can be no estoppel on a point of law. (*Baker, J. C.*) *MT. KESARBAI v. JAMADAR.* 82 I. C. 126 : 20 N. L. R. 162.

—Ss 49 and 50—*Sir land—Occupancy right—Transfer by widow in favour of next reversioner—Sanction if necessary.*

The transfer by a Hindu widow of occupancy rights in *sir* lands in favour of an heir can be made only with the sanction of the Revenue authorities. (*Baker, J. C.*) *MT. BHAGWATI BAI v. DADU KHUSHIRAM.* 81 I. C. 878.

—S. 60—*Applicability of—Tenancy—Creation of, by occupancy raiyat—Section not retrospective.* *MT. LAHINI v. BALA.* 77 I. C. 798.—(I OF 1920)—*Applicability of the Hindu Law of Succession.*

The Hindu Law of Succession by survivorship and as to the vesting of a son's interest by birth is not applicable to a tenancy governed by the C. P. Tenancy Act. (*Baker, J. C.*) *MT. GOWRA v. CHAITRAM.* 78 I. C. 63 : 1924 Nag. 372.

—*Tenancy of fractional share—Suit for joint possession.*

Under the C. P. Tenancy Act there can be no tenancy in respect of a fractional share of a field or fields not divided by metes and bounds and a suit for joint possession by the lessee of such a share is not maintainable. (*Prideaux, A. J. C.*) *MAROTI KUNBI v. BAPUJI.* 78 I. C. 636.

—S. 21—*Landlord and tenant—Purchase of crops—Rights of landlord—Limitation.*

The mere purchase of standing crops by a stranger would not give any cause of action to the landlord, unless it was brought to his notice that the purchaser was appropriating the crops, and some overt act would be necessary to give the landlord notice of the claim of the purchaser. There is no reason why limitation should run from the time when all the crops were cut, as appropriation must be held to have commenced from the time when the crops began to be cut. (*Baker, J. C.*) *NATHULALSA v. SHANKERLAL.* 7 N. L. J. 80 : 81 I. C. 651 (1) : 1924 Nag. 87.

—S. 49—*Foreclosure—Occupancy right in Sir—Accretions.*

A mortgagor is entitled to remain in possession as occupancy tenant of all the land that is *sir* at the time of the passing of the final decree and

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not merely of that which was *sir* at the date of the mortgage. (*Baker, O. J. C. and Halifax, A.J.C.*) *BHIMRAJA v. MOOKUNDILAL*.

76 I. C. 687 : 1924 Nag. 155.

—S 49—*Sir land—Mortgage without sanction—Foreclosure—Lambardar—Powers of disposition.*

Where *sir* lands are mortgaged without sanction to transfer cultivating rights, the mortgagor becomes on foreclosure occupancy tenant of the *sir* lands. The *lambardar* after surrender has no power over the same. (*Kotwal, A. J. C.*) *NANDKISHORE v. LALSINGH*.

78 I. C. 730 : 1924 Nag. 381.

—S. 89—*Division among proprietors—Effect.*

Where the proprietors of a village decide to divide it and agree thereafter to collect rents separately from tenants in the lands allotted, they become landlords of the particular lots allotted and can make a valid surrender thereof. (*Baker, J. C.*) *KHETSINGH v. MANMODSINGH*.

78 I. C. 134 : 1924 Nag. 383.

—S. 89—*Surrender of holding by father—Sons accepted as tenants by landlord—Validity.*

Where an occupancy co-tenant surrenders his portion of the holding and the landlord recognised his sons as tenants, the arrangement is valid. (*Baker, J.C.*) *SHER SINGH v. KALU SINGH*.

80 I. C. 734.

—S. 97—*Trees—If can be attached.*

77 I. C. 620 : 1924 Nag. 42.

—Sch. II, Art. I—*Applicability—Part of holding.*

There is no reason for holding that Art. I of Sch. II refers only to an entire holding and not a part of a holding. It applies to cases of disportion of either part. (*Halifax, A. J.C.*) *BUDGA v. CHAIN*.

78 I. C. 214 (2).

—Sch. II, Art. 1—*Applicability—No possession within 2 years of suit.*

Where in a suit in ejectment regarding an occupancy holding the plaintiff admits he had no possession within two years previous to the suit, his suit is barred under Art. I, Sch. II. (*Baker, J. C.*) *RAGHUNATH SINGH v. GABDOO*.

80 I. C. 355 (2).

—Sch. II, Para. 1—*"By any person"—If include trespasser.*

The words "by any person" in Sch. II, Para. 1, are not confined to a person claiming under the landlord and are wide enough to include a trespasser. (*Baker, J. C.*) *MEGHRAJ v. RAMGOPAL*.

78 I. C. 743 : 20 N. L. R. 103 : 1924 Nag. 249.

CHAMPERTY—Law in India—Vendee's suit to recover possession—Parties.

In India there is no law of champerty and indigent persons can make over property to which they lay claim to some other person who is prepared to pay the costs of litigation. If after such an arrangement the vendor backs out, the vendee can only sue making the vendor a defendant. (*Pullan, A. J. C.*) *INDARPAL SINGH v. RAMESHWAR BAKSH SINGH*.

80 I. C. 285.

CHOTA NAGPUR ENCUMBERED ESTATES ACT, S. 17.

CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920), S. 3—*Applicability—Proper parties.*

The charitable and Religious Trusts Act does not cease to apply to a case where the trustee has parted with the entire trust property.

Persons who claim adversely to the trust and who are not liable under S. 3 of the Act are not proper parties to an application for directing the trustee to produce the accounts. (*Suhrawardy, J.*) *SYED REZA ALI v. KAZI NURUDDIN AHMED*.

78 I. C. 174

—Ss. 3 and 5 (1)—*Application under—No notice to all the trustees—Notice served on three trustees only—Legality of order.*

An application was made by a worshipper at a Hindu temple under S. 3 of Act XIV of 1920 to direct the trustees of the temple to furnish the petition through the Court with particulars of the value and condition of the jewels, vessels and other articles belonging to the deity, to direct the accounts of the temple for the last three years to be examined and audited, to order the respondent to produce all documents relating to the temple and its properties and to appoint a commissioner to prepare an inventory of all jewels, vessels, etc., belonging to the deity. To this application three respondents were made parties and it was stated that they were the chief archakas. It was found however that there were 21 archakas of the temple who were all in the position of trustees of the temple and that the temple was managed by the vote of the majority of this body of 21. *Held*, that the order of the lower court granting the prayer of the applicant after notice to three of the trustees and without notice to all the trustees was illegal and should be set aside. (*Krishnan, J.*) *SRINIVASA AYYANGAR v. ANNATHANAM AYYAR*. (1924) M. W. N. 515: 82 I. C. 733 : 35 M. L. T. (H.C.) 51.

CHIT FUND—If a lottery—Discontinuance in the middle—Subscriber if entitled to sue for refund of paid up subscriptions—Severance of legal from illegal part of the contract. See CONTRACT ACT, ss 23 AND 65.

47 M. L. J. 876.

—Penalty.

Subscriptions payable monthly—Provision for payment of whole of the arrears in case of default in payment of instalment. See CONTRACT ACT, S. 74.

47 M. L. J. 833.

CHOTA NAGPUR ENCUMBERED ESTATES ACT. (IV OF 1876), Ss. 3, 7 and 18—Manager—Position of—Lease not agreed to by manager—Effect.

An agreement to lease which is not assented to by the manager of an estate cannot be enforced in a Court of Law, though other officers in the estate have negotiated the same.

Position of manager under the Act considered. (*Lord Shaw.*) *SETH HUKUM CHAND v. RAN BAHADUR SINGH*.

3 Pat. 625 :

34 M. L. T. (P.C.) 120 : 80 I. C. 841 :

21 L. W. 1 : L. R. 5 (P. C.) 190 : 5 Pat. L. T. 639 :

1924 P. C. 156 : 47 M. L. J. 562.

—Ss. 17 and 18—*Contract made with Bengal Government does not bind the estate—Powers of manager under the Act discussed.*

CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT, S. 6.

Under the Chota-Nagpur Encumbered Estates Act the owner is disabled not only from acts of management but from mortgaging, charging, leasing or alienating the property, whereas on the other hand the Manager is vested and alone vested with such powers. Therefore a contract for sale for part of such estate entered into with Lieutenant-Governor of Bengal is neither binding on the Manager nor on the Estate. (*Lord Shah.*)
SETH HUKAM CHAND v. RAJA RAM BAHADUR SINGH. 8 Pat. 625 : 34 M. L. T. (P.C.) 120 : 80 I. C. 841 : 21 L. W. 1 : 5 Pat. L. T. 639 : L. R. 5 P.C. 190 : 1924 P. C. 156 : 47 M. L. J. 562 (P. C.).

CHOTA NAGPUR LANDLORD AND TENANT PRO- CEDURE ACT (I OF 1879), S. 6—Occupancy rights —Creation of.

Quære : Whether Act I of 1879 which relates to procedure could create substantive rights of occupancy. (*Ross and Sen, JJ.*) *LAL SINGH v. KRISHTO KHUTYA.* 1924 P. H. C. C. 304.

CHOTA NAGPUR TENANCY ACT (IV OF 1908)— Applicability of—Execution sale—Land valuation in sale proclamation—Effect of.

Under the Act there is no provision requiring the court to assess the value of the property sought to be sold. There are no rules which require the parties to assess the value of the property sought to be sold. But where a low value is given by the decree-holder in the sale proclamation with the result that the property which was of very great value has been sold for an insignificant sum of money, there is a material irregularity which vitiates the sale. 20 A, 412 Relied on. (*Das and Ross, JJ.*) *MAHARAJ KUMAR JAGAT MOHAN NATH SAHJ DEO v. JAIPAL SINGH.*

3 Pat. 325 : 5 Pat. L. T. 88 : 1924 P. 524 (1).

—S. 14—Resumption, Successor—Meaning of.

The word "successor" in Sec. 14 of the Act means not only a successor *de jure* but also a successor *de facto*. "Resumption" means an entry upon the land. Resumption is nothing more than an unequivocal demand for possession so as to operate as a final election by the landlord to re-enter. (*Das and Ross, JJ.*) *KAMAKSHAYA NARAIN SINGH v. SURAJ NATH MISRA.*

3 Pat. 320 : 5 Pat. L. T. 85 : 1924 P. H. C. C. 60 : 2 Pat. L. R. 69 : 78 I. C. 474 : 1924 P. 449.

—S. 26—Scope of.

S. 26 of Act VI of 1908 does not invalidate agreements which were valid at their inception, but was intended to validate agreements in special cases out of such agreements as would otherwise have been invalid owing to the provisions of S. 21 of Chota Nagpur Landlord and Tenant Procedure Act. (*Ross and Sen, JJ.*) *BHOLA NATH MAJHI v. SHIVA PRASAD SINHA.*

82 I. C. 988 : 1924 P. H. C. C. 307.

—S. 46—Surrender of holding—Validity.

A surrender by a tenant of his holding to the landlord for valuable consideration is valid and is not contrary to S. 46 of the Chota Nagpur Tenancy Act. (*Bucknill, J.*) *BARJO SANTHAL v. FAKIR SANTHAL.*

75 I. C. 601 : 1924 P. 793 (2).

CHOTA NAGPUR TENANCY ACT, S. 177.

—S. 72—Surrender by raiyat—Effect on prior mortgages—B. T. Act, S. 86—Difference in the land.

The provisions of S. 72 are similar to those contained in S. 86 of the Bengal Tenancy Act, with this difference that the provisions contained in Cl. (6) of the Bengal Tenancy Act do not find place in S. 72.

S. 72 leaves the power of surrender conferred by the section unhampered by the existence of any encumbrances over the property.

Consequently in spite of a prior sale or mortgage by a raiyat he is free to exercise his right of surrender of the holding in favour of the landlord, for under Cl. (2) of S. 46 no transfer by a raiyat of his right in his holding or any portion thereof is binding on the landlord unless it is made with his consent in writing.

The landlord is the owner of the property, and raiyat's interests is carved out of it only for limited purposes and the right of reversion which the landlord undoubtedly has in the land cannot be affected except by express statutory provision. That reversion is recognised in the rights which accrue to the landlord by an abandonment of the holding or by a voluntary surrender by the tenant who willingly yields up to him the limited right which was carved out. There it is immaterial that the transfer is for valuable consideration and the surrender for no consideration at all. No equitable considerations would arise in favour of a transferee of a non-transferable holding who takes knowing the limited interest of the tenant and his unquestionable right under Ss. 72 and 83 of surrender and abandonment. There is no reason why the landlord should be prejudiced unless he is a party to any fraud dishonestly committed by the raiyat in surrendering the holding. (*Jwala Prasad and Ross, JJ.*) *RAM URAON v. DOMAN KALAL.* 1924 P. H. C. C. 117.

—S. 74—Scope of—If retrospective.

S. 74 has no retrospective effect as it affects substantive rights of parties. Hence agreements prior to the date of the Act coming into force are not affected by the section. (*Ross and Sen, JJ.*) *BHOLA NATH MAJHI v. SHIVA PRASAD SINHA.*

82 I. C. 988 : 1924 P. H. C. C. 307.

—S. 77—Possession for 10 years—Occu- pancy rights.

A person in possession of *ghatwali* lands for 10 years prior to the passing of Act VI of 1908 does not acquire occupancy rights, as S. 77 prevents such acquisition. (*Ross and Sen, JJ.*) *LAL SINGH BHUMIJ v. KRISHTO KHUTYA.*

1924 P. H. C. C. 304.

—S. 139—Suit to eject non-occupancy ryots holding over—Civil Courts—Juris- diction. *MT. JAGESHWAR KUER v. TILAKDARI SINGH.*

77 I. C. 587 : 1924 P. 267.

—S. 177—Suit for rent—Payment to third person—Plea of—Addition of parties.

The law has been made more stringent than before by the amendment of S. 177. That section lays down that when the claim of a third person to receive rent is pleaded, that third person should be made a party to the suit and the plea

CHOTA NAGPUR TENANCY ACT, S. 177.

decided in his presence. (*Jwala Prasad, J.*)
PAGHALAN GORAIN v. CHOTU KUNJA.

2 Pat. L. R. 24 : 79 J. C. 601 : 5 P. L. 614 :
 1924 P. 522

—Ss. 177, 218 and 224—*Suit for rent—Valuation at less than one hundred rupees—Title to land—Intervener made a party.*

A suit for rent for less than Rs. 100 was filed before a Deputy Collector. The defendants denied plaintiff's title and stated that they paid rents to a third party. Under S. 177 the third party was made a party intervenor who claimed that he was entitled to claim rent and had received rents from defendants and right to the title to the land was gone into. *Held*, that an appeal lay to the Judicial Commissioner and not to the Deputy Commissioner from the decision of the Deputy Collector under Ss. 218 and 224. Where proceedings are taken under S. 177 the Court will not come to a decision as to the respective titles of parties to the suit. But if a question of title or interest in land has been determined by the Deputy Collector in such a proceeding an appeal will lie to the Judicial Commissioner and not to the Deputy Commissioner. (*Adami, J.*) *JANKI CHOWDHURY v. SAMBODH KURMI.* 1924 P. H. C. C. 278 : 1924 P. 807.

—S. 181—*Rent decree—Execution—Limitation.*

Under S. 181 the period of limitation for the execution of a rent decree runs from the date when the decree is signed. (*Dass and Ross, JJ.*) *BISHUN LAL v. BINDESHWARI SAHU.* 2 Pat. L. R. 7 : 78 I. C. 224 (1) : 5 Pat. L. T. 374 : 1924 P. 712.

—S. 212—*Rent decree—Sale of holding—Purchaser of portion of holding—Deposit of decree amount—Withdrawal by landlord—Effect of.*

Under S. 212 a purchaser of a part of a holding deposited the whole of the decretal amount due to a landlord who had brought the holding to sale in execution of a rent decree. The landlord withdrew the amount but subsequently refused to recognise the person who deposited the amount as co-tenant of the holding. *Held* that having accepted the money, it was no longer open to him to say that he did not recognise the part purchaser as a co-tenant of the holding. (*Ross and Sen, JJ.*) *RAJENDRA NARAYAN SINGH DEO v. MAHESH CHANDRA CHATERJI.* 1924 P. H. C. C. 281 : 1924 P. 669.

CIVIL PROCEDURE CODE (V OF 1908)—*Whether Judge vested with power to determine issue of law first—O. 14 and R. 2, O. 15, R. 3—Scope of.*

The Code of Civil Procedure has vested the judge with power to determine whether issues of law should be tried first. He must decide himself whether circumstances exist in each particular case calling for the exercise of that power. Both O. 14, R. 2 and O. 15, R. 3 give ample power to the Judge to try issue of law first. The power under O. 14, R. 2 can be exercised at the issue stage but O. 15, R. 3 gives power to the judge to proceed to determine issues of law at a stage subsequent to the issue stage. The subordinate Courts should not try piecemeal but it is a matter of judicial discretion. (*Das and Adami, JJ.*) *LACHMI NARAIN v. RUP NARAIN.* 2 Pat. L. R. (Civil) 303.

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C. P. CODE (1908), S. 2.

—Ss. 2, 12 and 152—*Decree—Order substituting names—Appeal—Amendment.*

Pending an appeal the appellant had made an application for substitution of names. But the commissioner disposed of the appeal without passing any order on the application. Subsequently on the matter being brought to his notice he ordered that the decree may be corrected without prejudice to any objection which might be made to the application. *Held*, that the order of the Commissioner was not a decree within S. 2 (2), C. P. Code, and was not therefore appealable to the Board of Revenue (*Burn, J. M.*) *SURAJ MAL v. KEWAL.* L. R. 5 A. 269 (Rev.)

—S. 2 (2) and C. 43, R. 1 (k)—*Decree—Abatement—Legal representative—Plaintiff deceased—Petitions by several persons to be brought on record as legal representatives—Grant of one, and rejection of others—Appeal from orders of rejection of latter—Maintainability—Effect—Will set up by person whose petition is rejected—Genuineness of, opinion on—Not to be expressed.*

Several persons, including the appellant, applied to be brought on record as the legal representatives of a deceased plaintiff. The application of one of them was granted, appellant's application being dismissed as out of time. *Held*, that no appeal lay from the order rejecting applicant's application. Where a legal representative is brought on record; there is no abatement within the meaning of O. 43, R. 1 (k) of the Code, nor is there any decree within the definition of S. 2, Cl. (2) thereof.

Held, that the Court below erred in pronouncing upon the genuineness of the will under which the appellant claimed. (*Spencer and Kumara-swami, Sastri, JJ.*) *KASIBHOTLA VENKATA SESHAMMA v. GUNNESWARA RAO.* (1924) M. W. N. 58 : 79 I. C. 860 : 1924 Mad. 622 : 46 M. L. J. 129.

—S. 2 (2)—*Decree—Decision on cardinal issue in the case—Remand—Appeal.*

When one issue is settled and the case is remanded to a lower court for the determination of another issue, the order is a decree and is appealable. (*Fremantle, S. M.*) *UMRAI v. RAJA DURGA NARAIN SINGH.* L. R. 5 A. 156 (Rev.)

—S. 2 (2)—*Order when a decree.*

Where both the claimants are not parties to the suit, an order rejecting the application of one of them is not a decree and is not appealable. 43 M. 812; 39 M.L.J. 218, dist. 39 M. 488; 28 M.L.J. 491, followed. (*Jackson, J.*) *RUCKMANI AMMAL v. VEERASAMI AIYANGAR.*

47 M. L. J. 3 : 35 M. L. T. (H. C.) 82 : 8 I. C. 942 : 1924 M. W. N. 768 : 1924 Mad. 813.

—S. 2 (2)—*Decree—Decision in default of plaintiff—Appeal—Oudh Rent Act (XXII of 1886)*

Whenever any Court delivers a decision default of the plaintiff that decision is an order and not a decree within the meaning of S. 2 (2) C. P. Code. Where the objection of a judgment debtor in certain execution proceedings is dismissed for default no appeal is allowed from such order either under the C. P. Code or under the Oudh Rent Act. (*Dalal, J. C.*) *Wazir Hasan, A. J. C.* MAHOMED ZAKI ULLAH v. MT. GULKANDI.

1 O. W. N. 854 : 1 O & A. L. R. 1207.

C. P. CODE (1908), S. 2.

—S. 2 (3)—*Attaching creditor—If a decree holder.*

An attaching creditor is not a decree-holder within the meaning of S. 2 (3), C. P. Code (*Mukerji, J.*) RAM BADAN SINGH v. CHAUDHRI RAM PARGASH SINGH. 80 I. C. 947; L. R. 5 A. 629.

—Ss. 2 (2) and 144—*Decree—Order in restitution proceedings—Attaching creditor of decree—Set off—C. P. Code. S. 49 and O. 21, R. 18.*

The determination of any question under S. 144, C. P. Code comes within the definition of a 'decree' under S. 2 of the C. P. Code. There is no distinction between a decree in a suit and a decree in a proceeding under S. 144, C. P. Code. Attaching decree holders of a decree are assignees within the meaning of O. 21, R. 18, C. P. C. and they are subject to the same equities as the decree-holders under S. 49 C. P. Code. Even if the case does not come within the purview of O. 21, R. 18, C. P. C. the court is not powerless to direct a set-off under its inherent powers (*Chatterjee and Panlon, JJ.*) ADWAITA CHANDRA SAHA v. THE CHITTAGONG CO., LTD. 28 C. W. N. 988.

—S. 2 (11)—*Legal representative—Scope of definition—Decree against intermeddler—Effect on real heir.*

An intermeddler is included in the definition of legal representative but he is not the representative so far as succession to the property of the deceased is concerned. The definition is only for purpose of procedure and it cannot alter rules of substantive law—The mere fact an intermeddler is joined as a party to a suit will not make the decree therein binding on the real heir who is not party thereto. (*Gokul Prasad, J.*) LALSA RAI v. Udit Rai. 1924 All. 717.

—S. 2 (11)—*Legal representative of defendant—Pleas open.*

A person who is added as a legal representative of a deceased defendant cannot and need not set up in defence pleas which are open to him only personally. (*Krishnan and Coleridge, JJ.*) GUNNAM AKKAMMA v. NUNE VENKATAPATHI. 1925 Mad. 59.

—S. 2 (11)—*Legal representative—Decree against manager of a shrine—Execution against successor.*

Where the plaintiff obtained a decree against a person whom he had appointed to manage a shrine, for possession of the property and the plaintiff after the death of the judgment-debtor sought to execute the decree against another person who claimed to have been appointed manager of the shrine. *Held* that the latter was not a legal representative of the deceased within S. 2 (11), C. P. Code and that the decree could not be executed against him. (*Shadi Lal, C. J. and Martineau JJ.*) RAM SINGH v. WARYAM SINGH. 5 Lah. L. J. 459; 77 I. C. 585; 1924 Lah. 251.

—S. 2 (11)—*Major—Execution proceedings—If legal representative.*

A major who is entitled to appear to the exclusion of the guardian appointed during his minority is not within the definition of legal representa-

C. P. CODE (1908), S. 2.

tive under S. 2, C. P. Code. (*Oldfield and Deva' doss, JJ.*) NAGAPPA CHETTY v. MUTHURAMAN CHETTY. 78 I. C. 12.

—S. 2 (11)—*Legal representative—Deceased defendant—One heir brought on record—If sufficient.* 26 Bom. L. R. 375.

—S. 2 (11)—*Person in possession of estate—Execution against.* 1924 Cal. 362.

—S. 2 (12)—*Decree for mesne profits—Subsequent interest—Liability to pay—Decree against manager of temple—Liability of temple properties.*

In a suit by the plaintiff for partition and recovery of mesne profits against an idol represented by its manager a preliminary decree for mesne profits was passed against the said idol. Subsequently a final decree followed and the question arose in execution as regards the liability to pay interest and the liability of the endowed properties. *Held* (1) that mesne profits carried interest from the date of the preliminary decree and that they were recoverable from the endowed properties. 35 Cal. 691; 2 I. A. 145 referred to. (*Mookerji and Dalal, JJ.*) SRI GANESHI MAHARAJA v. LALTA PRASAD. 22 A. L. J. 768; 82 I. C. 312; L. R. 5 A. 583; 1924 All. 801.

—S. 2 (12)—*Mesne profits—Calculation of—Cultivating profit—Collection charges.*

Where the person dispossessed by a trespasser is himself, ordinarily, a cultivator of the land in dispute, the profits to which he is entitled are those that the wrongful holder might have obtained by cultivation with due diligence. It is not open to a trespasser to dispossess and actually cultivate and then to sublet the land trespassed upon to some third person and claim to compensate the rightful occupant only to the extent of what he may have obtained by the sub-letting. Ordinarily in calculating the amount of profits, payment made by the defendants for rent, revenue or cesses, must be deducted but the court should not allow to the defendants the expenses of collecting the profits, unless they entered on the property in the exercise of a *bonafide* claim of right. (*Kinkhede, A. J. C.*) UMASHANKAR v. PANDIT RAMLAL. 20 N. L. R. 112; 1924 Nag. 427.

—S. 2 (12) and O. 20, R. 12—*Mesne profits—Liability for—Wrongful possession—Land under attachment—Non liability for mesne profits—Point if can be raised on second appeal.*

Wrongful possession by the defendant is the very essence of a claim for mesne profits and the very foundation of a decree therefor. It is impossible to hold that during the time the lands remained under attachment by virtue of an order under S. 146, Cr. P. C., the defendants who had no title to the lands, remained in possession. Consequently the defendants would not be liable for mesne profits for that period. 24 C. 413; 5 C. W. N. 728; 21 W. R. 269; 10 C. 785 Ref. Where no decree for mesne profits had been drawn up under O. 20, R. 12 at the time when the defendant filed his cross appeal before the lower appellate court and the objection as to mesne profits was not taken it can be allowed to be raised on

C. P. CODE (1908), S. 2.

second appeal. (*Walmsley and Mukerji, J.J.*)
 CHHAGANMULL AGARWALLA v. AMANATULLA
 MAHOMED. 39 C. L. J. 447 : 51 Cal. 853 :
 1924 Cal. 1010.

—S. 2 (12)—*Mesne profits—Nature of—Basis of calculation—Burden of proof—Lands in the possession and cultivation of defendant—Allegation of cultivation at a loss for successive seasons—What plaintiff should prove.*

When mesne profits are claimed from a person the onus of proving what profits might with diligence have been received in any year lies upon the party claiming mesne profits but the onus of proving what profits the person in wrongful possession actually received lies on the person in possession. Mesne profits are in the nature of compensation or damages. In any case the proper measure to be awarded is to be determined by what the party in possession actually receives or recovers except in cases where it is or can be shown that what is so received or recovered falls below what would have been so recovered or received with due diligence. Where in a suit for mesne profits it was found that the defendant was directly in possession during nine consecutive seasons and suffered considerable loss throughout he cannot be said to be dealing with the lands with due diligence; for, if the lands had been let out they would have fetched some rent, however low it may be. In such a case the person claiming mesne profits must let in some affirmative evidence with regard to the amount for which they might have been reasonably let out. In the absence of such evidence, mesne profits cannot be ascertained. (*Spencer and Srinivasa Iyengar, J.J.*) MUHAMMAD ABDUL GAFFUR ROWTHER v. MUHAMMAD SAMSUDDIN ROWTHER. 47 M. L. J. 730.

—Ss. 2 (12), 141 and O. 18, R. 1 and O. 26, R. 10—*Mesne profits—Basis of calculation—Burden of proof—Enquiry by Commissioner—Local inspection and report by Commissioner—Crop cutting experiments—Value of.*

On an application by the defendant for recovery of mesne profits for the period during which he had been dispossessed from his land under the decree of the first court since reversed on appeal, the Court appointed a commissioner to ascertain the amount of mesne profits due from the plaintiff. The Commissioner, in the course of his enquiry directed the plaintiff to adduce her evidence in the first instance. The plaintiff refused to do so, and the defendant let in his evidence and closed his case; thereupon the plaintiff applied to the Commissioner to allow her to adduce her evidence; the Commissioner refused her request and submitted his report based on his local inspection and crop-cutting experiments conducted by him and, on information obtained from persons whose evidence was not recorded by him. *Held*, that the procedure of the Commissioner was irregular and his report could not be accepted. The defendant was first bound to let in evidence to prove the quantum of profits alleged to have been received by the plaintiff and the plaintiff was entitled thereafter to let in her evidence under O. 18, R. 1, C. P. Code. Though the burden of proving the mesne profits actually

C. P. CODE (1908), S. 9.

received lay on plaintiff under S. 106 of the Evidence Act, yet as regards the amount of mesne profits which might with ordinary diligence have been received by the person in occupation, the onus lay on the person claiming it (*i.e.*) the defendant. Though the Commissioner could base his report on local inspection and crop cutting experiments conducted by him he could not base it on information obtained by him from persons whose evidence he had not recorded. Such evidence not being legally admissible the Court could not act upon it. (*Spencer and Venkatasubba Rao, J.J.*) KAMAKKA v. NEGASAM. 47 M. 800.

—S. 9—*Arbitration—Remedy of aggrieved party—Right to file objection—If bars Civil suit. See ARBITRATION.* 80 I. C. 969.

—S. 9—*Caste usage—Right of parties—Jurisdiction of Civil Courts.*

A claim by five of the members of a caste that they are entitled to use the *Wadi* and the vessels is one of a civil nature and Courts can adjudicate on the question; where the right is once found, the mode of exercise of the right is one for the caste to determine. (*Macleod, C. J. and Crump, J.*) CHUNILAL GULABDAS v. CHHOTALAL PRANJIVAN. 1924 Bom. 522.

—S. 9—*Claim to worship and receive offerings—If of a civil nature.*

A suit to restrain defendants from obstructing the plaintiff from worshipping a deity and to receive the voluntary offerings made is one of a civil nature and is maintainable. (*Shah, A. C. J. and Coyajee, J.*) LAXMAN BABALING GURAV v. VISHRAM MAHADEV RANE. 76 I. C. 629.

—S. 9—*Jurisdiction of Civil Court—Suit by one director against another in a Company—Injunction.*

A suit by one director against the other directors of a limited Company for an injunction restraining the latter from preventing him from acting as such is maintainable in a Civil Court. (*Newbould and Ghose, J.J.*) SARAT CHANDRA CHAKRAVARTHY v. TARAK CHANDRA CHATTERJI. 51 Cal. 916 : 28 C. W. N. 803 : 82 I. C. 405 : 1924 Cal. 932.

—S. 9—*Liability to pay Government Revenue—Suit for fixing—If of a civil nature.* 78 I. C. 188.

—S. 9—*Suit of a Civil nature—Ghats or Chaukis in a sacred river—Fees paid for services rendered at—Suit for share—Maintainability.*

Chaukis are well-understood spots on the banks of a sacred river where one or other of the members of the family of priests used to sit, receive his clients and help them in the observance of their religious ceremonies connected with the river such as bathing, etc. The gains made by the performance of services at these spots are property in law and a suit for a share in the business resulting in such gains is maintainable as a claim of a Civil nature within the meaning of S. 9 of the C. P. Code. 18 A.L.J. 679; 21 A. L. J. 358; 43 A. 581 Ref. (*Wazir Hasan and Neave, A. J. C.*) MT. RACHHPALI v. MT. CHANDRESAR. 27 O. C. 114 : 10 O. L. J. 595 : 78 I. C. 256 : 1924 Oudh 252.

C. P. CODE (1908), S. 10.

S. 10—Appeal—If a continuation of suit—Matter in issue—Meaning of.

The object of S. 10 is to prevent courts of concurrent jurisdiction from trying 2 parallel suits in respect of the same matter in issue. The expression "matter in issue" has reference to the entire subject-matter in controversy and every matter in dispute should be in issue in both the suits. An appeal is a continuation of the suit for the purposes of the section. (*Raymond, A. J. C.*) JAINARAYAN BABULAL v. NATHOOMAL MANOHARLAL. 82 I. C. 539.

Ss. 10, 11, 47 and O. 34, Rr. 7 and 8—Mortgage—Decree for redemption—Omission to execute—Second suit for redemption on the same mortgage, whether maintainable—Res judicata—Remedy to the second plaintiff.

Where a suit for redemption has been instituted by one of the mortgagors for the redemption of the entire property and a decree has been passed therein but not executed a subsequent suit by the other mortgagor for redemption of the same mortgage is barred by the rule of *res judicata*. 43 B. 334 dissented from. 5 O. L. J. 43 referred to.

A suit for redemption of a mortgage by a co-mortgagor must be deemed to be a suit brought in a representative character. 1 O. W. N. 640 referred to.

Where the decree for redemption passed is not executed, the suit must be taken as pending and S. 10, C. P. Code would be a bar to proceeding with a second suit. The plaintiff in the second suit however can proceed with the previous suit where it was left off. (*Dalai, J. C. and Wazir Hasan, A. J. C.*) NARAIN v. GAYA DEEN. 1 O. W. N. 910.

S. 10—Scope of.

S. 10 does not bar the institution of a suit but only the trial of it under certain circumstances. A Court cannot dismiss a suit under the section but only postpone its trial. Nor does the section dispense with the necessity of instituting suits or enable a Court to hold that a suit is premature. (*Jwala Prasad and Ross, JJ.*) MT. DULHIN SONA KUAR v. MT. BIBI ALE FATIMA. 77 I. C. 157.

S. 10—Stay of suits—Connected suits—Appeal.**S. 11—Applicability—Findings on several issues—Decision how far *res judicata*—Exhaustive.**

The principle which prevents the same case from being twice litigated is of general application and is not limited by the specific words of the C. P. Code. It is a well settled rule that an estoppel is not confined to the judgment but extends to all facts involved in it as necessary steps or ground work; in other words, a judgment operates by way of estoppel as regards all findings which are essential to sustain the judgment, though not as regards all the findings which did not form the basis of the decision or were in conflict therewith. 48 I. A. 49; 12 B. L. R. 391; 6 C. L. J. 621; 11 C. L. J. 461; 28 M. 338 Rel. on. (*Mookerjee and Sukrawardy, JJ.*) DWIJENDRA NARAYAN ROY v. JAGES CHANDRA DE. 39 C. L. J. 40; 79 I. C. 520; 1924 Cal. 600.

C. P. CODE (1908), S. 11.

S. 11—Applicability—Execution proceedings.

S. 11, C. P. Code though not expressly made applicable to execution proceedings, the principle underlying the same applies and if a point has been directly or by implication decided in any particular execution proceeding, the point cannot be raised subsequently. (*Mookerjee and Dalal, JJ.*) DWARKA DAS v. MUHAMMAD ASHFA-ULLAH. L. R. 5 A. 744; 80 I. C. 722; 1925 All. 117; 22 A. L. J. 928.

S. 11—Applicability—Execution proceedings—Failure to object to executability of decree at earlier stage.

On the analogy of S. 11, when a judgment-debtor fails to set up the plea that the decree was not executable at one stage of an execution proceeding, he is thereafter precluded from setting it up at a subsequent stage of the case. (*Kinkhede, A. J. C.*) KHAIKULLA v. SETH DHANRUPMAL. 80 I. C. 905.

S. 11—If exhaustive—Status of wife—If decision between husband and wife binding on father.

S. 11, C. P. Code, is not exhaustive. A decision in a suit between a husband and wife as to whether they were divorced or not cannot be re-agitated in a suit by the father against one of them. (*Mukerji, J.*) MT. KHARON BIBI v. NAZIR. 1924 A. 815.

S. 11—Parties—Co-defendants—Previous suit for ejectment—No contest between defendants—Validity of partition not questioned—Decision whether *res judicata*.**S. 11—Parties and representatives—claim suit—Sale declared nominal—Effect.**

Plff. purchased certain properties from the first defendant in 1915 and later on some of the properties were attached in execution of a decree against the first defendant held by the second defendant. Plaintiff put in a claim petition which having been dismissed, he brought a suit against the first and second defendants for a declaration of his title. The second defendant alone contested the suit which was dismissed on the ground that the sale by the first defendant in favour of the plaintiff was nominal and sham. The first defendant sold some of the items comprised in the sale to the plaintiff in favour of the third defendant. Thereupon the plaintiff brought a suit against the third defendant for declaration of his title under the original sa'e-deed. Held that the suit was barred by *res judicata*. (*Phillips and Odgers, JJ.*) CHINNA KOZHANDAI NAINAR v. ANANTA VIJAYA NAINAR. 20 L. W. 979.

S. 11—Parties and representatives—Prior suit against four persons—Plea that some other persons were also joint tenants—Dismissal for default—Suit against all persons subsequently—Maintainability of.

The plaintiffs sued to eject six defendants describing themselves as occupancy tenants, and defendants holding without consent and without payment of rent. The defendants claimed that they were occupancy tenants jointly with the

C. P. CODE (1908), S. 11.

plaintiffs and they pleaded *res judicata* arising from a suit previously decided. In 1921 plaintiffs had brought a similar case against four of the defendants who made similar objections and added that the other two persons now impleaded were also joint in the cultivation. After some evidence had been recorded plaintiffs absented themselves and the suit was dismissed for default. *Held* that the suit did not constitute *res judicata* as the defendants in the subsequent suit were not the same as in the previous case. (*Fremantle, S. M. and Burn, J. M.*) *HARGU LAL v. MUNSHI*. L.R. 5 A. 329 (Rev.).

———S. 11—Directly and substantially in issue. *MEHAN SINGH v. KEHAR SINGH*. 75 I. C. 317 : 6 Lah. L. J. 39.

———S. 11—Directly and substantially in issue—Application to set aside *ex parte* decree—Non-service of summons—Separate suit—If lies. *MUSTHAN v. BABU MOHENDRA NATH SINGH*. 1924 Rang. 119.

———S. 11—Directly and substantially in issue—Decision on invalidity of sale-deed. 76 I. C. 370.

———S. 11—Directly and substantially in issue *Ex parte* decree—Application to set aside—Non-service of summons—Finding as to service—Subsequent suit to set aside. 5 Pat. L. T. 66.

———S. 11—Directly and substantially in issue—Judgment on rent payable—Effect. *MANNOO LAL CHOWDHURY v. LALJI CHAUBI*. 77 I. C. 334.

———S. 11—Directly and substantially in issue—Different causes of action—Suit on—Rule of *res judicata*.

Where there are two agreements to sell two consignments of *mohwa* a suit for damages for failure to deliver one consignment and a decree therein do not bar a fresh suit on the agreement to deliver the second consignment. (*Drake Brockman, J. C.*) *JODHRAJ v. BYRAM*. 7 N. L. J. 25.

———S. 11—Directly and substantially in issue—Heard and finally decided—Decision on immaterial issues—Not *res judicata*.

In a suit by reversioner for a declaration that certain alienations made by the widow of a deceased Hindu were not binding on the reversioners, the defence was that the suit was barred by limitation and that the properties in question were not part of the estate of the last male owner. The trial court raised issues on both the points but dismissed the suit expressly on the ground of limitation. With a view to avoid the necessity for a remand in case the appellate court took a different view of the question of limitation, the trial court gave a finding on the issue as to title against the plaintiffs. *Held*, that the finding on the question of title to the property was an *obiter dictum* and not *res judicata* I. L. R. 4 M. 134 followed. (*Krishnan and Odgers, J.J.*) *BATHULA PITCHI REDDI v. BHARATA SASTRI*. 20 L. W. 526 : 47 M. L. J. 532 : 82 I. C. 485 : 1924 M. W. N. 859 : 1924 Mad. 893 (2).

———S. 11—Directly and substantially in issue—Unnecessary issue—Withdrawal of suit.

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Plff. sued for resumption of a muafi and withdrew the suit without leave to sue afresh. The Court had raised an issue as to whether the Land was liable to resumption or whether it was liable to assessment for rent. In a subsequent suit for assessment of rent by plaintiff, *held* that in the prior suit it was unnecessary to raise an issue on the liability to assessment and consequently the prior decision did not operate as *res judicata*. (*Fremantle, S. M. and Burn, J. M.*) *THE SPECIAL MANAGER, COURT OF WARDS v. BADRI PRASAD*. L. R. 5 O. 101.

———S. 11—Directly and substantially in issue—Nature of suits same—Dates different—Second suit barred.

A subsequent suit is barred under S. 11 where the subsequent suit is exactly of the same nature as the previous suit with the difference that the date from which the accounts are asked for in the later suit is a few years later than in the previous suit. (*Macleod, C. J. and Crump, J.*) *SIDAGAVADA v. RAM CHANDRA BABAI*. 1924 Bom. 118.

———S. 11—Directly and substantially in issue—First suit in respect of one payment towards decree—Second suit in respect of subsequent payment—Title of plaintiff—Decision on, *res judicata*. See C. P. CODE, O. 2, R. 2. 10 O. & A.L.R. 574.

———S. 11—Directly in issue—Claim of occupancy negatived in respect of certain area—Subsequent suit in respect of another area under the same grant.

Where a claim of occupancy rights based on an old grant was decreed at settlement in respect of certain area the decision bars a subsequent claim that another area was also held under the same grant. (*Burn, J. M.*) *MAHANT KUNJ BEHARI DAS v. BIRWA MEHNAM*. L. R. 5 O. 31.

———S. 11—Directly and substantially in issue—Subject-matter different—No bar.

Where the subject-matter of the two suits is different and the second suit relates to a different grove land from that involved in the prior suit, there is no bar of *res judicata*. (*Neave, J.*) *BHANU PRATAP SINGH v. BHAGWAN SINGH*. L. R. 5 A. 406 : 1924 A. 922.

———S. 11—Directly and substantially in issue—Finding in unnecessary suit—If *res judicata*.

To constitute *res judicata* the suit need not be one which the plaintiff was bound to institute. The usefulness or otherwise of a suit is a question which is entirely beside the point and a finding given in a suit which plaintiff need not have instituted but has in fact instituted is as much *res judicata* as in a suit which he was bound to institute. (*Abdul Raoof and Moti Sagar, J.J.*) *HATHI KHAN v. MT. ALMO*. 78 I. C. 3.

———S. 11—Co-defendants—Decree dismissing suit—Finding as between co-defendants—Not implied in decree nor embodied therein—Appeal if lies.

Where a decree is one of dismissal of a suit, findings in the judgment as between co-defendants which are not necessarily implied in the decree or embodied therein do not operate as *res*

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judicata as it is not open to the party aggrieved by such findings to appeal against the decree. Case-law discussed. (*Ramesam and Reilly, JJ.*) PARIGI VENKOPACHARLU v. RADHABAYAMMA.

47 M. L. J. 612 : 35 M. L. T. (H. C.) 101 : (1924) M. W. N. 867 : 1924 Mad. 858.

—S. 11—Co-defendants—Issue as to title to property—Conflict of interest—Subsequent suit for title and possession.

Ordinarily the doctrine of *res judicata* does not operate as between co-defendants and the Court applies the doctrine with considerable caution as between co-defendants where there is a conflict of interest as between them, where it is necessary for the court to decide the conflict and where the judgment clearly decides the question as between those co-defendants. Where though no issue is expressly framed as between the co-defendants the basis of the decision as between them is a decision on their title and on foot of that decision, their liability to contribute is determined, the decision operates as *res judicata* in a subsequent suit for declaration of title and possession. (*Greaves and Chakravarthi, JJ.*) HALADHAR DAS TANTI v. NAGENDRA NATH MANDAL. 51 I. C. 997.

—S. 11—Co-defendants—Prior Mortgage suit—Appellant and Respondent impleaded as Co-defendants—Contest between mortgagee and appellant as to Respondent's title in mortgage suit—Whether decision *res judicata* in subsequent suit for possession by Respondent against Appellant.

Where there has been a conflict of interest between co-defendants and an adjudication was necessary to give the appropriate relief to a party or a co-defendant has a common interest with the plaintiff and has actively supported him against the other defendant, the decision will operate as *res judicata* in a subsequent suit.

29 M. 515 : 11 B. 216; 3 Hare 627; 71 I. C. 481 A. I. R. (1923) Lah. 186 Referred to. (*Herald and Lentaigne, JJ.*) MAUNG THWE v. MA SHWE PON. 3 Bur. L. J. 54 : 82 I. C. 423 : 1924 R. 279.

—S. 11—Co-defendants—Decision when *res judicata*.

Where the relief given in a suit does not require or involve a decision of any case between co-defendants, the latter will not be bound as between each other by anything decided in the suit. (*Baker, J. C.*) JAGESHWAR RAO v. GUJAR RAO. 1924 Nag. 168.

—S. 11—Co-defendants—*Res judicata* between—Rule as to—Applicability of—Conditions—Fraudulent benami transfer—Plea of—Maintainability—Covenant for quiet enjoyment—Damages for breach of—Suit for—Plea in.

In the course of the insolvency of C. the official Assignee challenged, as not being *bona fide* and as being without consideration a transfer of the insolvent's property obtained by R, from a transferee from the insolvent himself, and a transfer made by R to A of the same property. A suit brought by the Official Assignee against R, and A jointly for a declaration that the

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transfers in their favour must be set aside for want of good faith and like considerations was decreed on the ground that the transferees were not purchasers in good faith, the Appellate Court in that suit also expressing the opinion that the transfers were not for consideration.

In a suit by A against R for damages for breach of covenant for quiet enjoyment due to her having been ousted by the Official Assignee, held (1) that the opinion of the Appellate Court in the prior proceeding that the transfer in favour of A was not for consideration was mere *obiter dictum* and did not operate as *res judicata* between R and A, and (2) that R. could not plead that the transfer in favour of A. was a benami transaction intended to cheat the creditors of C. (*Coulis-Trotter and Ramesam, JJ.*) RAMASWAMI NAICKER v. ALAMELU AMMAL.

46 M. L. J. 298 : (1924) M. W. N. 204 : 34 M. L. T. (H. C.) 301 : 78 I. C. 921 : 1924 Mad. 604.

—S. 11—Co-defendants—Decision when *res judicata*.

Where it is absolutely essential for the determination in a prior suit questions *inter se* between defendants and they were so decided, the decision is *res judicata*. (*Hallifax, A. J. C.*) MT. MUNNA v. SUKLAL. 1924 Nag. 142.

—S. 11—Co-defendants.

If the plaintiffs respondents and the defendant appellant were co-defendants in the previous suit but their interests were not at variance, decision in the previous suit is in no way a decision between them as parties and does not therefore operate as *res judicata*. But it is not of course impossible for a Court to arrive at a decision as between co-defendants which will operate as *res judicata* in subsequent proceedings. (*Shwar, J.*) KALI DIN v. MADHO. 1923 A. 169.

—S. 11—Co-defendants—Decision on issue as to construction of will—*Res judicata*—Inconsistent decisions—Later decision to prevail.

Where in order to ascertain the relief that the plaintiff should get, it is necessary to determine the right construction of a will and declare the rights of the plaintiff as well as the defendants *inter se*, the decision operates as *res judicata* as between the co-defendants. As regards co-defendants an adjudication which is necessary to give the proper relief to the plaintiff is *res judicata* as between the co-defendants as well, provided there is a conflict of interest.

Where there are two inconsistent decisions between the same parties, the later one will prevail and operate as *res judicata*. (*Walsh and Ryves, JJ.*) RAM PRASAD v. MAHABIR.

46 A. 220 : 22 A. L. J. 91 : L. R. 5 A. 71 : 79 I. C. 803 : 1924 A. 310.

—S. 11—Co-defendants—When decision is *res judicata*.

For a decision to operate as *res judicata* between co-defendants there must have been an active controversy between them in the suit and a decision on that should have been necessary to give relief to the plaintiff. (*Kinkhede, A. J. C.*) LAXMAN v. JANOO. 1924 Nag. 429.

C. P. CODE (1908), S. 11.

———S. 11, Explan. IV—*Parties and representatives—Plea open to, in personal capacity—If can be set up—Omission—Effect.*

A person who is added as legal representative of a deceased defendant cannot and need not set up in defence pleas open to him in his personal capacity and the omission to do so will not result in the matter being *res judicata* in a subsequent suit. (*Krishnan and Coleridge, JJ.*) *GUNNAM AKKAMMA v. NUNE VENKATAPATHI*.

1925 Mad. 59.

———S. 11—*Parties and representatives—Decision in suit by mortgagee against purchaser of hypotheca—Subsequent suit against person deriving title under former purchaser.*

A suit by a mortgagee to enforce his mortgage as against a purchaser of the hypotheca was dismissed on the ground that the mortgage had been paid off. In a subsequent suit by the plaintiff to enforce his mortgage against a person who had purchased the hypotheca from the defendant in the previous suit but prior to the institution of that suit. *Held* that the decision in the prior suit was not *res judicata* and did not bar the subsequent suit. (1921) 41 M. L. J. 392 referred to. (*Madhavan Nair, J.*) *DURAICHAMI TEVAR v. ADIMUTHU NADAN*.

20 L. W. 740 :
47 M. L. J. 728.

———S. 11—*Parties and representatives—Decision against mortgagee if binding on mortgagor.*

A mortgagor does not claim under his mortgage and a decision against a mortgagee in a suit to which the mortgagor was not a party does not operate as *res judicata* against the mortgagor or his successors-in-interest. (*Burn, J. M.*) *HAJA BHAGWAN BAKSH SINGH v. THAKUR DIN MISIR*.

L. R. 5 O. 118.

———S. 11—*Parties and representatives—Persons under whom they claim—Both parties claiming through same person—If res judicata.*

When both parties to the subsequent litigation claim through the same person who was a party to the prior suit there is no bar of *res judicata*. (*Wazir Hasan and Neave, A. J. Cs.*) *MT. RAJ DULARI v. MT. CHANDESHUR DEI*. 78 I. C. 65.

———S. 11—*Litigating under the same title—Prior suit as Trustee—Subsequent suit in personal capacity—No bar.*

It is not obligatory on a party seeking to protect certain property as *wakf* property from an impending sale to assert in the same suit any personal right thereto which he may afterwards find himself to be entitled in case the property in question is not found to be *wakf* property. It is immaterial whether he could have joined in the previous suit an alternative claim for the protection of the personal share he was now seeking. There was no obligation to join the two claims and the omission to set up their present title in the previous suit does not, therefore, bar the decision of that matter in the present litigation.

The right in which the relief was claimed in the previous suit was not the same in which the relief is claimed in the present suit. The former suit was brought for the protection of what was

C. P. CODE (1908), S. 11.

described as public property. The present suit was brought for the protection of personal or private rights. So far as the property in dispute went, the capacity in which the plaintiffs sued was not the capacity in which they were now suing. (*Kanhuiya Lal and Stuart, JJ.*) *KANHAIYA LAL v. ASHRAF KHAN*.

46 A. 280 :
78 I. C. 402 : 10 O. & A. L. R. 360 :
L. R. 5 A. 177 : 1924 A. 355.

———S. 11—*Litigating under the same—One of the parties—Same in both suits—Claim by other party under different title.*

A lessor is not bound by a finding as between the lessee and a third party. 14 L. W. 387 Ref. Similarly a lessee who claims under a title previously created by a lessor is not bound by a subsequent finding between the lessor and third parties. Where the plaintiff is litigating under a title by lease obtained subsequent to that under which he litigated in the prior suit, the decision in the prior suit cannot be *res judicata* even though the other party was the identical person. (*Krishnan, J.*) *NALLAMUTHU PADAYACHI v. SRINIVASA AIYAR*. 19 L. W. 369 : 34 M. L. T. (H.C.) 160 : (1924) M. W. N. 378 : 1924 Mad. 576.

———S. 11—*Litigating under the same title—Parties under whom they claim—Scope of.*

The title by which the parties to the subsequent suit claim must for purposes of *res judicata* be subsequent to the commencement of the former suit because transferees prior to the date of such a suit are not bound by a decision in that suit. The words "between parties under whom they or any of them claim" cover a case where the latter litigant occupies by succession the same position as the former litigant. (*Kinkhede, A. J. C.*) *TULARAM v. MT. SUMRATI*.

1924 Nag. 422.

———S. 11—*Litigating under the same title—Application for letters of administration—Rejection on the ground that the applicant was not legally married—Passing of Act legalising marriage—Fresh application for letters—Maintainability of. See DECEASED BROTHERS' WIDOWS' REMARRIAGE ACT. 2 Pat. L. R. 125.*

———S. 11—*Competent Court—Settlement officer—Enhancement of rent—Status of tenant—Decision if res judicata.*

The mere fact that in a statement laid before the settlement officer and accepted by him for the purpose of enhancement of rent the land was shown as held under occupancy rights does not make the matter as to the status under which the land is held *res judicata*. Misdescription of the status of the tenant does not prevent the zemindar from afterwards contesting the occupier's status. (*Fremantle S. M. and Burn, J. M.*) *COOMBS v. SARDAR SUNDAR SINGH*. L. R. 5 A. 337 (Rev.).

———S. 11—*Competent Court—Civil and Revenue Courts. MT. CHITTO v. GANGA SAHAI*. 77 I. C. 638.

———S. 11—"Competent Court"—Meaning of 76 I. C. 932 : 1922 O. C. 150 and 1923 O. C. 151.

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—S. 11—Competent Court—Arbitration Court—Objections to award dismissed—Suit to set aside award—If lies.

Where the objections to an award are dismissed it is not open to the objector to re-agitate the same questions by way of a regular suit to set aside the award. (*Rupchand Bilaram, A. J. C.*) *KHIMJI v. MT. NATHIBAI*. 76 I. C. 953.

—S. 11—Competent Court—Small Cause suit—Decision of, when *res judicata*.

A decree for money upon covenant in a small cause suit does not operate as *res judicata* in a subsequent suit in the Munsif's Court on the regular side. Nor does the decision of the High Court refusing to interfere with the decree of the Small Cause Court operate as *res judicata*. (*Rankin, J. C. and Ghose, J.*) *MOHINI MOHAN RAY v. RAM DAS PARAMHANSA*. 28 C. W. N. 271 : 80 I. C. 210 : 39 C. L. J. 532 : 1924 Cal. 487.

—S. 11—Competent Court—Jurisdiction—Heard and decided—Decision of Revenue Court—Decision on.

The plaintiffs claimed to be the *dobladars* of the plot in dispute. Previous to this suit the plaintiffs had brought a suit in the Revenue Court against the Defendant alleging that the defendant was their tenant. The Revenue Court held that the defendant was not the plaintiff's tenant at all and directed that the plaintiffs should sue the defendant for possession in the Civil Court. Held that the only point on which the judgment of the Revenue Court was conclusive was that no relation of Landlord and tenant subsisted between the parties. The judgment did not decide as to whether or not plaintiffs were the rent-free grantees. (*Sulaiman, J.*) *CHAUDHRI HAR SARUP v. BRIJNANDAN LAL*.

L. R. 5 A. 133 (Rev.) : 79 I. C. 587 : 1924 A. 479.

—S. 11—Competent court—Jurisdiction—Revenue Court—Decision by Assistant Collector of second class—Khudkhast Land—Subsequent suit in court of Assistant Collector.

A decision of an Assistant Collector of the second class would operate as a decision of the Civil Court in a subsequent suit in the Court of an Assistant Collector of the second class but it would have no effect in the Court of an Assistant Collector of the first class. (*Stuart, J.*) *LALA SUNDER LAL v. BHUP SINGH*.

L. R. 5 A. 105 (Rev.) : 1924 A. 466.

—S. 11—Competent Court—Decision of revenue Court—Subsequent suit in Civil Court—Bar—Fraud vitating decision—What constitutes.

A revenue Court's decision cannot be called in question in a Civil Court by a mere allegation of fraud in the pleading or evidence, when the Judge, after giving full opportunities to the parties to produce their evidence, has decided rightly or wrongly in favour of one set of facts. To avoid a decision on the ground of fraud it must be shown that the plaintiff was prevented from putting his case before the Court or that some trickery or deceit was practised in connection with the proceedings. The mere fact that one of the parties did not admit something which he might in fairness have admitted in the

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former suit, when he was under no obligation to make the admission, would not bar the decision from being *res judicata*. (*Kendall, A. J. C.*) *ASHARFI LAL v. DY. COMMISSIONER, GONDA*.

10 O. and A. L. R. 553 : L. R. 5 O. 149 : 79 I. C. 660 : 1 O. W. N. 8 : 11 O. L. J. 448 : 1924 Oudh 419.

—S. 11—Competent Court—Small cause Court—Decision on title to property.

The decision of a Small Cause Court on a question of title is not *res judicata* in a subsequent suit. (*Madharan Nair, J.*) *NARANO MAHA-PATRO v. RAMCHANDRA MARDARAJA DEO GANI*. 80 I. C. 724.

—S. 11—Competent Court—Small Cause Court—Decision in rent suit—Permanent tenancy—Finding if *res judicata*.

The decision of a Small Cause Court in a suit for rent that the tenant was a permanent tenant does not operate as *res judicata* in a subsequent suit on the regular side, even though the Small Cause Judge had jurisdiction to decide the latter suit. (*Pratt and Fawcett, JJ.*) *RUKMINI VITHU v. RAYAJI*. 26 Bom. L. R. 672 : 48 Bom. 541 : 1924 Bom. 454.

—S. 11—Competent Court—Prior suit in Small Cause Court—Damages—Dismissal of—Subsequent suit in regular side—Combining of causes of action.

Plaintiff was the consignor of two parcels by defendant railway. He brought two suits in the Small Cause Court for damages to the goods and they were dismissed. Subsequently plaintiff sued in the original side of the district munsif's Court for damages clubbing the value of the two parcels and bringing the claim above 500 rupees. Held that the subsequent suit was barred both under S. 11 and under O. 2, R. 2, C.P. Code. The joining together of the subject matter of the two previous suits was no more than a device for evading the provisions of S. 11, C. P. Code, and could not be possibly countenanced. (*Daniels and Neave, JJ.*) *MANGAN LAL v. G. I. P. RY. CO.* 22 A. L. J. 745 : L. R. 5 A. 580 : 1924 A. 849.

—S. 11, Explan. II.—Competent Court—Test of.

It is the competency of the Court of first instance to entertain the two suits which regulates the application of the rule of *res judicata*; the fact that in the two suits appeals may lie in different Courts does not affect the application of the rule. (*Scott-Smith, J.*) *PIR BAKHS V. JHANDU KHAN*. 1924 Lah. 644.

—S. 11—Competent Court—Revenue Court—*Res judicata*—Kabzadari—Claim of—Sub-settlement—Rejection of claim for want of evidence—Subsequent claim of underproprietary rights—Maintainability of.

The plaintiff claimed rights of Kabzadari Dar-miant at the sub-settlement but as he produced no evidence his claim was rejected. He subsequently claimed underproprietary right. Held that the plaintiff could have claimed under-pro-prietary right at the sub-settlement and he having omitted to do so a subsequent claim for

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such right was barred by *res judicata*. (*Fremantle, S. M. and Burn, J. M.*) SPECIAL MANAGER, COURT OF WARDS *v.* SHER BAHADUR SINGH.
L. R. 5 O. 137.

—S. 11—Competent Court—Decision of Revenue Court—Correction of records—Subsequent suit for possession.

In proceedings for correction of records the Asst. Collector decided the question of correction on a report from the Naib-Tabsildhar without reference to evidence on record. *Held*, that the judgment of the Asst. Collector did not operate as *res judicata* in a subsequent suit for possession. (*Fremantle, S. M. and Burn, J. M.*) RAM PAL *v.* MT. SHUBRAJI KUNWAR.
L. R. 5 O. 127: 10 O. & A. L. R. 846.

—S. 11—Connected suits—Appeals in one only—Effect of—Other decrees not appealable against.

Where there were a number of cases between the same parties involving the same issue and an appeal was preferred only in one, the decision in the others having been allowed to become final. *Held* that the bearing of the appeal was barred by *Res judicata*. (*Fremantle, S. M. and Burn, J. M.*) GHAZI DIN SINGH *v.* AGIL SINGH.
L. R. 5 A. 124 (Rev.).

—S. 11—Heard and finally decided—Decision in proceedings for letters of administration, MAUNG HMAT *v.* MA HTAY. 76 I. C. 494. (2)

—S. 11—Execution proceedings—Earlier order not deciding.

1924 Mad. 45.

—S. 11—Execution applications—Decision in when *res judicata*—Successive applications against same person—Maintainability.

1924 A. 34.

—S. 11—Adverse finding—Heard and finally decided—Suit dismissed—Findings against successful party—If *res judicata*.

A decision cannot be said to be based on a finding unless an appeal can be preferred against that finding. When a suit is decided in favour of the defendants, but there is a finding adverse to them that finding is not *res judicata* against them, as they could not have appealed against the finding. (*Baker, J. C.*) MT. GIRJABAI *v.* PURUSHOTTAM DAS.
1924 Nag. 333.

—S. 11—Adverse finding when *res judicata*.

It is well established that no finding can operate as *res judicata* which is not necessary to the relief granted by the decree. (*Daniels, A. J. C.*) OUDH BEHARI LAL *v.* DAL SINGH, 10 O. L. J. 404: 79 I. C. 666: 1924 Oudh 205.

—S. 11—Adverse finding—Decree in favour of a party—Not *res judicata*.

In a suit instituted by plaintiff to eject the defendant from certain land, the latter pleaded that he had a permanent tenancy and in the alternative, that even if he was a yearly tenant, the tenancy had not been determined by a valid notice to quit. The trial Court found that the defendant had failed to establish a permanent tenancy but dismissed the suit holding that the defendant was

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a yearly tenant and there was no proper notice to quit. On appeal by the plaintiff the appellate Court upheld the dismissal of the suit on the ground of want of a notice to quit without deciding on the plea of permanent tenancy. In a subsequent suit in ejectment brought by the plaintiff after due notice, the defendant again set up a permanent tenancy. *Held* that the decision in the prior suit did not operate as *res judicata* and that the plea of permanent tenancy was open to the defendant in the subsequent suit. (*Krishan and Waller, J.J.*) RAMASWAMY REDDI *v.* TALAI-VASAL MARUDAI REDDI.
47 Mad. 453:
46 M. L. J. 198: 19 L. W. 377:
34 M. L. T. (H. C.) 62: (1924) M. W. N. 241:
1924 Mad. 469.

—S. 11—Adverse finding—Decree in favour of party.

Where a suit is dismissed against a defendant but the judgment contains a finding adverse to him, such finding does not operate as *res judicata* 48 C. 460 (P. C.) foll. (*Spencer, O. C. J. and Srinivasa Aiyangar, J.*) KUPPUSWAMI GOUNDAN *v.* MARIMUTHU GOUNDAN.
47 M. L. J. 487:
20 L. W. 783: 82 I. C. 438:
(1924) M. W. N. 807: 1925 Mad. 52.

—S. 11—Adverse finding—When operates as *res judicata*.

Where a suit in ejectment is dismissed on the ground that the defendant's tenancy had not been terminated, an extra finding that the defendant had no right of occupancy in the suit land does not operate as *res judicata* in a subsequent suit. (*Fremantle, S. M. and Burn, J. M.*) SRIPAT SAHAI *v.* RAM AUTAR CHAUBE.
L. R. 5 A. 3 (Rev.).

—S. 11—Adverse finding—Party against whom suit is dismissed—How far affected by findings—Appealability—Suit for declaration and consequential relief—Form of decree.

Where a point adversely decided against the defendant in a suit is correctly and substantially in issue in the suit and where in other proceedings the matter would be *res judicata*, he is entitled to appeal against the decision even though the suit was decided in his favour on some other ground. The true test in cases of this kind is to see not merely the forum but the substance of the decree and the judgment. In suits where declaration and consequential relief are sought and the consequential relief is refused, because the court is against the plaintiff's rights which he seeks to declare, it would be better if the decree formally embodied the result of the declaration but even if it does not do so but simply dismisses the suit, the decree in substance is one where the declaration is refused.

Where a person is adjudged an insolvent any decision obtained against him without making the Official Receiver a party to the proceedings will not be binding on him inasmuch as the property is vested in the Receiver. (*Kumaraswami Sastri, J.*) NIMMAGADDA VENKATESWARALU *v.* BODAPATI LINGAYYA. 20 L. W. 63: 47 Mad. 633:
1924 M. W. N. 491: (1924) Mad. 689.

—S. 11—Leave to withdraw appeal—Effect of.

C. P. CODE (1903), S. 11.

The dismissal or withdrawal of an appeal has the same effect as a decision on the merits and leaves the finding of the trial Court final against the appellant for purposes of the rule of *res judicata*. (*Daniels, J.*) *PARBHU DAYAL v. MURLIDHAR*, 22 A. L. J. 365: 73 I. C. 677: L. R. 5 A. 298: 10 O. & A. L. R. 528: 1924 A. 867.

———S. 11—*Heard and finally decided—Decree on mortgage—Decree not drawn up in accordance with law—Second suit to redeem mortgage if barred.*

In a suit for redemption of a mortgage the decree provided for redemption on payment of a particular sum within two months from the date of the decree. The decree went on to say that the plff. was to make up the court-fees. It was provided that on his failure to pay the money and the court-fees within the prescribed period the decree could not be executed. The decree was not drawn up in the manner prescribed by Order 34, R. 7 of the C. P. Code and did not contain any clause that if payment was not made on or before the date fixed by the Court the plaintiff should be debarred from all rights to redeem or that the mortgaged property should be sold. The plaintiff defaulted to pay the money within the time and brought a suit again for redemption. *Held*, that the second suit for redemption was not barred by *res judicata* or by S. 47 of the C. P. Code. (*Scott-Smith and Fforde, JJ.*) *ARURA v. BUR SINGH*, 5 Lah. 371: 1925 Lah. 31.

———S. 11—*Heard and finally decided—Issue not framed—Decision binding as res judicata.*

The question of a person's legitimacy, though not embodied in a specific issue by itself, having been directly and substantially in issue and heard and decided in a prior suit, operates as *res judicata* as between persons claiming under the same title. (*Chandrasekara Aiyar, C. J. and Plumer, J.*) *RAMJEE RAO v. ANANDAPPA*, 2 Mys. L. J. 92.

———S. 11—*Heard and finally decided—Express adjudication essential—Mere description insufficient.*

At the time of the partition of a mahal a tenant was treated as an occupancy tenant and was styled in the proceedings as *sakri ul milkial manrusi quabzadar*. In a subsequent suit to contest a notice of ejectment,

Held, that the proceedings did not have the effect of *res judicata* (*Fremalle, S. M. and Burn, J. M.*) *GOKUL v. SHEO SANKAR LAL*, 10 O. & A. L. R. 402: L. R. 5 O. 73: 11 O. L. J. 395.

———S. 11—*Heard and finally decided—Question abandoned by the plaintiff but decided by Court at express request of defendant—If res judicata.*

Where the plaintiff had excluded certain question by the statement of his pleader and the first Court had therefore expressly stated that it could not decide it but the defendant, expressly urged in appeal that the Judge was wrong in not deciding that question even though his action was based on the plaintiff's adviser's statement and he asked the lower appellate Court expressly to decide it and the Court did decide it,

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Held, that the question was necessary for the decision of the suit and therefore the decision thereon operated as *res judicata*. It was immaterial that the Court did not refer to that question in its judgment. (*Sir John Edge*) *MIDNAPORE ZAMINDARY CO., LTD. v. KUMAR NARESH NARAYAN ROY*, 47 M. L. J. 23: 26 Bom. L. R. 651: L. R. 5 P. C. 137: 51 Cal. 631: 35 M. L. T. (P. C.) 169: 80 I. C. 827: (1924) M. W. N. 723: 20 L. W. 770: 29 C. W. N. 34: 51 I. A. 293: 1924 P. C. 144.

———S. 11—*Compromise decree—Heard and decided—Admission of parties—No res judicata.*

Where the parties compromise a suit and there is no express adjudication on the question of relationship set up by them, the point cannot be said to be *res judicata*. (*Shadi Lal, C. J. and Le-Rossignol, J.*) *NIHAL SINGH v. NARAIN SINGH*, 6 Lah. L. J. 45: 80 I. C. 525: 1924 Lah. 469.

———S. 11—*Co-defts.—Heard and decided—First suit for possession by one brother against another—Dismissal on oath taken by defendant—Second suit by sister's heirs against brothers for the inheritance—Dismissal—Finding that property was that of the plaintiff in prior suit—Suit by heirs of plaintiff against uncle—Partition.*

The parties to the suit were Mahomedans. The plaintiffs' father sued for possession of certain lands from his brother. On defendant taking an oath, as agreed the suit was dismissed. The sister's daughter of the defendant brought a suit for a share of the lands against the defendant but that suit was dismissed on the ground that the land belonged to the plaintiffs' father. On the death of their father the plaintiffs brought the present suit for recovery of their share of the properties alleging that in the suit by the representatives of his sister, the defendant had wrongly alleged that the properties were exclusively his own. *Held* that the decision in the prior suit by the plaintiff's father was *res judicata* and that the plaintiffs could not in the face of that decision treat the defendant as a trespasser, or dispute his title to the suit lands.

The alternative claim of the plaintiffs that the plaintiffs' father was entitled to a share of the property and not the whole ought to have been put forward in the prior suit and not having been so put forward, the plaintiffs were estopped from claiming the same in the present. The decision in the suit filed by the sister's representatives against the defendant did not wipe off the effect of the decision in the suit by the plaintiff's father as in that suit the plaintiffs' father and the defendant were both co-defendants. 34 M. L. J. 740 Ref. (*Spencer, O.C.J.*) *MAHOMED ESUF ROWTHER v. SULTAN ABDUL KADER*, 47 M. L. J. 20:

78 I. C. 1055: 34 M. L. T. (H. C.) 147: (1924) M. W. N. 569: 1924 Mad. 711.

———S. 11—*Heard and decided—Suit in ejectment—Claim of occupancy rights—Dismissal of suit for want of notice to quit—Occupancy right negatived—Subsequent suit for ejectment—Res judicata.*

C. P. CODE (1908), S. 11.

In a previous suit by an inamdar against a tenant, the latter set up a permanent right of occupancy in the land. The first Court negatived the claim of permanent occupancy right and decreed the suit. On appeal, the appellate Court upheld the decision of the trial Court negating the claim of permanent occupancy right set up by the tenant but dismissed the suit for want of a proper notice to quit. In a subsequent suit by the inamdar to eject the tenant after service of notice the tenant set up again a permanent occupancy right. *Held*, that the defence was barred by *res judicata* by reason of the decision in the prior suit. 12 L. W. 277; 9 L. W. 180 foll. 48 C. 460; 13 C. 17 Dist. (*Krishnan and Venkatasubba Rao, JJ.*) VEERASAMI MUDALIAR v. PALANIAPPAN.

34 M. L. T. (H. C.) 175; 19 L. W. 513;
(1924) M.W.N. 466; 1924 Mad. 626;
46 M. L. J. 515

—S. 11—*Heard and finally decided—First suit based on title—Subsequent suit on basis of possession—Bar.*

A suit for partition between the plaintiff and defendant who were brothers, proceeded in the Court of first instance both on the question of possession and title. On appeal the Appellate Court confined its decision to the question of title. In a subsequent suit for possession between same parties held that the decision in a prior suit did not operate as *res judicata* on the question of possession. (*Sulaiman and Kanhaiya Lal, JJ.*) LALA GULAB RAI v. SUNDAR LAL. L. R. 5 A. 528.

—S. 11—*Heard and finally decided—Decision on issue—Grounds therefor—Res judicata.*

It is the issue decided and not the reason for the decision which constitutes *res judicata*. (*Daniels, J.*) KUNDAN LAL v. JAGAT RAM.

1924 A. 927.

—S. 11—*Heard and finally decided.*

The mere fact that two persons were ranged on opposite sides in a prior suit will not constitute the decision thereon *res judicata*, if there was no contest, no issue and no finding between the parties. (*Kotwal, A.J.C.*) DOMA v. GOVIND.

1924 Nag. 1124.

—S. 11 (Expl. IV)—*Might and ought—Trustees—Suit by one trustee against others—Suit for protection of trust property.*

A decree obtained by one of the trustees on behalf of the trust against the other trustees either for a declaration that the property in dispute was trust property or for rendition of accounts in a suit brought in the interests of the trust or for the protection of the trust property is binding as much on the trustees who are parties to the suit as on all persons interested in the trust. 2 I. A. 145, 152 Ref. (*Sulaiman and Kanhaiya Lal, JJ.*) THAKUR SRI GAT ASHRAM NARAINJI v. JAISHTH MADHO ACHARIA.

22 A. L. J. 641; L. R. 5 A. 410;
80 I. C. 406; 46 A. 651; 1924 A. 604.

—Ss. 11 (IV) and 92—*Might and ought—Scheme suit—Decision in—Res judicata.*

Under Expl. VI to S. 11, C. P. Code, the decision in a scheme suit under S. 92 will be *res judicata*, if the conditions laid down in the ex-

C. P. CODE (1908), S. 11.

planation are satisfied. (*Newbould and Ghosh, JJ.*) ABU MAHOMED BAREKAT v. ABDUR RAHIM.
80 I. C. 44.

—S. 11 (Expl. 4) O. 2, R. 2—*Might and ought—Suit for redemption and subsequent one for mesne profits res judicata.*

Where the plffs. executed an usufructuary mortgage to X, and subsequently applied for redemption which was refused, and afterwards got a decree in Court, and subsequently filed a suit for mesne profits, from the date of notice, and it was contended that the doctrine of *res judicata* will apply.

Held, relying on *Satya Badi Bohara v. Harabati* 34 C. 213 and *Rukmi Bai v. Venkatesh*. 31 Bom. 527, that even after a tender or deposit the mortgagee continues as mortgagee with a statutory liability to account for profits received by him, holding the property as a trustee for the mortgagor, and that the liabilities of the mortgagee in such a case have to be determined once and for all in the redemption suit and cannot be determined in a separate suit. A second suit for mesne profits is not maintainable under S. 11, Expl. 4, O. 2, R. 2, C. P. C. (*Duckworth, J.*) MA NYO TONA v. MAUNG HEHA BU. 2 Rang. 382; 1925 Rang. 13.

—S. 11 (Expl. IV)—*Might and ought—Mortgages—Prior and subsequent—Omission to claim priority—If bars suit on mortgage.*

A person mortgaged his property first to X and then to Y. Later on X took a mortgage in renewal of his earlier mortgage and brought a suit on the basis of the both the mortgages impleading Y. Y remained *ex parte* and did not set up any priority. *Held*, the omission did not preclude him from afterwards suing on his own mortgage. (*Kinkhede, A.J.C.*) LAXMAN v. JANOO.

1924 Nag. 429.

—S. 11 (Expl. IV)—*Constructive Res judicata—Omission to plead available ground of defence.* NABI BAKHSH v. MAHOMED SALAM ULLAH.
1924 Lah. 83.

—S. 11 (Expl. IV)—*Suit for rent—Ex parte decree—Defence of separate tenancy—Constructive res judicata.*

Where in a suit for rent against certain tenants the defendants pleaded that there had been a division of the tenancy with the knowledge and consent of the landlords, but the plaintiffs produced two *ex parte* decrees for rent, after the period of the alleged division, jointly against all the defendants. *Held*, that the defendants were barred from setting up the case of a separate tenancy.

There is no hard and fast rule as to what questions should be regarded as questions that ought to have been raised in the previous suit. But there are several tests which have been applied from time to time when such questions have come up for decision. One of the tests is whether by raising the question the decree which was passed in the previous suit could have been defeated varied or in any way affected. If the question is of such a nature it must be deemed to be a question which ought to have been raised in the previous suit. The decision in a previous suit for rent, whether *ex parte* or *inter partes* operate as *res judicata* in

C. P. CODE (1908), s. 11,

a subsequent suit for rent, even for a different period, if it decides any question which arises in the suit or if it omits to decide any question which ought to have been decided if objections were taken by a party (*Suhrawardy and Dubal, JJ.*) SHIB CHANDRA TALUKDAR v. LAKHI PRIYA GUHA, 40 C. L. J. 507.

—S. 11—*Might and ought—Constructive res judicata—Omission to raise legal pleas—Irrelevant matter.*

To operate as constructive *res judicata* it must be shown that the plea which is now sought to be raised could have been raised as a valid defence to the previous suit and that the parties to the two suits are the same. If the plea sought to be raised in the second suit is not directly relevant to the issue in the first suit, the omission to raise it in the first suit would not operate as constructive *res judicata* in the second suit. (*Madhavan Nair, J.*) PARIM MANICKYAM v. KODIMANGI. (1924) M. W. N. 666.

—S. 11—Constructive *res judicata*—Alternative defence—Omission to put forward—Effect of. MAUNG PO v. MAUNG PO THEIN.

76 I. C. 612.

—S. 11—*Might and ought—Prior suit in ejectment—Enhancement agreement—Dismissal of suit—Subsequent suit in ejectment—Plea of occupancy right.*

In an ejectment suit the Court held that the defendant was entitled to remain in possession for 5 years from the date of a certain enhancement agreement. A fresh suit for ejectment was brought against the defendant after the expiry of 5 years and he pleaded that he had acquired occupancy rights by exchange: held, that in the former suit the defendant had either failed to set up his rights under the exchange or if he had set them up he had failed to prove them. In either case the prior decision operated as *res judicata* in the latter suit and no occupancy rights could be claimed. (*Burn, J.M.*) MOHAN v. BHANWAR SINGH. L.R. 5 A. 119 (Rev.).

—S. 11—*Probate proceedings.*

The order passed on compromise in previous probate proceeding cannot operate as a bar to an application for probate of the same will. (*Newbould and Ghose, JJ.*) BROJO LAL BANERJEE v. SHARATUBALA DEBI. 51 Cal. 745 : 1924 Cal. 864.

—S. 11 (Expl. V)—*Suit for possession—Future mesne profits not claimed—Fresh suit if barred.*

Where in a prior suit for possession, there was no claim for future mesne profits, a subsequent suit for such profits is not barred by *res judicata*. (*Miller, C.J. and Foster, J.*) RAMJANAM SINGH v. KHUB LAL SINGH. 80 I. C. 710.

—S. 11 (Expl. VI)—*Suit against joint family—Representative character.*

A member of a joint Hindu family will be bound by the decision in a prior suit in which other members of the family were parties and the decision in which was arrived at after a hot contest, by virtue of Expl. VI to S. 11. (*Sulaiman, J.*) NAGINA RAI v. SANGAM RAI. 81 I. C. 737.

C. P. CODE (1908), s. 11.

—S. 11 (Expln. VI)—*Representative suit—Suit by reversioners—Suit to set aside alienation.*

Where a prior suit by certain persons, claiming as collaterals, to set aside an alienation by a sonless proprietor had been dismissed, a subsequent suit by other collaterals for the same purpose is barred by *res judicata*. 38 M. 406 ; 44 M. 19. foll. (*Scott-Smith and Zafar Ali, JJ.*) KHAIR MAHOMEDAR v. UMAR DIN. 5 Lah. 421.

—S. 11, (Expln. VI)—*Representative suit—Joint Hindu family—Decree against father in respect of joint family properties—Sons if bound by the decree.*

When a suit is brought in respect of the family property, impleading the father as a defendant, the decree passed against the father binds the sons. The case of a managing member, other than the father, may perhaps stand on a different footing. But where there is a dispute about property, which is admittedly family property and when the father is made a party to the suit, it cannot be said that the father is made a party in his individual capacity and not as the manager of the family. Where there are a number of defendants having a common interest and the contest is carried on by some of them *bona fide* against the plaintiff, the decision is binding on all the defendants including those who were *ex parte* 24 M. 689 ; 24 M. 658 ; 36 A. 383 ; 30 M. 215 ; 43 M. 487 Referred to. (*Spencer and Devadass, JJ.*) MEYYAPPAN SERVAI v. MEYYAPPAN AMBALAM. 19 L. W. 484 : 34 M. L. T. (H. C.) 209 : 1924 Mad. 571 : 46 M. L. J. 471.

—S. 11, (Expln. IV)—*Representative suit—Suit by Hindu widow for declaration of invalidity of adoption—Decision—Effect of.*

A suit by a Hindu widow for a declaration that the defendant was not the validly adopted son of her husband was referred to arbitration. The arbitrators made an award upholding the adoption and a decree followed upon the award. In a suit by the reversioners questioning the adoption. Held, that the matter was *res judicata* by reason of the prior award and decree. (*Sulaiman and Kanhaiya Lal, JJ.*) SHIB DEO MISRA v. RAM PRASAD. 46 A. 637 : 22 A. L. J. 690.

—S. 11 (Expl. VI)—*Representative suit—Suit by reversioner—Alienation contested—Effect.*

A suit by a reversioner to contest an alienation is one brought on behalf of all the reversioners and all of them are bound by the decision given in the case under Expl. VI to S. 11, C. P. Code. (*Martineau, J.*) BHARAT SINGH v. SHAFI MAHOMED. 79 I. C. 484.

—S. 11—*Execution proceedings—Notice under O. 21, R. 66—Necessity for decision on prior application—Effect of.*

In proceedings for execution of a mortgage decree, the court held that the petitioner, a puisne mortgagee who applied to be made a party and for notice under O. 21, R. 66, C. P. Code, was not entitled to the notice being a mere *pro forma* defendant. Petitioner did not appeal against the order but after the conclusion of the execution sale applied for an order that he was

C. P. CODE (1908), S. 11.

not liable to be evicted from properties inasmuch as notice under O 21, R. 66, C.P. Code, was not served upon him *Held*, that the contention was barred by *res judicata* the same having been negatived in the prior proceedings. (*Das and Ross, JJ.*) *BAIJNATH SINGH v. HARI PRASAD BAB.* 1924 P. 628 : 1924 P. H. C. C. 209.

———S. 11—*Execution proceedings—In issue—Failure to set up plea open.*

Where the defendants in a suit fail to set up a plea which was open to them, it must be deemed to have been decided by necessary implication against them and is *res judicata* in subsequent execution proceedings. (*Rupchand Bilaram, A.J.C.*) *LAWRENCE, PHILLIPS & CO. v. NAZARATH.* 78 I. C. 806.

———S. 11, (Expl. IV).—*Execution proceedings—Application for transfer of decree—Notice to judgment-debtor—Limitation—Failure to plead—Effect of.*

Where the assignee of a decree applies to the Court to transmit the decree to another court for execution and the judgment-debtor though served with notice fails to appear and plead that the decree could not be executed as being barred S. 11, Expln. IV, will apply and the question would be *res judicata* in subsequent execution proceedings. 8 C. 51 ; 40 M. L. J. 197 (P. C.) foll. Even in an application for transfer of a decree it is open to the judgment-debtor to plead limitation and he ought to do so. (*Phillips and Odgers, JJ.*) *KALEPALLI RAJITAGIRIPANY v. KALEPALLI BHAVANI SANKARAN.*

47 Mad. 641 : 80 I. C. 103 : (1924) M. W. N. 527 : 1924 Mad. 673 : 47 M. L. J. 4 : 19 L. W. 650.

———Ss. 11 (Expln. IV) and 47—*Execution proceedings—Res judicata—Execution sale by revenue authorities—Application to mamlatdar to set aside sale on deposit—C.P. Code, O. 21, R. 89.*

A decree was transferred for execution to the Collector who sold the property on 9—6—1914. The judgment-debtor applied under O. 21, R. 89, C.P.C. within one month of the sale to set it aside on deposit of the required amount with the mamlatdar. The Mamlatdar remitted the deposit to the Civil Court and directed the judgment-debtor to appear before that Court on 8—8—1914. The judgment-debtor renewed his application before the Court and the auction-purchaser also agreed to the sale being set aside but the application was eventually dismissed on other grounds. On appeal the district Court ordered the lower Court to proceed with the application to set aside the sale. On further appeal the High Court confirmed the order of the District Court. Subsequently the execution sale was set aside by the Court. On appeal by the auction-purchaser the District Court allowed the appeal holding that the application made by the mamlatdar was ineffectual and that made to the Civil Court was barred by limitation. On a second appeal to the High Court by the judgment-debtor, *Held*, that the order of the Court below was appealable having regard to the prior proceedings and that the prior decision of the District Court and the High Court having proceeded on the footing that the application of the judgment-debtor was within time, it

C. P. CODE (1908), S. 11.

was not open to the auction-purchaser now to contend that it was barred. (*Shah, A. C. J. and Fawcett, J.*) *GADIGAPPA CHAN BASAPPA v. SHIDAPPA GURU—SHIDAPPA.* 48 Bom. 638 : 26 Bom. L. R. 817 : 1924 Bom. 495.

———S. 11—*Issue of law—Decision on—If res-judicata.*

Even an erroneous decision on a question of law can operate as *res judicata*. (*Kinkhede, A. J. C.*) *TULARAM v. MT. SUMRATI.*

1924 Nag. 422.

———S. 11—*Issue of law—Previous decision when res judicata.*

A previous decision on a question of law which affects the subject-matter of the subsequent suit or creates a legal relation between the parties or defines the status of either of them is as binding upon them as a previous decision on a question of fact. (*Fremantle, S. M.*) *MIRZA BAHADUR MAHAMAD JAFAR ALI KHAN v. MT. RUKMIN.*

L. R. 50. 52 : 10 O. & A. L. R. 547 : 11 O. L. J. 66.

———S. 11—*Minor—Decision in a suit by or against—Res judicata against minor—Conditions—Gross negligence of guardian ad litem—What constitutes—Omission to rely upon a judgment in support of plea of res judicata if gross negligence—Second appeals—Gross negligence of guardian ad litem—Finding as to—Interference with—Jurisdiction.*

The question was whether the plaintiff's claim was barred by *res judicata* by reason of the decision of the High Court in a prior Second Appeal. Both the courts below held that the decision in the Second Appeal was not binding upon the plaintiff inasmuch as he was a minor at the time, and his guardian, the Court of Wards, was guilty of negligence.

No evidence was adduced to show that the manager under the Court of Wards or any of the other persons responsible for the conduct of the previous litigation was either negligent or that he did not conduct it with due care and diligence. The courts below came to the conclusion that there was negligence merely on the fact that a previous judgment between the parties had not been relied on in the previous litigation for the purpose of raising the plea of *res judicata*.

Held, that the courts below erred in holding that there was gross negligence or such negligence as would be sufficient to vitiate the decision in the Second Appeal and that the same therefore operated as *res judicata* against the plaintiff.

Held, further that what was gross negligence was a question of mixed law and fact and that it was competent to the High Court in Second Appeal to interfere with the finding of the courts below on such a question. (*Davados, J.*) *SITHAM-RAJU ANANDA RAO v. APPA RAO.* 47 M. L. J. 700.

———S. 11 and O. 32, R. 4 (3)—*Minor defendant—Appointment of guardian ad litem—Consent of guardian—Express or implied consent—Ex parte decree against minor—Execution sale—Binding character of—Prior suit by minor through next friend to set aside the sale—Dismissal of—Subsequent suit by minor to set aside the decree—Bar of res judicata.*

C. P. CODE (1903), S. 11.

The question whether or not a person appointed as guardian *ad litem* of a minor defendant consented to his being so appointed is a question of fact in each case. The consent of the guardian referred to in O. 32, R. 4 (iii) C. P. Code need not be expressed in writing but may be implied from the circumstances of the case. 43 All. 104 fol.

A guardian of a minor defendant is not bound to waste the minor's money in contesting a suit to which there is no good defence. Unless it is proved that the minor has been in any way prejudiced by the course the proceedings took or that there has been any fraud or gross negligence on the part of the guardian, the minor would be bound by the decree.

In a suit by a minor to set aside a decree and a sale in execution on the ground that the minor was not represented in the suit, it was found that the minor had previously sued through his next friend to set aside the execution sale and had failed in the previous suit. *Held* that the ground on which the present suit was based *viz.*, that the minor was not properly represented in suit in which the decree was passed, was a ground that might and ought to have been put forward in the previous suit, and that not having been done, the decision in the previous suit constituted *res judicata* under Explan. 4 to S. 11 of the C. P. Code. (*Krishnan and Waller, JJ.*) YEZZU MALLAYYA v. PUNNAMMA. 47 Mad. 476 : 46 M. L. J. 291 : 77 I. C. 628 : 19 L. W. 410 : 1924 Mad. 608.

—S. 11—Partition suit—Prior suit for partition under a will and partition deed—Dismissal. 77 I. C. 92.

—S. 11—Prior decision—Interlocutory—Pending suit—Order made in the course of—Finality of.

An order made in the course of a suit is final and cannot be retried by the Judge in the course of the same litigation. 48 C. 499 followed. (*Mookerjee and Rankin, JJ.*) IRRANI MUNDLE v. NAIMUDDIN SARDAR.

39 C. L. J. 251 : 81 I. C. 527 : 1924 Cal. 1006.

—S. 11—Suit for declaration on merits. Plaintiff out of possession. 77 I. C. 756.

—S. 11—Withdrawal permitted in appeal—Effect on decision of Trial Court. 1924 A. 260.

—S. 11—Wrong decision in a rent suit. 76 I. C. 444.

—S. 11—Decision not appealed from—Effect of—Reversal in another proceeding. 76 I. C. 473.

—S. 11—Prior decision—Objections to application—Personal decree—Omission to raise objections—Effect of.

A mortgage decree-holder applied for a personal decree under O. 34, R. 6. of the C.P. Code. The judgment-debtor objected that the application was barred by limitation and that the accounts furnished by the decree holder were incorrect. The application was dismissed as barred by limitation. On appeal the appellate Court was of the contrary opinion and remanded the application for disposal on the merits. The judgment-debtor subsequently raised other objections to the maintainability of the application for personal decree.

C. P. CODE (1908), S. 11.

Held that as the application to which the latter objections were taken was the same as that to which the previous objections were taken, the rule of *res judicata* did not apply to the case and the judgment-debtor was not debarred from taking the subsequent objections. (*Mukerjee and Dalal, JJ.*) SANTI LAL v. RAS NARAIN.

L. R. 5 A. 565 : 82 I. C. 65 : 1924 A. 804.

—S. 11—Connected suits—Appeals from both—Dismissal of one as time-barred—Effect on the other.

Two connected suits were tried together and disposed of by one judgment but separate decrees were drawn up. Two appeals were preferred, but one was dismissed. *Held*, there is no bar of *res judicata* to hearing and disposing of the other appeal. The order dismissing the prior appeal as out of time cannot amount to an adjudication on the issues. (*Pipin, J. C.*) MT. BABO v. JEHANGIR. 75 I. C. 479.

—S. 11—Connected suits—Common judgment but two decrees—Appeal against one only—If barred.

If two suits involving common issues are tried together and disposed of by one judgment, and an appeal is preferred against the decree in one only the other decree having become final operates as *res judicata* and the appeal is barred. (*Kulwant Sahay, J.*) DHANI SINGH v. SRI CHANDRA CHOOR DEO. 1924 P. 823.

—S. 11—Miscellaneous proceedings—Principles of—Applicability of. 47 M. L. J. 286.

—S. 11—Compromise decree—Partition—Suit for—Dismissal of suit—Subsequent suit for partition.

The plaintiffs, except one, subsequently born, had sued on 8—9—1919 for partition. The suit was compromised and both the parties filed a joint petition on 31—8—1920. It was to the effect:—"In the above case parties entered into a compromise at the remonstrance of a few respectable persons. The parties shall bear their own costs. The plaintiffs withdrew their claim. Hence the claim should be struck off." This petition of compromise was verified by all the parties. A decree was passed in accordance with this compromise. The order was "It is ordered and decreed that according to the compromise this case be struck off. The parties to bear their own costs." In a subsequent suit for partition by the plaintiffs, *Held* that the suit was barred by *res judicata* (*Mukerji and Dalal, JJ.*) RADHEY LAL v. MULCHAND. 46 A. 820 : 22 A. L. J. 749 : 80 I. C. 933 : L. R. 5 A. 541 : 1924 A. 905.

—S. 11—Miscellaneous proceedings—Probate proceedings—Order after contest in, binding character of—Effect of grant of probate—Omission to put forward grounds of attack—Right to apply for revocation—Application by third party for revocation—Party already defeated if can avail himself of. *See* PROB. AND ADMN. ACT, S. 50. 46 M. L. J. 383.

—S. 11—Miscellaneous proceedings—Right of widow to succeed—Decision in favour of—If can be questioned in legal representative petition.

C. P. CODE, (1908), S. 11.

Where a widow's right to succeed to her husband's properties was decided in her favour in preference to rights of survivorship set up by the brother of the deceased the latter cannot in subsequent legal representative proceedings object to her right. (*Philips and Odgers, JJ.*) KOTHANDARAMASAMI NAIDU v. PAPPAMMAL. 79 I. C. 891.

—S. 11—Miscellaneous proceedings—Succession certificate—Decision given in proceedings *Not res judicata*. See SUCCESSION CERTIFICATE ACT, S. 25. 5 Lah. 105.

—S. 11, (Explan. IV)—*Might and ought—Separate suits for possession and mesne profits against same defendants—Maintainability of.*

Where a plaintiff sued for possession of lands only when he might have joined in the same action a claim for mesne profits and damages, it is open to him to bring a subsequent suit against same defendants for the profits which became payable before the institution of the former suit and which might have been included in such suit. (*Macleod, C. J. and Shah, J.*) RAMACHANDRA ADARAM v. LODHA GOURI. 26 Bom. L. R. 288 : 80 I. C. 259 (1) : 1924 Bom. 368.

—S. 11 (Explan. IV)—*Might and ought—Mortgage suit—Failing to plead paramount title—Effect.*

If a person joined as defendant in a mortgage suit has a title paramount to that of the mortgagor he is not bound to set up such a title by way of defence to the mortgage suit and the question of his title will not be *res judicata* against him. (*Prideaux, A. J. C.*) HEMRAJ v. SURYABHAN. 1924 Nag. 403 (1).

—S. 11—Explan. VI—Applicability. 77 I. C. 1028.

—S. 13—Foreign judgment—Suit on—Plea of want of jurisdiction—Merits if open.

46 A. 119 : 10 O. & A. L. R. 61 : 79 I. C. 332 : 1924 A. 161.

—S. 16—*Mortgage decree—Suit for declaration of invalidity—Properly within jurisdiction but decree obtained outside—If a suit for land.*

A mortgage decree was obtained in Benares, the lands being situated in Patna. A suit to declare the invalidity of the mortgage decree was instituted in Patna. *Held*, it was not a suit for land within the meaning of S. 16, C. P. Code. If an application to execute the decree had been put in that would constitute a cause of action within the meaning of S. 20, C. P. Code ; otherwise the lower Court has no jurisdiction to entertain the case. (*Das and Macpherson, JJ.*) THE BENARES BANK, LTD. v. SURENDA NARAIN SINGH. 1924 P. 831.

—S. 16—Proviso—Defendant—What it includes. 1924 Cal. 443.

—S. 20—Contract—Refusal to take delivery at Akola—Place of suing.

The defendants had by wire ordered the plaintiffs to send to them at Akola certain bags of grain. The price was agreed to be paid at Khurai. The plaintiffs sent the bags by train to Akola and also sent the invoice, but as the defendants did not send the money they sent the Railway receipt to their own agent at Akola and gave a notice to

C. P. CODE, (1908), S. 20 (c).

defendants to take delivery of the goods and pay the money to the agent. As defendants failed to pay the money the plaintiffs ordered him to sell the goods. The goods were sold at a loss for which the plaintiffs brought the suit.

Held that the breach of contract occurred at Akola, and therefore the cause of action arose wholly at Akola and the Court at Khurai had no jurisdiction. (*Baker, J. C.*) GANPATLAL v. THE FIRM OF BILASRAI RAMJIDAS. 1924 Nag. 18.

—Ss. 20 and 21—Cause of action—Suit for rent—Jurisdiction—Residence of defendant—Waiver of objection B. T. Act, S. 144—Execution sale—Legality of. 77 I. C. 253.

—S. 20—Creditor and debtor—No agreement as to place of payment—Creditor can sue where he is.

Where there is no place specified for the payment of a debt, the debtor must pay the creditor at his place and it necessarily follows the creditor can sue for such money at his own place. (*Kendall, A. J. C.*) MOHAMMED MUMTAZ ALI KHAN v. GANGA PRASAD. 82 I. C. 122.

—Ss. 20 and 115—Question of jurisdiction. 77 I. C. 764 (2).

—S. 20(c)—Accounts—Principal and agent—Rendition of accounts—Forum.

The plaintiff was a trader in grain at Bilsa in the district of Budaun in the United Provinces. The defendant was a commission agent at Bombay of the *fakka adatia* type corresponding to what is known in England as *del credere* agent that is to say, an agent or factor who, being entrusted with the goods of his principal to dispose of to the best advantage, is in lawful possession of them with a general power to deal with them without reference to his principal but guaranteeing the solvency of the sub-purchasers, and while entitled to charge against his principal his expenses and entitled also to an indemnity from his principal against all losses resulting from carrying out his duty, is under an obligation to pay to the plaintiff, his principal, the amount due after the accounts have been properly settled. The plaintiff brought a suit in Budaun for recovery of money alleged to be due from the defendant commission agent on account of profits on sales improperly retained by the defendant. *Held*, that the mere fact that payments had been made by post and statements of account sent by post to Budaun was not conclusive of the question of where payment ought, under the contract, to be made. The contract of agency having been made by correspondence and the defendant having agreed to act as plaintiff's agent by a letter sent from Bombay, the Budaun Court had no jurisdiction.

Unless the contract clearly indicated the contrary, an agent of this kind who became a factor entrusted with the goods of his principal with wide powers has an eventual liability to account to his principal but the accounting must necessarily be done at the place where all the business is transacted. (*Walsh, A. C. J. and Neave, J.*) TIKA RAM v. DAULAT RAM. 46 A. 465 : 22 A. L. J. 591 : 80 I. C. 661 : 1924 A. 530.

C. P. CODE (1908), S. 20.

—S. 20—Accounts—Suit by principal to recover money from agent—Forum of suit.

Where the principal and agent are carrying on business in different places, the former cannot call upon the latter to render accounts at his own place of business on the ground that goods were sent from such place, unless there was an agreement to that effect. A suit for money in such a place is not maintainable. (*Martineau, J.*) THE FIRM PRITHI SINGH JAMAYAT RAI v. THE FIRM HARSUKH DAS.

1924 Lah. 593.

—S. 20 (c)—Cause of action—Commission agent—Suit for price of goods entrusted—Cause of action—Jurisdiction—Offer, acceptance—Money intended to be paid to principal.

The plaintiff, a permanent resident of a place within the jurisdiction of the District Munsif's Court of M, went to Madras where he and the defendant talked and settled about the commission to be paid to him. He told defendant in Madras that he would consign goods directly to him or to others who would be directed to deliver to him. Plaintiff sent goods to a firm at Madras with instructions to deliver them to the defendant. He also wrote to the defendant asking him to sell them and send the amount. The firm delivered the goods to the defendant, who wrote to the plaintiff stating that he would send the amount after selling the goods.

In a suit instituted by the plaintiff in the Munsif's Court of M. to recover the price of the goods delivered to defendant as commission agent on behalf of plaintiff, *held* that the money was intended to be paid to the plaintiff at his native place, that part of the cause of action therefore arose within the jurisdiction of Court M, and that that court had jurisdiction to try the suit.

The making of an offer may be part of the cause of action, but this means not the posting of the offer but the receipt of the offer.

The receipt of the acceptance when the contract is complete is a part of the contract. (*Ramesam, J.*) CHEMALAPATI VENCATA REDDY v. NATARAJA SETTIL.

19 L. W. 499 :
34 M. L. T. (H. C.) 116 : (1924) M. W. N. 336 :
1924 Mad. 789 : 46 M. L. J. 371.

—S. 20—Cause of action—Conduct alleged as cause of action if determines forum.

Where the plaintiff alleged that on account of defendants' dishonesty or negligent conduct and dereliction of his duty as agent, the plaintiff had suffered a loss.

Held, the cause of action accrued at the place where the conduct complained of occurred. 6 S. L. R. 181 Dist (1912) I S. L. R. 93 Foll. (*Kennedy, J. C. and Raymond, A. J. C.*) FIRM OF GHANDARI KHUBAI v. FIRM OF DEVJI LADHA.

1924 Sind 22.

—S. 20 (c)—Cause of action—Contract—Performance of—Place where money is payable—Forum.

The cause of action in suits arising out of a contract arises at the place where the contract was made or the place where the contract was to be performed or performance completed or at the place where in performance of the contract any

C. P. CODE (1908), S. 20.

money to which the suits relate was expressly or impliedly payable. (*Drake-Brockman, J. C.*) JODRAJ v. BYRAM. 7 N. L. J. 25.

—S. 20 (c)—Cause of action—Sale of goods by Calcutta Firm to Madras Firm—Payment of price by hundis—Suit for recovery of money over paid—Forum.

Plaintiff a firm of merchants carrying on business in Madras purchased goods from the defendants at Calcutta firm. The arrangement as regards payment of the price was that the money was to be paid by means of hundis drawn by the defendants on the plaintiffs. The hundis were to be presented at Madras along with the railway receipts for the goods. In the course of their dealings, the defendants drew a hundi in their favour for price of goods sold and endorsed it to a hundi broker in Calcutta. The hundi was eventually presented to the plaintiffs in Madras and paid off. The plaintiffs then sued the defendant at Madras for recovery of a sum of money alleged to have been overpaid by means of the hundi. On a question arising as to whether the Madras Court had jurisdiction to entertain the suit, *held*, that a part of the cause of action arose in Madras as the payment was made in Madras and that under S. 20 (c) of the Civil Procedure Code the suit was maintainable in the Court in which it was brought.

Where a person outside Madras draws hundis, on a firm in Madras which under the contract, the Madras firm has to honour and pay when presented to them in Madras, the payment cannot be considered to be made when the hundi is negotiated by the drawer outside Madras but only when the payment is actually made by the firm in Madras on the hundi. (*Krishnan and Waller, JJ.*) PONNUSWAMI AIYAR AND NARAYANASWAMI AIYAR v. DAMODAR HUNSRAL.

47 Mad. 403 : 19 L. W. 168 : 34 M. L. T. (H. C.) 7 :
(1924) M. W. N. 178 : 79 I. C. 800 :
1924 Mad. 464 : 46 M. L. J. 82.

—S. 20, Cl. (c)—Jurisdiction—Breach of Contract for sale of goods—Place of delivery—Suit instituted in. 1924 Lah 349.

—S. 20 (c)—Cause of action—Sale of goods—Breach of contract—Goods deliverable at Karachi or liable to rejection there—Cause of action.

A contract for sale of goods provided that goods were to be sent to Karachi, and if they were approved of by the buyers, the unpaid purchase money to be paid. *Held*, the Courts at Karachi had jurisdiction to entertain a suit relating to the transaction, as part of the cause of action arose there.

In cases of contract, the cause of action arises in the place where the contract was made, the place where it was to be performed or performance completed and the place where in the performance of the contract any money to which the suit related was expressly or impliedly payable (*Kincaid, J. C. and Aston, A. J. C.*) KOOVERBHAN SUKHANAND v. LOUIS DREYFUSS & Co.

79 I. C. 30.

—S. 20 (c)—Cause of action—What is—Goods sent for sale at place X—Suit for wrongful sale.

C. P. CODE (1908), S. 20.

The term "Cause of action" means the whole bundle of relevant facts which a plaintiff must allege and prove to enable him to succeed.

Where goods are sent to place X to be sold there and a sale takes place in contravention of instructions, a suit for damages will lie at place X. (*Baker, J. C. and Prideaux, A. J. C.*) *FIRM JOHARMAL RUDMAL v. SUNDERLAL NARAYANDAS.*

1924 Nag. 308.

—S. 20 (c)—*Contract—Suit on cause of action—Place of performance.*

Though the new Civil Procedure Code omits in S. 20 the third explanation to S. 17 which was in the old Code the place where the performance of a contract has to be made determines the place where the cause of action arises wholly or in part and gives jurisdiction to the Court within whose limits that place is situated. (*Subbanna, J.*) *BASAPPA v. MALLAPPA.* 2 Mys. L. J. 66.

—S. 20 (c)—*Decree transferred for execution—Suit to restrain execution—If can be filed in the executing court.*

Where a decree of one court is transferred to another court for execution, a suit for an injunction restraining execution can be filed in that Court as part of the cause of action arises there. (*Kinkhede, A. J. C.*) *SULTANALI v. BALAJI.*

1924 Nag. 413.

—S. 20—*Place of suit—Delivery at Karachi—Payment at Peshwar—Karachi Court has jurisdiction.*

Certain contracts for import of goods were executed at Peshawar and both the parties had their places of business there but one of them had also a branch office in Karachi. As to the mode of payment the contracts provided that the documents for the purchase of goods would come through a Bank, i. e., the payment for the goods was to be made in Peshawar. The contract was for the sale and purchase of certain goods and the property in these goods passed under the terms of the contract to the applicants as soon as they arrived in the Karachi Harbour and the responsibility for any loss or damage to the goods was entirely theirs from that moment.

Held, that the parties contemplated the performance of the contracts in Karachi, a part of the cause of action therefore arose in Karachi and therefore Karachi Court had jurisdiction to entertain a suit in respect of the contract. 1 Lah 22 Dist. (*Kennedy, J. C. and Raymond, A. J. C.*) *FIRM OF KHALSA BIOS. v. HARI RAM SRI RAM & Co.*

1924 Sindh 29.

—S. 20—*Tort—Agency for purchasing goods—Damages for agent's negligence.*

The plaintiffs at Karachi sent a telegram to their commission agent in the United Provinces to buy and send them certain specified goods. In respect of goods sent, the plaintiffs sued for damages for the agent's negligence at Karachi. *Held*, the cause of action arose in U. P. and the suit was not maintainable at Karachi.

Sending of quotation cards or catalogue of price of goods is not an offer but only an invitation for offer. (*Rufchand Bilaram, A. J. C.*) *FIRM PREMJI MULJI v. FIRM OF TARACHAND THAWERDAS.*

1924 S. 64.

C. P. CODE (1908), S. 22.

—S. 21—*Mortgage suit—Territorial jurisdiction of Court—Alteration of prior to final decree—Decree if valid—Jurisdiction—Test of—Principle of S. 21—If applies to collateral proceedings—Waiver of jurisdiction.*

Prior to the passing of a final decree in a mortgage suit the territorial jurisdiction of the court over the suit properties was taken away by a Government notification. No objection was then raised as to the competency of the court to pass the final decree. In a suit brought to set aside the decree on the ground that the decree was void for want of jurisdiction. *Held*, the mortgage decree was valid and binding on the parties.

Per Phillips, J.—The jurisdiction of a court consists in its power to entertain suits and when once a suit has been properly entertained, its jurisdiction to try it to its conclusion is not removed unless it is specifically so done by the order of a competent authority.

Per Venkatasubba Rao, J.—Where the parties to a suit invoked the jurisdiction of a court to pass a decree, they cannot afterwards impeach the decree on the ground of want of jurisdiction. The principle underlying S. 21, Civil procedure Code, is that the plea of want of territorial jurisdiction may be waived. Though in terms it disallows objections in an appellate or revisional court, the principle is of general application and it in appeal or in revision the decree cannot be impeached, it is equally reasonable that in a collateral proceeding it should not be allowed to be attacked. The section applies where there is want of jurisdiction not merely at the institution of the suit but at any stage during the progress of it. (*Phillips and Venkatasubba Rao, JJ.*) *CHOKKALINGA PILLAY v. VELAYUDHA MUDHALIAR.* 1925 Mad. 117 : 47 M. L. J. 448.

—S. 21—*Transfer of territorial jurisdiction—Effect on pending proceedings—Objection—Waiver—Appeal.*

In a suit on a mortgage an application for the appointment of a Receiver *pendente lite* was made. Issues were framed in the case and afterwards the application for a receiver was heard. Before delivery of judgment on the application, the territorial jurisdiction of the Court was transferred by a notification of the Government and vested in another court. In spite of this the former court proceeded to deliver judgment appointing a Receiver, without any objection to its jurisdiction being taken by the parties. The defendants appealed against the order appointing a Receiver on the ground, *inter alia*, that the Court ceased to have jurisdiction over the cause at the time when the order was made. *Held*, that S. 21, C.P. Code, governed all cases of want of territorial jurisdiction and that the appellants not having taken objection to the passing of the lower court's order must be held to have waived objection on the ground of want of jurisdiction and could not raise the same objection on appeal especially as there had been no failure of justice. (*Odgers and Wallace, JJ.*) *RAMANI v. NARAYANASWAMI AIYAR.* 20 L. W. 467 : 1924 Mad 697 : 47 M. L. J. 192.

—S. 22—*Issues settled—Decision on one—Transfer—Application for.*

C. P. CODE (1908), S. 21.

Where all the issues arising out of the pleading had been settled and one issue as to the jurisdiction of the Court has actually been disposed of, an application for transfer cannot be maintained. The provisions of S. 22, C. P. C., are mandatory. (*Broadway, J.*) *FIRM OF BEHARI LAL KANHAIYA LAL v. THE OFFICIAL RECEIVER, LAHORE.* 78 I. C. 603.

—Ss. 21 and 37—*Execution proceedings—Order for delivery of immovable property after transfer of territorial jurisdiction—Objection to jurisdiction not raised in the first Court, if can be allowed on appeal.*

Pending an application for execution by delivery of possession of the properties decreed, the territorial jurisdiction of the court over the properties was taken away and vested in another Court. Notwithstanding this the court passed an order for delivery of the properties without any objection by any of the parties. Subsequently on appeal from the order of the court it was contended that the court had no jurisdiction to order delivery. *Held* that the judgment-debtor having waived all objection to territorial jurisdiction in the lower court could not be allowed to raise it on appeal. The objection being one of form and not of substance, the appellate court would not allow it to be taken for the first time. 43 M. 675 (F. B.) (*Spencer and D. vadoss, JJ.*) *MANAVIKRAMAN v. ANANTHANARAYANA AIVAR.*

19 L. W. 16 : (1924) M. W. N. 33 : 79 I. C. 808.
1924 Mad. 457 : 46 M. L. J. 250.

—Ss. 21 and 99—*Local jurisdiction—Place of suit—Objection—Prejudice.*

Before an objection to the local jurisdiction of a Civil Court can be given effect to, prejudice to the applicant in revision must have been pleaded and proved. (*Foster, J.*) *THE INDIAN GENERAL NAVIGATION & RV. CO., LTD. v. FIRM OF DAULAT RAM CHATURBHUI.* 2 Pat. L. R. 74 : 80 I. C. 745 : 1924 P. 327.

—Ss. 22 and 23—*Plaintiff having option of choosing forum—Transfer—Convenience and expense.*

Under the terms of a promissory note the plaintiff had the option of suing in one of two places and he exercised his option by filing a suit in one place. The defendant applied to have it transferred to the other, on the ground the plaintiff himself was living there and that it would be more convenient for the parties and the witnesses who lived nearer that place. *Held*, it was a fit case for transfer. (*Neave, A. J. C.*) *DUTT v. PANDIT SHEO BALAK PANDEY.*

10 O. & A. L. R. 108 : 11 O. L. J. 377 :
1924 Oudh 410.

—S. 24—*Application for transfer—Notice.*

Notice should be issued to the parties before a Court passes an order of transfer otherwise than on its own motion. (*Matineau, J.*) *LABHU RAM v. KARTA RAM.* 78 I. C. 614 (1).

—S. 24—*Transfer of suit—Choice of forum—Plaintiff's right to.*

A plaintiff is entitled to file his suit in the Court having jurisdiction to try it and the convenience of the defendant is not a ground for transfer of

C. P. CODE (1908), S. 36.

the suit. (*Shuruddin and Roe, JJ.*) *RAJAKA-
LANAND SINGH v. MAKSUDAN JHA.*

2 Pat. L. R. 111.

—S. 24—*Powers of transfer—Limitations.*

A superior court has no jurisdiction to direct the transfer of a case from a court subordinate to it to another court which is outside its jurisdiction. In such a case it is even doubtful whether it can direct the former court to return the plaint to be returned for presentation to another court outside its jurisdiction. (*Baker, A. J. C.*) *TOPAN HARI & Co. v. SINGHAI DALCHAND.*

1924 Nag. 152.

—S. 24—*Transfer of suit—Reasonable apprehension.* 77 I. C. 762.

—S. 34—*Mortgage suit—Interest up to date of redemption—Discretion of Court—Rule of damdupat.*

S. 34 C. P. Code, vests discretion in a Court to award interest in a mortgage suit up to the date fixed for redemption, even in cases to which the rule of *damdupat* applies at the date of suit. (*Kinkhede, A. J. C.*) *WILAYAT ALI KHAN v. MAROTI.* 78 I. C. 632.

—S. 34—*Interest—Damages—Breach of contract.*

Under S. 34, C. P. Code, the Court has a discretion to award interest on damages for breach of contract from the date of suit up to the date of decree but the court should state its reasons for so doing. (*Sunderson, C. J. and Richardson, J.*) *PANNALAL SAGORE v. MUKHRAM RADHA KISSEN.* 39 C. L. J. 77 : 80 I. C. 67 : 1924 Cal. 637.

—Ss. 34 and 151—*Damages or interests as damages by way of restitution—No jurisdiction to allow in cases where interest not awarded by the decree.*

The Court has no inherent jurisdiction under S. 151, C. P. Code, to award interest or damages in lieu of interest on the decretal amount from the date of decree where no interest has been specifically awarded by the decree.

A decree-holder is not entitled in execution proceedings to interest by way of restitution under S. 144, C. P. Code, in cases where the decretal amount has never in fact been realised, though he will be entitled to such restitution on amounts realised and reimbursed to the opposite party for the period he was kept out of the use of the money. (*Lentaigne and Carr, JJ.*) *MAUNG PE v. MA HNIT.* 3 Bur. L. J. 58 : 82 I. C. 427 : 1924 Rang 275.

—S. 35—*Appeal—Costs—Order as to—Appealability of.*

An order as to costs is within the discretion of the trial Court and unless some question of principle is involved therein, an appeal will not be entertained from the order. (*Sulaiman, J.*) *LACHHMI VARAIN v. MT. BRIJ RANI.*

L. R. 5 A. 573 : 80 I. C. 39 : 1924 A. 794.

—S. 35—*Costs—Partition suit.* 77 I. C. 914.

—Ss. 36 and 47—*Order—Commissioner—Order for remuneration of—Execution.*

C. P. CODE (1908), S. 37.

Where a Court makes an order for the remuneration of the Commissioner in a partition suit and directs it should be paid by one of the parties the order comes within S. 36, C. P. Code, and is executable under S. 47, C. P. Code. (*Suhra wardy and Duval, JJ.*) CHANDRA KUMAR DE v. KUSUM KUMARI ROY. 40 C. L. J. 180 : 1925 Cal. 57.

—Ss. 37 and 150—Execution—Jurisdiction—Money decree—Transfer of area where judgment-debtor lived from one court to another. MUTHUKARUPPA CHETTY v. PAIYA KAVUNDAN. 1924 Mad. 32.

—Ss. 38 and 39—Mortgage properly situate in two districts—Jurisdiction of court to direct sale of both.

The provisions of Ss. 38 and 39 indicate that no court can execute a decree in which the subject matter of the suit or application for execution is property situated entirely outside the local limits of its jurisdiction. But in cases of decrees for sale of mortgage property an exception has been recognized and a court can order execution of property comprised in the mortgage though situated partly in another district. (*Dass and Ross, JJ.*) ABDUL HADI v. MT. KABULTUNNISA. 80 I. C. 901.

—S. 39—Order transmitting decree for execution—Nature of—Objections to execution—When to raise.

An order transmitting a decree for execution is one of a quasi administrative nature—Objections to the execution of the decree should be raised before the court to which it is transmitted for execution. (*Richardson and Page, JJ.*) NARAIN DAS DATTA v. HANKU BEHARI CHATTOPADHYA. 78 I. C. 1001.

—Ss. 39 and 41—Transfer for execution—Certificate issued—Jurisdiction if ceases.

A court to which a decree was transferred for execution issued a certificate under S. 41 and returned the copy of the decree to the original Court. *Held*, thereafter it ceases to have any jurisdiction in execution. (*Dalal, J.*) SHIAM LAL v. KOERPAL. 22 A. L. J. 1039.

—S. 39 (1) (d)—Execution of decree—Court's power to transfer to another Court—decree-holder's right to execute his decree, whether liable to be limited.

The powers of a Court to transfer a decree passed by it to another Court for execution are not limited by the fact that there is not sufficient property within the local limits of the jurisdiction of that Court to satisfy the decree. A Court has no power to take away the decree-holder's legal right to execute his decree in such manner as he chooses, having regard to his own facilities and convenience.

Quære.—Does an order of a Court transferring a decree passed by it to another Court for execution fall within the provisions of section 47 (1) C. P. Code, and amount to a decree as defined in S. 2 (2) C. P. Code, and does an appeal lie against it. (*Wasir Hasan, J. C. and Kendall, A. J. C.*) MOHAMMAD SADIQ ALI KHAN v. NAWAB SHARF JAHAN BEGAM. 10 W. N. 409.

C. P. CODE (1908), S. 42.

—S. 39 (2)—Presumption under.

1924 Mad. 144.

—S. 41—Applicability—What amounts to information. MANI RAM PURCHAND v. VITHU RAMJI. 76 I. C. 548.

—S. 41—Decree—Transfer for execution—Certification.

Certification is a very important step when a decree has once been transferred to another court for its consequence is that the latter court ceases to have jurisdiction to execute the decree. There must be a formal certification by the court to which the decree has been transferred to another for execution to the court which passed the decree. (*Macleod, C. J. and Shah, J.*) SHIVLINGAPPA MALLAPPA v. SHIDMALLAPPA.

26 Bom. L. R. 345 : 80 I. C. 752 : 1924 Bom. 359.

—S. 41—Execution of decree—Transfer of decree for execution—Jurisdiction—Certification—To which Court should be made.

Where a decree is sent for execution to another court by the court which passed the decree the former Court is not divested of its jurisdiction until it sends the certificate under S. 41, C. P. Code. The meaning of Rule 172 (a) of the Oudh Civil Digest that the record shall be returned to the Court by which the decree was sent for execution when the decree has been executed wholly or in part by the Court to which it has been sent is that satisfaction should be such that no further satisfaction of the decree in that Court would be possible. (*Dalal, J. C. and Neave, A. J. C.*) SYED MD. SHAKUR v. JUGULKISHORE.

10 O. & A. L. R. 1277.

—S. 42—Transfer of decree for execution to another Court—Judgment-debtor's estate taken over by Court of Wards after passing of decree—Objection to execution of decree by Manager of the Court of Wards—Maintainability of.

The Court of Wards took charge of the estate of a judgment-debtor which was situated at Aligarh. On the application of the decree-holder the Collector as manager of the estate under the Court of Wards was brought on the record and the decree was transferred for execution to the Court of Aligarh without any objections taken by the Collector who had been given notice of the application. Subsequently when execution was applied for in the Aligarh Court the Collector raised an objection on the ground that as the decree-holder had failed to notify his claim under S. 17 of U. P. Court of Wards Act, his demand must be deemed to have been satisfied under S. 18. The decree-holder contended that the question not having been raised at the time when the Collector was impleaded as a party representing the Court of Wards or at the time when the decree was transferred for execution, it could not now be raised. *Held*, that the judgment-debtor was justified in taking the plea before the Court at Aligarh as neither the impleading of the Collector as a party nor the order transferring the decree for execution amounted to a decision of the question whether the decree-holder's demand must be deemed to have been satisfied under S. 11 of U. P. Court of

C. P. CODE (1908), S. 47.

Wards Act. The executing Court had power to consider the objection. (*Mukerjee and Daniels, JJ.*) SANWAL DAS v. COLLECTOR OF ETAH.

46 A. 560 : 22 A. L. J. 439 : L. R. 5 A. 380 : 1924 A. 700.

— S. 47—*Applicability—Test.*

In order to see if an order falls under S. 47, C. P. Code, it is necessary to see if it decides a question arising between the parties to the suit and relates to the execution of the decree. (*Pearson and Graham, JJ.*) DEVENDRA NATH BASU v. KAILASH CHANDRA KALU.

80 I. C. 861.

— S. 47—*Appeal against order staying execution.*

75 I. C. 419.

— S. 47—*Appeal—Costs of Commission—Execution—Nature of order, C. P. Code, S. 151.*

— S. 47—*Appeal—Pre-emption decree—Question of payment in time.* NILAKANTH v. MAHABIR SINGH. 1924 Oudh 104 : 26 O. C. 345.

— S. 47—*Appeal—Execution sale—Purchase by decree-holder—Application to set aside*

Where in execution of a decree the decree holder purchases the property and an application is put in to set aside the sale ostensibly under O. 21, R. 90, but which states the sale was illegal, the application also falls under S. 47 and any order passed therein amounts to a decree from which a second appeal lies. (*Sulaiman and Mukerjee, JJ.*) SUPERIOR BANK, LTD. v. BUDH SINGH. 22 A. L. J. 413 : 10 O. & A. L. R. 639 : 1924 A. 398.

— S. 47 and O. 21, R. 90—*Appeal—Execution sale—Application to set aside—Limitation—Order overruling—Appealability.*

Every order in proceedings under S. 47, C. P. Code, is not appealable. Orders dealing with mere matters of procedure such as those directing the production of documents, or the summoning of witnesses although in a wide sense they may be said to be orders relating to the execution can hardly be said to be the determination of any question within S. 47, C. P. Code, read with S. 2. The questions for determination there referred to must be those which the parties are asking the court to decide as to their rights or liabilities and not merely interlocutory questions of procedure which incidentally arise for determination in the course of the proceedings. When the rights or liabilities of the parties as to the execution, discharge or satisfaction of the decree are determined by the order, then the order is appealable as a decree. The judgment-debtor applied to set aside an execution sale on the ground of material irregularity and fraud in conducting the sale and also on the ground that execution had been barred.

The Court below held that by reason of a prior order in execution it must be held to have been impliedly decided that execution was not barred. Held that the question whether or not execution was barred was a question within S. 47, C. P. Code, arising between parties to the suit and that the order of the Court below was appealable. (*Dawson Miller, C. J. and Foster, J.*) SHIVA NARAYAN LAL CHAUDHURY v. NARAYAN PRASAD. 2 Pat. L. R. 22 : 1924 P. 683

C. P. CODE (1908), S. 47.

— S. 47—*Appeal—Execution sale—Omission to serve notice under O. 21, R. 22, C. P. Code.*

Where an application to set aside an execution sale is based not only upon the failure to publish and conduct the sale according to law but also on the ground of the omission on the part of the decree-holder of the necessary notice under O. 21, R. 22, C. P. Code, the case comes under S. 47, C. P. Code, and a second appeal lies. (*Mullick and Foster, JJ.*) KISHUNDEO NARAYAN MAHTA v. RAMRAJAN SINGH. 5 Pat. L. T. 61 : 1924 P. 67.

— S. 47—*Appeal—Order refusing stay of sale.*

An order refusing stay of sale under O. 41, R. 6, falls under S. 47 and is appealable. (*Martineau, J.*) SHANKAR DAS v. KASTURI LAL.

75 I. C. 789.

— S. 47—*Appeal—Order refusing stay of sale.*

An order refusing to stay a sale pending an appeal falls under S. 47, C. P. Code, and is appealable. (*Scott-Smith, J.*) FIRM OF PHALLU MAL HIRA LAL v. BANARSI DAS.

1924 Lah. 631.

— S. 47—*Appeal—Order refusing stay of sale.*

An order refusing stay of sale in pursuance of a decree which is pending appeal falls under S. 47, C. P. Code, and is appealable. (*Moti Sagar, J.*) THE FIRM PHAGGU MAL MATA DIN v. BENARSI DAS.

75 I. C. 1001.

— S. 47—*Appeal—Question relating to execution—Stay of execution—Refusal to restore execution application dismissed for default.*

An order passed by an executing court is a decree only when it determines a question relating to the execution, discharge or satisfaction of the decree. An order refusing to restore an execution application dismissed for default is not a decree and is not open to appeal. Where the execution court stayed proceedings directing each party to bear his costs, the question does not relate to execution, discharge or satisfaction of the decree and there is no appeal from the order. (*Sulaiman, J.*) LACHMI NARAIN v. MT. BRIJ RANI.

L. R. 5 A. 573 :

80 I. C. 39 : 1924 A. 794.

— S. 47—*Appeal—Order staying execution.*

An order staying or refusing to stay execution of a decree falls under S. 45 and is appealable. (*Martineau, J.*) FIRM OF GOBINDRAM-RAM CHANDER v. FIRM RULIA RAM NAURTA RAM.

1924 Lah. 602.

— S. 47—*Appeal—Award—Order in execution.*

An appeal lies against an order in execution of an award and for this purpose the award stands on the same footing as the decree in a suit. (*Kennedy, J. C. and Madgowkar, A. J. C.*) DONALD GRAHAM & Co. v. KWEALRAM.

79 I. C. 477.

— S. 47—*Appeal—Order directing decree to be executed only against property—Decree.*

Where a Court executing a decree holds that the decree could be executed only against the:

C. P. CODE (1908), S. 47.

property of the judgment-debtor and not against him personally, it has the force of a decree and there is an appeal and second appeal from it. (*Campbell, J.*) *THE FIRM OF MUL CHAND HUT CHAND v. THE FIRM OF GANDA MAL RALLIA RAM.* 1924 Lah. 604.

—S. 47—*Appeal—Party against whom suit dismissed—Objection—Order in—Remedy.*

Under S. 47, C. P. Code, a defendant against whom a suit has been dismissed is a party to the suit, and where he puts in an objection petition to an attachment and that is dismissed, he is entitled to come in by way of appeal. The fact that the petition is put in under O. 21, R. 58, does not disentitle him from pleading it was really one under S. 47. (*Moti Sagar, J.*) *MT. GAURAN v. CHANDU LAL.* 1924 Lah. 589.

—S. 47 and O. 21, R. 58—*Appeal—Claim in execution proceedings by legal representative of judgment-debtor—Enquiry under, to be full and exhaustive.*

Where the legal representative of a deceased judgment-debtor objects to the attachment of certain property in execution on the ground that it is his own property and not that of his judgment-debtor, the question falls within S. 47, C. P. Code, and the enquiry must be full and all the evidence adduced should be taken. (*Lentaigne and Carr, JJ.*) *ARUNACHELLAM CHETTIAR v. MAUNG SAN NGWE.* 2 Rang. 168; 1924 Rang. 323.

—Ss. 47 and 135—*Appeal—Arrest in execution of decree—Exemption under S. 135, Civil Procedure Code, claimed by judgment-debtor—Appeal—Arrest in execution of two decrees—Legality of.*

Where judgment-debtor arrested in execution of a decree claims exemption from arrest under S. 135, Civil Procedure Code, and the Court negatives his contention, the order is one under S. 47 and is appealable. Where a judgment-debtor has been arrested in execution of a decree and brought before the Court, he is not at the time exempt from arrest in execution of another decree held by a different decree-holder. (*Wallace and Jackson, JJ.*) *GOVINDASAMI ODAYAR v. THE UNION BANK, LTD., KUMBakonam.* 47 M. L. J. 678; 35 M. L. T. 102 (H. C.); (1924) M. W. N. 781; 1924 Mad. 900.

—S. 47 and O. 21, R. 66—*Appeal—Sale Proclamation—Order selling—Order in which property is to be sold—Order settling—Appeal from—Maintainability.*

A Judge acts not judicially but only administratively when he settles a sale proclamation; his order does not come within S. 47 of the Code.

Held, therefore, that no appeal lay against an order merely settling one of the terms of the sale proclamation, namely, the order in which the property was to be sold.

The ruling in 27 M. 59 : 14 M. L. J. 57 (F. B.) is good law even under the present Code. (*Krishnan and Waller, JJ.*) *LANKA RAMA NAIDU v. LANKA RAMAKRISHNA NAIDU.* 46 M. L. J. 192; 19 I. W. 235; 35 M. L. T. (H. C.) 275; 78 I. C. 829; (1924) M. W. N. 220.

1924 Mad. 527.

C. P. CODE (1908), S. 47.

—Ss. 47, 151 and O. 21, R. 90—*Appeal—Second appeal—When lies—Auction sale set aside under inherent powers of Court—Sale contrary to order of the Court—Effect of.*

An application to set aside an auction sale was dismissed by the District Munsif on the ground that there was no evidence of fraud or material irregularity. On appeal the District Judge agreed with the findings of the Court below but holding that the sale was in contravention of a prior order of court which had become final, set aside the sale under his inherent powers. Held, the order of the District Judge was not one under O. 21, R. 90 but under S. 151 and an appeal lay to the High Court.

In the case of an application to set aside an auction sale there is no second appeal when the court approached under S. 47 acts under O. 21, R. 90. But when it is so approached and exercises its inherent power under S. 151 there is a second appeal. 33 I. C. 692; 38 C. 339; 27 M. L. J. 605; 30 M. L. J. 611; 3 Pat. L. J. 645 referred to. Where the parties disputing the sale are parties to the suit they approach the court under S. 47 which decides the forum and not the scope of the jurisdiction. (*Jackson, J.*) *AKSHIA PILLAI v. GOVINDARAJU CHETTY.* 47 M. L. J. 569; (1924) M. W. N. 84; 1924 Mad. 778.

—S. 47 and O. 21, R. 92—*Bar of suit—Property not covered by decree sold in execution—Mistake—Suit to recover.*

More than three years after an execution-sale, the judgment-debtor applied for restoration to possession in respect of certain items of property which were alleged to have been sold by a mistake and not directed to be sold under the mortgage-decree. The property had been purchased by the decree-holder and transferred to another person subsequently. Held, that the application was barred under O. 21, R. 92, inasmuch as the judgment-debtor could have applied under O. 21, R. 90, C. P. Code to set aside the sale. (*Ryves and Daniels, JJ.*) *INTIAZ-UN-NISSA v. CHATTAN LAL.* 22 A. L. J. 1119.

—S. 47—*Bar of suit—Subsequent suit for ejectment on fresh cause of action.*

1922 A. 411.

—S. 47—*Bar of suit—Compromise decree containing extraneous matters—Enforcement of.*

When a compromise decree contains provision extraneous to the subject-matter of the suit, the enforcement of the latter is not by way of execution but by way of suit. (*Suhrawardy, J.*) *ARJUN KAPALI v. ASVINI KUMAR KAPALI.* 78 I. C. 317.

—S. 47—*Bar of suit—Decree-holder purchasing at auction—If a party to suit—Delivery proceedings—Question relating to execution.*

A decree-holder does not lose his character as a party to the suit merely because he is the auction-purchaser and a question as to the delivery to him of the property purchased is a question relating to the execution, discharge or satisfaction of the decree, and hence, a separate suit is barred. (*Raymond and Kennedy, A.J.Cs.*) *PIRIMAL v. MT. SANGHAR.* 78 I. C. 930.

C. P. CODE (1908), S. 47.

— S. 47—*Bar of suit—Adjustment uncertified—Suit for declaring satisfaction of decree.*

§ S. 47, C.P. Code, does not bar a suit for declaration that by means of an adjustment though uncertified the decree has been fully satisfied. (*Moti Sagar, J.*) *BISHEN SINGH v. MAHINDAR SINGH.* 1925 Lah. 54.

— S. 47—*Execution sale—Setting aside—Deceased Judgment-debtor—Representatives of—Some representatives not added—Effect of.*

Where in execution of a decree against a deceased judgment-debtor, her properties were attached and sold in execution and purchased by a third person and it is subsequently found that the son of the deceased judgment-debtor alone was impleaded as legal representative and not her daughter, *Held*, that the sale was not a nullity and that it was merely irregular 32 I. A. Ref. (*Shah, C. J. and Forcel, J.*) *MADHAV RAO HARBARI v. AMBABAI LAXMAN.* 26 Bom. L. R. 1210.

— S. 47 and O. 21, R. 58—*Objection by judgment-debtor that a certain property was not liable to be sold—Dismissal—Remedy—Suit or appeal—Objection dismissed without inquiry into merits—Error of law, effect of.*

Where a judgment-debtor made an application to the executing Court that out of several properties attached and entered in the sale proclamation, a certain item of property was not liable to be sold on the ground that he did not possess a saleable interest therein. *Held*, that the objection cannot be treated as one under O. 21, R. 58, C. P. C., but must be treated as one falling under S. 47, C.P.C., and hence an appeal lay against the order adjudicating the objection. 8 A 146 foll. 1 O. C. Suppl. 11 distinguished.

Where the Court dismissed the objection on the ground that it was made too late and was not *bona fide*.

Held, that the Court ought to have inquired into the merits of it and owing to its failure to do so the order was liable to be set aside. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) *LACHMAN PRASAD v. SRIMATI MIRNALUNI DEBI.* 10. W. N. 857.

— S. 47 and O. 21, R. 16—*Parties—Meaning of Order allowing execution by one of two assignees—Appeal—If lies.*

The word 'parties' in S. 47 contemplates parties ranged on opposite sides and not as co-decree holders. Hence an order allowing one of the assignee decree holders to execute a decree is not appealable at the instance of the other. (*Kinkhede, A. J. C.*) *RADHABAI v. BHIMRAO.* 82 I. C. 734.

— S. 47—*Parties—Decree-holder and objector to attachment—Colourable transactions—Enquiry.*

Proceedings between the opposite party and the judgment creditor as to whether the attachment is valid are proceedings under S. 47 and not under O. 21. Section 47 would be very much narrowed if it were laid down that people claiming under a purely colourable and fraudulent document are not to have their claim set aside or ignored when proceedings are taken in execution. (*Rankin, J.*) *KARALI PRASAD MUKHERJI v. JAMI NIBALA DEVI.* 1923 Cal. 344.

C. P. CODE (1908) S. 47.

— S. 47—*Parties—Defendant whose name is struck off—If still a party.*

A defendant whose name is struck off the record cannot be said to be a party to the suit or to the decree so as to attract the provisions of S. 47, C. P. Code. (*Kinkhede, A. J. C.*) *KANHAIYALAL KALAR v. LACHHI.* 80 I. C. 470.

— S. 47—*Parties—Action-purchaser—Position of.*

A *bona fide* auction-purchaser for value in execution of a decree is not a party to the suit within the meaning of S. 47, C.P. Code. (*Moti Sagar, J.*) *MT. ASGHARI BEGUM v. IRSHAD-UD-DIN.* 79 I.C. 57.

— S. 47—*Parties and representatives—Auction-purchaser—Stranger—If a representative of decree holder.* 1924 S. 101.

— S. 47—*Parties—Representative of the judgment-debtor—Attachment by two Courts—Sale by inferior Court—Rights of purchaser—Application to set aside the sale.*

In execution of a decree against a judgment-debtor certain property was attached by the Munsiff's Court. Subsequently the same property was attached before judgment by a Court of the Subordinate Judge which after the passing of the decree became an attachment in execution. The property however was sold in execution by the Munsiff's Court and purchased by the appellant. The decree-holder in the Sub Court applied to the Court to sell the property in execution of his own decree. The appellant applied to that Court that the property should not be sold inasmuch as by the execution sale in the Munsiff's Court it had become the property of the appellant and ceased to be the property of the judgment-debtor. The Sub-Court rejected the application. On appeal *held* that the appellant was the representative of the judgment-debtor and that his appeal was maintainable. (*Krishnan and Ongers, JJ.*) *SREE-NIVASACHARIAR v. APPAVOO REDDY.*

(1924) M. W. N. 551; 20 L. W. 864;
47 M. L. J. 720; 1924 Mad. 889.

— S. 47—*Parties—Court of Wards in which the estate of judgment-debtor is vested—Locus standi to object in execution.*

Where after the decree in a suit, the estate of the judgment-debtor becomes vested in the Court of Wards the latter can object in execution proceedings to the attachment and sale of property (*Ross and Sen, JJ.*) *LACHMI NARAIN GOURI v. SYED MAHOMED ABRAHIM HUSSAIN KHAN.*

1924 P. H. C. C. 310.

— S. 47—*Parties and representatives—Decree-holder auction purchaser—Resistance to delivery—Suit for removal of obstruction—Maintainability.*

The plaintiff, a mortgagee of an eight annas share belonging to the mortgagor and his brother obtained a decree on the mortgage and in execution the mortgagor's interest in the eight-annas share was sold and purchased by the plaintiff. The sale having been confirmed the plaintiff applied for delivery of possession but was obstructed by an alienee from the brother of the mortgagor. The court having held that the plaintiff was only entitled to joint possession of

C. P. CODE (1908), S. 47.

the eight-annas share along with the alienee, the plaintiff sued to recover possession of the eight-annas share beyond the expiry of one year from the date of the order in the execution proceedings. *Held*, that the plaintiff's suit for recovery of possession of the four annas share of the mortgagor's brother, having been filed after the expiry of one year from the date of the order was barred but that his claim for the remaining four-annas share was maintainable. 26 Bom. L. R. 601, F. II. (Shah, A.C.J. and Fawcett, J.) LAKSHMAN SADASHIV v. GOVIND GANESH, 26 Bom. L. R. 813 : 1924 Bom. 527

—S. 47—Parties—Dispute between judgment-debtor and auction-purchaser—If within section.

Disputes between a judgment-debtor and the auction purchaser as to the extent of the land sold do not fall within S. 47, C. P. Code, as it is not between parties to the suit, but between the judgment-debtor and his representative the purchaser. (Daniels, J.) MUKHTAR AHMAD v. KABIR AHMAD. 1924 A. 856.

—S. 47—Parties to suit—Interpretation of the terms—Applicability where co-defendants are arrayed as against each other.

Held, the expression between parties to the suit no doubt imports "between parties opposed to each other in the suit," but does not necessarily mean "between parties who are plaintiff and defendant respectively in the suit." It also applies to parties, who are opposed to each other in the course of execution proceedings, and when an order is passed under S. 47 in execution of the decree passed therein no separate suit is maintainable by one of them, to recover the same. Mangayya v. Sriramulu 24 M. L. J. 477. (Madavan Nair, J.) VEDAVYASA AIYAR v. MADURA HINDU LABHA NIDHI Co., LTD. 18 L. W. 311 : 20 L. W. 742.

—S. 47—Question relating to execution to discharge or satisfaction of decree—Adjustment of decree not certified—Fraud—It can be inquired into

Where a decree has been satisfied out of Court but it has not been certified as required by O. 21, R. 2, owing to fraud on the part of the decree-holder, the matter falls under S. 47 and the question of payment and satisfaction can be enquired into in execution proceedings. (Wazir Hasan, J. C.) SURAJ NARAIN MISRA v. ULAND SINGH. 1 C. W. N. 218 78 I. C. 776 : 10 J. & A. L. R. 375.

—Ss. 47 and 145—Question relating to execution of decree—Security of immoveable property—Stay of execution—Sale of property given as security—Suit under S. 67 of the T. P. Act, unnecessary.

The relationship between a decree-holder and a judgment-debtor who has executed a security bond under O. 41, R. 5, C. P. Code, charging certain immoveable properties for the due performance of the decree or order that may ultimately be passed by the Appellate Court is not that of mortgagee or mortgagor, and in the event of the appeal being dismissed, the decree-holder is entitled to

C. P. CODE (1908), S. 47.

realise his decretal money by sale of the properties given in security without instituting a suit under S. 67 of the T. P. Act. 41 M. 327 ; 42 A. 198 Rel. (Chatterjee and Panton, JJ.) JYOTI PRAKASH NANDI v. MUKTI PRAKASH NANDI. 1924 Cal. 485.

—Ss. 47, 144 and 151—Question relating to execution—Power of Court—Attached property entrusted to custodian—Direction to produce or restore—Default—Power to proceed against custodian.

An executing court which entrusts to a party to the decree or to a third person as a depository or *supraldar*, property taken by it under attachment or in execution of its process, has, either acting on its motion or at the instance of a party to the decree, power to order him to produce it for sale if necessary, even to return it to the judgment-debtor or to the objector or any other person from whose possession it was attached or taken, upon the decree being satisfied or objection being allowed or upon the termination of any proceedings in execution or for any cause whatever, and also if necessary, to visit him with any penalty for his default in obeying its orders by proceeding against him in a summary manner, in order to prevent the abuse of its own process and for shortening the litigation or for the ends of justice. 16 Nag. 178 Dis. (Kinkhede, A. J. C.) RAMJI v. ZIBLAJI. 20 N. L. R. 98 : 7 N. L. J. 130 : 80 I. C. 49 : 1924 Nag. 258.

—S. 47—Execution—Sale—Sale by inferior Court—Subsequent attempt to sell property by superior Court—Application by purchaser in former sale to stop the sale—Maintainability. See C. P. CODE, S. 63 (2). 47 M. L. J. 720.

—S. 47—Question relating to execution Judgment-debtor's application against unlawful dispossession—Execution struck off as satisfied—If maintainable.

A judgment-debtor's application complaining of unlawful dispossession is maintainable under S. 47 even after the execution is struck off as fully satisfied. (Kolval, A. J. C.) KRISHNA KUMBI v. VINAYAK KUMBI. 1924 Nag. 122.

—S. 47—Question relating to execution—Excess area in partition decree—Power to correct—Execution proceedings.

Where the final decree in a partition suit awards an excess share to one party by mistake, it can be amended in execution proceedings, the language of S. 47 being wide enough to cover the case. Apart from S. 47 the Court can do the needful under S. 151, C. P. Code (Raymond and Madgowkar, A.J.Cs) DANDUMAL v. DWARKAMAL. 78 I. C. 1039.

—S. 47—Question relating to execution—Simple mortgage—Acquisition of equity of redemption—Sale in execution of decree—Suit for possession.

In 1906 two simple mortgages were executed over the suit property, one in favour of plaintiff and the other in favour of one Bagirath. The defendant acquired the right of Bagirath and brought the property to sale under his mortgage.

C. P. CODE (1908), s. 47.

The plaintiff was made a party to the suit and he had also acquired the equity of redemption from the original mortgagor and was in possession of the property in that capacity. The decree in the defendant's suit was for sale of the property subject to the prior lien of the plaintiff. On the property being brought to sale the defendant purchased it himself. He thereupon obtained possession through the Court as against the plaintiff. Subsequently the plff. brought a suit not for recovery of his mortgage money but to be restored to possession of the property. *Held*, (1) that the plff. was not entitled to possession as mortgagee because the mortgage in his favour was a simple mortgage; he was not entitled to possession as owner because the equity of redemption had been sold and purchased by the defendant and his only right, if any, under the decree was to bring the property to sale for the enforcement of his prior lien. *Held*, also that the suit was barred under S. 47, C. P. Code. The plaintiff was a party to the decree. He had been dispossessed under the terms of the decree and his remedy for recovery of possession was by application to the execution Court. (*Daniels and Boys, JJ.*) DWARKA DAS v. DURGA PRASAD. 22 A. L. J. 683 : 82 I. C. 80 : 1924 A. 752.

S. 47—Question relating to execution—Stay order—Appeal.

An order staying or refusing to stay execution of a decree by the Court is a determination of a question relating to execution within the meaning of S. 47, C. P. Code. Though a stay order falls within S. 47, C. P. Code it is not a decree because it is not a determination which has attaching to it the characteristics required by S. 2, C. P. Code, to be attached to a determination, whether in a suit or in execution, if it is to amount to a decree. A stay order is therefore not appealable as a decree and no special appeal being given against such an order, no appeal lies. Cases reviewed. (*Daniels and Boys, JJ.*) HUSAIN BHAI v. BELTIE SHAH. 46 A. 733 : 22 A. L. J. 706 : 1924 A. 808.

S. 47—Question relating to execution—Exonerated defendant—Objection to execution of decree against property in his hands—Appeal.

One of the defendants in a suit for sale on a mortgage was exonerated by the plaintiff and no decree was passed against him or the properties in his hands. Subsequently the plaintiff brought to sale in execution certain property which the exonerated defendant claimed to be his own.

Held, that the objection raised by the defendant to the sale of the property in his hands was one relating to the satisfaction of the decree and that the exonerated defendant was a party to the suit within S. 47, C. P. Code consequently the objection was one that should be decided by the executing Court. (*Stuart and Mukerjee, JJ.*) MT. MAHADEI v. JAGANNATH DAS. L. R. 5 A. 91 : 78 I. C. 225 : 1924 A. 813.

Ss. 47 and 36—Question relating to execution—Order for payment of fees to Commissioner—Executable as a decree—Appeal. See C. P. CODE, Ss. 36 AND 47. 40 C. L. J. 180.

C. P. CODE (1908), s. 47.

—S. 47—Question relating to execution—Money paid into court—Right to draw out—Deposit into Court by a person not a party to the suit not interested in the decree. See C. P. CODE CONSTRUCTION. 46 M. L. J. 567.

S. 47—Question relating to execution—Suit by auction-purchaser who was himself a decree-holder—Suit for possession—Not barred.

Where a decree-holder in execution of his money decree purchased the right, title and interest of his judgment-debtor in certain immoveable properties a suit by the purchaser to recover possession on the strength of that title would not be barred by S. 47, C. P. Code, 35 B. 452 overruled. (*Macleod, C. J. and Crump, J.*) HARGOBIND MULCHAND v. BHUDAR RAJJI. 48 Bom. 550 : 26 Bom. L. R. 601 : 1924 Bom. 429.

S. 47—Question relating to execution—Objection by legal representative that decree is fraudulent—Remedy by suit.

If a judgment-debtor or a legal representative objects to the execution of a decree on the ground that the decree is not valid, because it is collusive, the question as to the validity of the decree is not one relating to the execution, discharge or satisfaction of the decree and cannot therefore be tried in execution under S. 47 of the Civil Procedure Code. Such a question can only be tried in a regular suit brought for the purpose. (*Kinkhede, O. A. J. C.*) BEHARI SINGH v. NAWAL SINGH. 20 N. L. R. 24 : 78 I. C. 136 : 1924 Nag. 81.

S. 47—Question relating to execution—Enquiry into extent of property attached and sold—Application by judgment-debtor.

Where a judgment-debtor applies to the executing Court for restoration of certain property alleged to have been taken possession of by the decree holder under colour of his decree the matter is one that ought to be enquired into by the executing Court. (*Kinkhede, A. J. C.*) KESHRI SINGH v. UMRAO SINGH. 20 N. L. R. 90 : 7 N. L. J. 151 : 1924 Nag. 246.

S. 47 and O. 21, R. 2—Scope—Legal representative—Execution of decree—Agreement prior to decree if can be pleaded in bar.

S. 47 of the C. P. Code is wide enough to permit any valid objection to be taken by a judgment-debtor to the execution of a decree by the decree-holder or the decree-holder's legal representative. An agreement between such legal representative and the judgment-debtor prior to the decree which would preclude the legal representative from applying can be set up in bar of execution by such legal representative. 40 M. 233 Foll. (*Spencer and Devadoss, JJ.*) ARUNACHELA GOUNDAN v. SWAMINATHA AIYAR. (1924) M. W. N. 144 : 77 I. C. 547 : 19 L. W. 27 : 1924 Mad. 611 (1) : 46 M. L. J. 240.

S. 47—Scope of—Mortgage suit.

S. 47 applies only to question regarding satisfaction of decree. A mortgage remains pending till final decree and hence questions arising on

C. P. CODE (1908), S. 47.

of proceedings between the final decree and the preliminary decree are not within the section. (*Baker, J. C.*) *LACHIRAM v. BHOLU*,
82 I. C. 452.

———S. 47—Scope—Validity of attachment—If within section—Colourable titles—If can be red.

Proceedings between the judgment debtor and the decree holder as to whether an attachment is valid fall under S. 47 and not under O. 21, C. P. Code. The claims of people holding under a purely colourable and fraudulent document can be set aside or ignored in such proceedings. (*Rankin, J.*) *KARALI PRASAD MUKERJI v. JAMINI-BALA DEVI*.
76 I. C. 316.

———Ss. 47 and 145—Surety—No personal liability—Liability in execution. 1924 A. 105.

———S. 47—Suit on judgment—Maintainability—Remedy by execution. See JUDGMENTS.
47 M. L. J. 829.

———S. 47 (3)—Execution proceedings—Question whether a party is or is not the legal representative—Decision thereon whether appeal lies.

Sub-S (3) of S. 47 of the Civil Procedure Code in express terms, includes a question arising between the parties whether any person is or is not the representative of a party, and in view of S. 2, the determination of such a question between the decree-holder and the judgment-debtor amounts to a decree and is appealable. (*Daniels, J.*) *PEARE LAL v. JHABBA LAL*.
82 I. C. 604 :
1925 All. 66 : L. R. 5 All. 668 (Civ.)

———S. 48—Fraud—Execution of decree—Evasion of arrest—Limitation—Extension of time.

Where a judgment-debtor evades arrest in execution of the decree he is guilty of fraud within the meaning of S. 48, C. P. Code, and the period of limitation for execution is thereby extended 6 M. 365 : 12 L. W. 710 followed (1898) 8 M. L. J. 203 not followed. (*Phillips and Odgers, JJ.*) *RS. RAMANATHAN CHETTIAR v. M. G. MOHIDEEN SAHIB*.
20 L. W. 475 : 80 I. C. 731 :
(1924) M. W. N. 745 : 1924 Mad. 836 :
47 M. L. J. 428.

———S. 48—Fraud—What is.

The word "fraud" in S. 48 has to be interpreted in a much wider sense than that in which it is generally used in English Law. Locking up the house so as to prevent attachment of moveables, evading arrest by any contrivance, dishonestly evading service of warrant, fictitious transfer of property to defeat or delay execution, all these amount to fraud. Fraud at any stage of the execution, gives a new starting point for limitation. (*Kinkhede, A. J. C.*) *KHAIRULLA v. SETH DHANRUPMAL*.
80 I. C. 905.

C. P. CODE (1908), S. 50.

———S. 49 and O. 21, R. 18—Decree—Attaching decree-holder—Right to set off—Inherent power of Court. 28 C. W. N. 988.

———S. 50—Assets—Property of deceased—Contest as regards inheritance—Acceptance of money in lieu of right to inheritance—Effect of.

A legal representative is liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. The fact that a claimant to the inheritance of a deceased person received a sum of money from the opposing claimants who were in possession of the estate does not make the money so received assets of the deceased in the hands of the claimant. *Quære* whether property converted into one form different from the form which the estate originally represented could be called as the property of the deceased. (*Wazir Hasan, J. C.*) *SHAMSHER BAHADUR SINGH v. MT. KAILASH BIBI*.
10 O. & A. L. R. 275 : 11 O. L. J. 441 :
1924 Oudh 364.

———Ss. 50 and 52—Legal representative—Assets—Impartible estate—Breach of trust by holder of impartible estate—Liability of successor to the Zemindari for such debts. See MAD. IMP. ESTATES ACT, S. 4. 19 L. W. 132.

———S. 50 and O. 9, R. 13—Legal representative not brought on record—Setting aside of ex parte decree by the legal representative of deceased defendant—S. 146, C. P. C. applicability of.

It is not incumbent on a party to be entitled to a rehearing under O. 9, R. 13, C. P. C. as the legal representative of a deceased defendant to be first brought on the record under S. 50, C. P. C., before filing an application for setting aside the ex parte decree (p. 700) 38 M. 442 referred to.

The provisions of S. 146, C. P. C. being very wide procedure prescribed therein equally applies to an application under O. 9, R. 13, C. P. C. (p. 701). (*Dalal, J. C.*) *MUSSAMMAT DEOKI v. JUGAL KISHORE*.
10 O. & A. L. R. 1001 :
1 O. W. N. 699.

———S. 50 (2)—Legal representative—Personal liability—Insufficiency of assets—Onus of proof.

If it were shown that a deceased person left a certain amount of assets and that the legal representative had received some portion of those assets, it would be for him to explain why he did not receive the whole of the assets and if he says that he did not so receive them, it would be for him to establish what proportion of the assets, proved to have been left by the deceased, really got into his hands. Of course, the burden is on the legal representative to show that he has utilised the assets that have come into his hands, in the proper administration of the estate; otherwise, he will make himself personally liable for the debts of the deceased to the extent of the assets shown to have been left by the deceased and presumed to have passed into his hands. From the mere fact that a person is a legal representative, it could not be strongly presumed that he got

C. P. CODE (1908), S. 52.

the assets of the deceased. It must be made out by the evidence in the case 30 M.L.J. 391; 21 M.L.J. 1096; 3 M. 359 Referred to (*Krishnan and Odgers, JJ*) *ANGAVALATHAMMAL v. JANAKI AMMAL*. 19 L. W. 119; 79 I. C. 894; (1924) M. W. N. 207; 1924 Mad. 466.

——— S. 52—Appropriation of assets of the deceased—Personal liability. *MIHI LAL v. BABU LAL*. 77 I. C. 303.

——— S. 52—Effect of.

The practical effect of S. 52, C. P. Code is not to make the liability of a person sued in a representative capacity any the less personal or to make the debt recoverable only from certain property; the application of the section only converts the decree from one for a single stated sum of money into a decree for that sum or another unascertained sum if the latter should be less. (*Hallifax, A. J. C.*) *BED PRASAD v. NAKCHHED PRASAD*. 1924 Nag. 410.

——— S. 52—Legal representative—Impartible estate—Decree for money against prior holder—Execution against money payable under a lease granted by predecessor but for period subsequent to his death—Money if assets in the hands of successor—Succession to estate by survivorship. See MAD. IMP. ESTATES ACT, S. 4. 46 M. L. J. 374

——— S. 52—Property of deceased—Income of, accrued since death of deceased and come into hands of representative if included in—Attachment of income—Decree-holder's right of—Realisation of amount attached.

Under S. 52 of the Code the income of landed property, which has passed from one Zemindar to the next, the property being an impartible Raj, is liable to execution for the debts of the deceased Zamindar.

Income accrued since the late Zamindar's death which has come into the hands of the new Zemindar can be attached. It is unnecessary to sell it. The Code has made ample provision for execution upon the money belonging to a deceased person in the hands of another. (*Schwabe, C. J., Coutts Trotter and Ramesam, JJ.*) *KADIRVELUSAMI NAICKER v. THE EASTERN DEVELOPMENT CORPORATION, LTD.* 47 Mad. 411; 34 M. L. T. (H. C.) 17; 1924 M. W. N. 346; 80 I. C. 163; 1924 Mad. 530; 46 M. L. J. 261 (F. B.)

——— S. 53—Applicability of—Decree for possession—Money-decree—Excludability against sons.

S. 53 of the C. P. Code is not confined in its operation to money-decrees. If a decree is passed in respect of joint family property, it can be executed against the sons after the father's death. 42 B. 504 not foll. (*Spencer and Devadoss, JJ.*) *MEYYAPPAN SERVAI v. MEYYAPPAN AMBALAM*. 19 L. W. 484; 84 M. L. T. (H. C.) 209; 1924 Mad. 571; 46 M. L. J. 471.

C. P. CODE (1908), S. 55.

——— S. 53—Decree under—Ancestral property—Liability for sale.

The whole of the ancestral property and not merely father's share can be sold under a decree passed in terms of S. 53. (*Daniels, J. C. and Wazir Hasan, A. J. C.*) *BHAGWANTI SAHAI v. MAHARAJ PRAG DIN*. 27 I. C. 111; 10 O. & A. L. R. 313; 11 O. L. J. 202; 81 I. C. 15; 1 O. W. N. 13; 1924 Oudh 393.

——— S. 53—Person taking property by survivorship—Legal representative—Nephew of deceased Hindu co-partner.

It is only in the case of a son or other descendant that a person taking property by survivorship can be joined as a legal representative under S. 53 of the Civil Procedure Code. The Section has no application to a nephew. 45 A. 455 Rel. on. He can, therefore, plead that he holds the property under an independent title and cannot be joined as a party to the proceedings for the preparation of the final decree. If he fails to do so he must be held to be bound by the decree. (*Daniels, J.*) *BALKARAN LAL v. MALIK NANDAR*. L. R. 5 A. 279; 78 I. C. 637; 1924 A. 873.

——— Ss. 55 (4) and 145—Assets of judgment-debtor in execution—Surety for production of Judgment-debtor and for his application in insolvency—Failure to produce Judgment debtor—Execution against surety.

The appellant executed a surety bond, as a result of which, the judgment-debtor who was arrested in execution of a decree against him, was released.

On the dismissal of the application of the judgment-debtor to be declared insolvent, the decree-holder applied to the Court for directing the appellant to produce the judgment-debtor who was released on his surety. Notice of this application was served upon the appellant and he was directed to produce the judgment debtor. The appellant failed to produce the judgment-debtor; even he himself did not appear in Court. The execution was dismissed.

The decree-holder now enforced the terms of the security bond executed by the appellant and proceeded to realise the decretal amount from the appellant.

Held that the liability of a surety under S. 55, C. P. Code enures for the benefit of the Court as well as for the decree-holder. The Court accepting the security may enforce it, failing which the decree-holder is equally entitled to enforce same in any way that may be open to him, for he is the ultimate beneficiary under the security bond. No doubt, under the Old Code of Civil Procedure sometimes it used to be contended that the remedy of the decree-holder against the surety was only by means of a regular suit. In order to save the decree-holder from trouble, inconvenience and expense of bringing a suit to enforce the security bond the present Code under S. 145 gives him a right and opportunity to enforce the bond, in execution proceedings. Therefore if the

C. P. CODE (1908), S. 55.

appellant as surety in the present case made himself liable for the performance of the decree or any part thereof, the decree-holder is entitled to enforce the bond by executing the decree against him in execution proceedings. The execution proceedings referred to therein, are not in any way connected with the execution proceedings in which the surety bond was filed but it may be any execution proceedings. The appellant's liability, therefore, arose on account of the failure of the judgment-debtor to appear in Court after the insolvency petition was dismissed and he was called upon to appear. (*Jwala Prasad and Kulwant Sahay, JJ.*) SHYAM PRASOONO KATARI v. KESHAB CHANDRA RANA.

1924 P. H. C. C. 63 : 5 Pat. L. T. 336 :
81 I. C. 702 : 1924 P. 467.

—S. 55, cl. 4—*Failure of judgment-debtor to apply within time—Effect of—Surety liable though judgment-debtor may die after the time allowed—Scope of sub clause.*

Where the judgment-debtor failed to apply within time to be declared an insolvent, on his release on offering a surety for Rs. 500 and the Court *suo motu* issued warrant of arrest but the judgment creditor prayed for calling upon the surety to pay the amount of the decree and praying that no warrant be issued.

Held, that execution for the amount of the decree should be allowed against the surety notwithstanding the fact that judgment-debtor had died after the order of arrest, because the surety's liability came into existence on the failure of the judgment-debtor. (*Macleod, C. J. and Shah, J.*) MAKANJI MAOJI v. BHUKHANDAS NAGARDAS.

48 Bom. 500 : 26 Bom. L. R. 415 :
1924 Bom. 428.

—Ss. 55 (4), 145 & O. 21, R. 40—*Surety for judgment-debtor—Insolvency—Non-appearance of judgment debtor—Liability of surety.*

When a judgment-debtor was arrested in execution of his decree the respondent stood surety for him and executed a bond undertaking liability for the decretal amount in case the judgment-debtor failed to appear in Court on any hearing till the final decision of the case. On the date of the hearing the judgment-debtor appeared and expressed his intention of applying to be declared an insolvent. The hearing was adjourned and no fresh security was taken, nor was the surety released. The judgment-debtor failed to appear on the adjourned hearing and the decree-holder applied to realise the decree amount by attachment of the surety's properties. *Held*, that the surety was liable in execution under S. 145, C. P. C. and that his properties could be attached and sold for the decree-debt. (*Moti Sagar, J.*) FIRM OF SHIV DAYAL RAM DITTA MAL v. MAHOMED KHAN.

6 Lah. L. J. 200 :
80 I. C. 700 : 1924 Lah. 490.

—Ss. 55 (4), 145—*Security for appearance in Court—Forfeiture—Notice to produce.*

Where a person stands surety for the appearance of a debtor in court, the court cannot proceed against the surety until it has issued notice to him to produce the debtor in court. Even under S. 145, notice should go to him to

C. P. CODE (1908), S. 60.

show cause why the bond should not be forfeited. (*Moti Sagar, J.*) DHARAM SINGH v. NAND SINGH.
78 I. C. 447.

—S. 60—*House of agriculturist—If exempted from sale under mortgage decree—Simple money-decree—Destination.*

Per *Walsh and Mukerjee, JJ.* On a proper construction of S. 60 of the Civil Procedure Code, the sale of an agriculturist's house (the expression is used for the sake of brevity), not in execution of a simple money decree in which the previous attachment is necessary, but in execution of a mortgage-decree, which has been passed on foot of a contract of mortgage specifically making the property a security for the debt, is not prohibited.

An agriculturist may make a valid mortgage of his house, there being nothing in section 60 of the Civil Procedure Code to the contrary, and after a decree for the sale of it has been made on foot of a mortgage, it may be sold in execution of the decree and the judgment-debtor is not entitled to raise the point in the execution proceedings. (*Walsh, Ryves and Mukerjee, JJ.*) MUBARAK HUSAIN v. AHAMAD. L. R. 5 A. 201 :
22 A. L. J. 321 : 46 A. 489 : 1924 A. 328.

—S. 60—*House of agriculturist—Panchattri Money—Attachment.* NAND SINGH v. LACHMI NARAIN SINGH.
1924 Lah. 226.

—S. 60 (c)—*Agriculturist—Who is.*

Where a person earns his livelihood, otherwise than by agriculture the mere fact that he has some sort of an interest in some lands, is not sufficient to entitle him to claim the exemption under S. 60, C. P. C. (*Ashworth, A. J. C.*) LACHIMAN DASS v. MT. PARTAPI.
10 O. & A. L. R. 1275.

—S. 60 (e)—*Breach of contract—Right to sue for damages—If attachable.*

Where the right to sue for damages for breach of a contract is attached and sold, no title passes as the attachment is in contravention of S. 60 (e). (*Raymond, A. J. C.*) GORDHANDAS KALIDAS v. FIRM OF GOKAL KHATAOO.
78 I. C. 409.

—S. 60 (e)—*Mere right to sue for damages—Bankrupt.*

The mere right to sue for damages in the case of a bankrupt is restricted to damages arising from bodily or mental suffering or injury to his person or reputation as contradistinguished from injuries to his estate. (*Raymond, A. J. C.*) THE OFFICIAL ASSIGNEE, OF BOMBAY v. FIRM OF CHANDULAL CHIMANLAL.

1924 S. 89.

—S. 60 (g)—*Gratuity by University—If attachable—If a debt before it falls due.*

A gratuity paid by a University for services rendered not being a pension granted by Government is not exempt from attachment under S. 60 (g), C. P. Code. Such a gratuity recommended by the authorities constitutes a debt even before it becomes due and can be attached. (*Moti Sagar, J.*) MAHOMED ABDULLA v. JIWAN MAL.

1924 Lah. 688.

C. P. CODE (1908), S. 62.

—S. 60—Provident Fund—Deposits in—Optional subscriber—Deposit not open to attachment. See PROVIDENT FUND ACT, S. 4.

3 Pat. 74.

—S. 62—Meaning of—Intention of the legislature.

For purposes of jurisdiction the true meaning of the word 'residing' in S. 62 should be understood. A man may have several residences and may be residing in more than one place. The word 'ordinarily' is used by the legislature to get over that difficulty when it desires to specify one place, only for service or for establishing jurisdiction. It is sufficient if the person has a residence within the jurisdiction of the court, although he may not be staying there at the time of the institution of the proceedings. (*Walsh, A. C. J. and Ryses, J.*) TAWASSUL HUSAIN v. WAJID ALI. L. R. 5 All. 695 (Civil).

—S. 63 (2)—Attachment by courts of different grades—Sale by inferior court earlier though attachment by it later—Validity—Subsequent attempt to sell the properties in execution of a decree of superior court—Application by purchaser in execution of decree of inferior court to stop sale—Maintainability—Civil Procedure Code, S. 47—Enquiry on application—Scope of.

Where property attached by a court of a higher grade is subsequently attached by a court of a lower grade and is sold by the latter court in execution of its decree, the sale is under S. 63 (2) of the Civil Procedure Code valid and passes title to the purchaser. Where, subsequent to the sale by the Munsif, the decree holder in the suit in the Sub Court applied for the sale of the property in execution of his own decree, held, that the purchaser in execution of the Munsif's decree was entitled, under S. 47, Civil Procedure Code, to apply to the Sub Court to stop the sale on the ground that the title to the property has passed to him and that it has ceased to be the property of the judgment debtor. The purchaser in execution of the Munsif's decree is a representative of the judgment-debtor, and the matter is one relating to execution. Held further, that on such an application it would be open to the court to inquire whether the decree of the Munsif was vitiated by fraud or on any other ground. (*Krishnan and Odgers, JJ.*) SRINIVASA CHARIAR v. APPAVOO REDDY. 1924 M. W. N. 551 : 20 L. W. 864 : 1924 Mad. 889 : 47 M. L. J. 720.

—S. 63—Sale by Court of lower grade—Effect. 75 I. C. 325 : 1924 Cal. 168

—S. 64—Attachment—Prior contract for sale of property—Subsequent suit for specific performance—Decree—Rights of purchaser.

Property, which the 1st defendant had contracted to sell to the 2nd, was attached by the plaintiff in execution of a money decree obtained by him against the 1st defendant. After the attachment, the 2nd defendant brought a suit for specific performance and got an order for sale from the Court and delivery of possession. He put in a claim to the property attached which was allowed. In a suit brought by the plaintiff to set aside the order on the claim petition, held that

C. P. CODE (1908), S. 66.

the attachment could not prevail against the 2nd defendant's decree by which he got possession of the property in pursuance of the contract for sale, though it was open to the plaintiff, who was not a party to the suit for specific performance, to impugn the decree therein as being based on fraud or collusion. The plaintiff's proper course was to file a suit under S. 53 of the Transfer of Property Act to have the transfer avoided as being intended to defeat creditors. (*Sprnceer, O. C. J.*) SUNKARI SITAYYA v. MUDARAGADDI SAN-YASI. 19 L. W. 455 :

34 M. L. T. (H. C.) 110 : 1924 M. W. N. 329 : 80 I. C. 388 : 1924 Mad. 610 : 46 M. L. J. 361.

—S. 64—Attachment—Mortgage pending same—Effect.

A mortgage of properties, while they had been attached in execution of a decree, is void. (*Madhavan Nair J.*) SRINIVASA AIYANGAR v. VELLAYAN AMBALAM. 47 M. L. J. 913.

—S. 66—Applicability of—Title of persons beneficially interested in the purchase—Not affected.

S. 66, of the C. P. Code, was designed merely to create a check on the practice of making *benami* purchases at execution sales for benefit of the judgment-debtors but in no way affected the title of persons otherwise beneficially interested in the purchase. (*Wazir Hasan and Neave, A. J. C.*) THAKUR JAI INDAR BAHADUR SINGH v. THAKUR INDAR BAHADUR SINGH. 10 O. L. J. 481 : 78 I. C. 393 : 1924 Oudh 218.

—S. 66—Purchase by stranger in his own name—Instruction from decree holder to bid for him—Suit for possession.

The decree holder in a suit instructed a stranger to buy the property at an auction for him after obtaining permission to bid. The stranger did not obtain permission, but purchased it in his own name though intending it for the benefit of the decree holder. In a suit for possession by the latter, held S. 66 was a bar. Case lawfully reviewed. (*Baker, J. C.*) MAHARAJ BAHADUR v. NAWALKISHAR. 82 I. C. 541.

—S. 66—Scope of—Auction purchaser benami for debtor—Suit for possession.

S. 66 makes a suit founded on the ground mentioned therein not maintainable. It does not go further and has not the effect of excluding evidence as to the auction purchaser being *benami* for another wherever such evidence is relevant, as in a suit for possession based on title by prescription. (*Wazir Hasan, J. C. and Neave, A. J. C.*) MT. MAHMUDINISSA v. SYED ZAHID RAZA. 11 O. L. J. 466 : 1 O. W. N. 139 : 1925 Oudh 20.

—S. 66—Suit for possession—Plaintiff asserting title against certified purchaser, on the plea, that purchase was benami for him—Suit not contested by purchaser.

The plaintiff in a partition suit sued for possession against the other co-parceners, making the auction purchaser of his share in a court sale as a party defendant, on the allegation that the purchase at auction was merely *benami* on his

C. P. CODE (1908), S. 68.

account, and the latter did not choose to contest the claim, the lower court held that S. 66 of the C. P. C. barred a suit. *Held*, on appeal, that S. 66 is no bar, to a suit and applies only when the plaintiff attempts to assert title against a certified purchaser. 27 C. W. N. 208 followed. (*Neave, J.*) JAMHU DAS v. JAI PRAKASH.

82 I. C. 344 : L. R. 5 All. 671 (Civil.).

———S. 68—*Transfer of decree to Collector for execution—Sale—Purchase by decree-holder—Discovery of encumbrances by purchaser—Re-sale—Powers of Collector—Jurisdiction of Civil Court.*

A decree-holder who had obtained a mortgage decree made an enquiry in the Sub-Registrar's Office and declared that the property to be sold in execution was ancestral and free from encumbrances. The decree was thereafter transferred to the collector for execution with a note that there were no encumbrances over the property.

The property was sold by the Collector and purchased by the decree-holder himself. He gave a certificate of satisfaction of his own decree and had under the rules to pay the balance. He then discovered that there was heavy encumbrance over the property, the date of which being more than twelve years prior to the date of the sale was not shown in the Sub-Registrar's certificate for twelve years. The decree holder did not put in the balance of the purchase money and asked the Collector to re-sell the property declaring the encumbrance which he discovered. The Assistant Collector, who was in charge of sale, refused to hear him, being of opinion that he could not go behind the orders of the Civil Court. *Held* that the order of the Court below was erroneous because the decree having been sent to the Collector for execution proceedings, in spite of the sale having taken place, it was for the Collector to decide whether he would re-sell the property or not in order to realise the balance of the purchase money. (*Mukerji and Daniels, JJ.*) SHAHZAD SINGH v. HANUMAN RAI. 46 A. 62 : 22 A. L. J. 452 : L. R. 5 A. 350 : 1924 A. 704.

———S. 68 and Sch. III, Para. 11—*Property under management of Collector—Mortgage without sanction—Validity of—Payment of debts by mortgagee—Right to subrogation.*

Where property is under the management of the Collector entrusted with the execution of a decree under S. 68, C. P. C., a mortgage of the property without the permission of the Collector is void under Sch. III, Para. 11, C. P. C. Consequently if the mortgagee pays off prior encumbrances on the property, he does not become a transferee of the charge and the utmost that the mortgagee would be entitled to is to recover the money spent in paying of the debts from the mortgagor. (*Dalal J. C. and Neave, A. J. C.*) AKBAR HUSAIN v. SHAHANSHAH BEGAM. 27 O. C. 56 : 11 O. L. J. 82 : 1924 Oudh 302.

———Ss. 73 and 47—*Appeal—Rateable distribution—Partnership property—Attachment of partner's share in execution of personal decree—Appeal from order in rateable distribution proceedings.*

An order under S. 73, C. P. C. is not appealable unless it also comes under S. 47 C. P. C. and

C. P. CODE (1908), S. 73.

satisfies all the requirements thereof. In order to be appealable the order must decide a question arising between the decree holder on the one hand and the judgment debtor on the other hand. In cases where as between the parties to the suit a question relating to the execution discharge or satisfaction of the decree passed therein has been decided by the order for rateable distribution, an appeal lies. 39 M. 570 : 36 B. 156 Ref. (*Walmsley and Mukerji, JJ.*) DWARIKA DAS MARWARI v. JADAB CHANDRA GANGULY. 51 Cal. 761 : 28 C. W. 704 : 78 I. C. 731 : 39 C. L. J. 439 : 1924 Cal. 801.

———S. 73—*Right to—Rateable distribution—Partner's property—Attachment of partner's share in execution of a personal decree—Consent of other partners—Effect of Contract Act, S. 262.*

There were two decrees against a person one in his personal capacity and the other against him and his partner in respect of partnership debts. In execution of the personal decree, his half share in the partnership moveables was attached with the consent of the other partner. Subsequently the whole of the moveables including the half share already attached were attached for the decree against the partnership. Both the attaching decree holders consented to rateably divide among themselves the proceeds of sale of the moveables but the other partner objected. *Held*, that the other partner having consented to the attachment of a half share of the moveables, they ceased to be partnership property and were liable to be distributed for the debts of the other partners.

Per Mukerji, J.—An application for rateable distribution would be maintainable even though the two judgment debtors of the two decrees were not precisely the same. (*Walmsley and Mukerji, JJ.*) DWARIKA DAS MARWARI v. JADAB CHANDRA GANGULY. 51 Cal. 761 : 28 C. W. N. 704 : 78 I. C. 731 : 39 C. L. J. 439 : 1924 Cal. 801.

———S. 73—*Moneys deposited by judgment-debtor—If distributable rateably.*

S. 73 C. P. Code does not apply to moneys voluntarily deposited by a judgment debtor for payment to a particular decree holder. It applies only to cases where money is realised by process of court. (*Kinkhede, A. J. C.*) FIRM OF HAJI UMAR SHARIF v. RODBA. 81 I. C. 7.

———S. 73—*Assets—Decree holder purchasing property—Set off—Receipt of assets.*

An application for rateable distribution must be made before receipt of assets. Where in execution of a decree, the decree holder himself purchased the property and did not deposit the amount under O. 21. Rr. 84 and 85 but claimed his right of set off, an application put in under S. 73 after the date of the sale cannot be held to be an application "before the receipt of such assets" *Quaere* whether in such a case there can possibly be a receipt of assets at all? (*Wazir Hasan, J. C.*) MOHAN LAL v. AMAR NATH. 1 O. W. N. 729 : 80 I. C. 40 : 10 O. A. L. B. 1168.

———S. 73—*Nature of proceedings—Inquiry into bona fides of decree.* 1924 Nag. 39.

C. P. CODE (1908), S. 73.

—S. 73 (1)—*Applicability—Proviso (b)—Scope of—If confined to immovables.*

The words "any property" in clauses (a) and (b) of the proviso as contradistinguished from "immovable property" in clause (c) shows that a mortgage of moveables is included therein. (*Mukerjee, J.*) JATINDRA CHANDRA CHOUDHURY v. RANGPUR TOBACCO COY. 1924 Cal. 990

—Ss. 75 and O. 41, R. 28—*Remand by High Court for trial on certain issues—Appointment of commissioner to record evidence—Legality of.*

The High Court in second appeal framed certain issues and remanded the case for trial to the lower appellate court giving the parties liberty to adduce additional evidence. After some witnesses had been examined in court, both the parties requested the court to appoint a commissioner to take the evidence of the other witnesses on the spot and to send a report. This was done and the lower appellate Court decided the issues on the evidence so taken. Objection was taken in the High Court to the findings of the lower appellate court on the ground that court had no jurisdiction on remand to take evidence on commission. Held that the lower appellate court had jurisdiction under S. 75 C. P. Code to appoint a commissioner to examine witnesses and that its findings were findings of fact binding on the High Court in second appeal. (*Abdul Raoof and Marlineau, JJ.*) LABH SINGH v. RAM LAL. 5 Lah. 252 : 81 I. C. 589 : 1925 Lah. 39.

—S. 79—*Railway administration under Government control—Notice of suit—Parties—Secretary of State.*

Where a railway administration is owned and worked by the Government, suits for and against the Railway should be brought in the name of Secretary of State for India in Council. (*Fawcett, J.*) SUKHANAND SHAMLAL v. OUDH AND ROHIL KHAND RAILWAY. 48 Bom. 297 : 26 Bom. L. R. 71 : 80 I. C. 531 : 1924 Bom. 306.

—S. 80—*'Act purporting etc' refer to Public officer only—Injunction proper in emergent cases—Want of notice no bar in such cases.*

Per Shah, Ag. C. J.—The words "in respect of any act purporting to be done" in S. 80 C. P. Code apply to the 'Public Officer' only and not to the Secretary of State for India in Council. But the principle underlying the decisions in 35 B. 662 and 40 B. 372 is independent of these words and is applicable to suits against the Secretary of State for India as well as to suits against public officers. The rule contained in S. 80 is a rule of procedure and does not effect in any way the cause of action or the rights of the parties. If the cause of action requires an immediate remedy by way of injunction, and if S. 80 is literally applied the party aggrieved would have no remedy. In a case where a class of persons is taxed heavily it would not be fair to treat the position as one of ordinary pecuniary liability of an individual only.

Where at the date of the suit a situation had arisen which was calculated to cause serious apprehension in the minds of the plaintiffs that irreparable damage might be caused to their business as dealers in saris unless the enforcement of the orders were stopped at once.

C. P. CODE (1908), S. 86.

Held: the redemdy sought by way of injunction was appropriate and necessary to safeguard their interests under the circumstances. 35 Bom. 362 : 40 Bom. 392, Foll. 44 Bom. 555 Diss.

Per Keshm, J.—No suit may be instituted against the Secretary of State until the expiration of the two months notice required by the section. The terms of the section are imperative and make no exception in the case of suits for an injunction and a Court of law is not entitled to graft on to the plain wording of the section, a qualifying clause excepting suits for an injunction, a kind of relief which must have been in the contemplation of the framers of the Code when the section was drafted and redrafted. Nor does it make any difference that the injury apprehended is immediate or irreparable. A suit in respect of something which a public officer is going to do, not in respect of something he has done, but in respect of the further acts threatened lies without notice. No notice is necessary in a suit for injunction to prevent a threatened act against the public officer. (*Shah, A. C. J. and Kemp, JJ.*) BHAGCHAND DAGADUSHA v. SECRETARY OF STATE FOR INDIA. 48 Bom. 87 : 26 Bom. L. R. 1 : 1924 Bom. 1.

—S. 80—*Notice under—Necessity for—Act done in official capacity.*

It is not the law that S. 80 C. P. Code has no application unless the act complained of was done in good faith. The section does not require that the act should have been done in good faith; it merely requires that it should purport to be done by the officer in his official capacity. If the act was one such as is ordinarily done by the Officer in the course of his Official duties and he considered himself to be acting as a public Officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the meaning of S. 80 C. P. C. The motives with which the act was done do not enter into the question at all 38 C. L. J. 104 41; M. 792 foll. (*Daniels and Neave, JJ.*) ABDUL RAHIM v. ABDUL RAHMAN. 22 A. L. J. 812 : L. R. 5 A. 599 : 80 I. C. 72 : 10 O. & A. L. R. 837 : 1924 A. 851.

—S. 80—*Official Receiver—Insolvency—Suit against—Notice—Waiver.*

Where an Official Receiver is appointed under S. 57 of the Prov. Ins. Act as the receiver in a particular insolvency, no suit can be instituted against him in respect of any act done by him in his capacity as such public officer without a previous notice under S. 80, C. P. Code. The omission of the official Receiver to Plead want of notice at the trial does not prevent him from raising the plea on appeal. (*Lindsay and Kanhaiya Lal, JJ.*) MURARI LAL v. DAVID. 22 A. L. J. 1116.

—S. 86—*Suit against—Ruling Chief as co-sharer—Sanction if necessary.*

In a suit against a Ruling Chief with respect to immovable property in Br. India which he held as co-sharer along with plaintiffs no relief can be granted unless the consent of the Government is obtained under S. 86 C. P. Code. (*Lindsay and Ryves, JJ.*) KANHAYA LAL v. MAHARAJA OF BENARES. 46 A. 355 : 22 A. L. J. 317 : 78 I. C. 559 : L. B. 5 A. 129 (Rev.) : 1924 A. 422.

C. P. CODE (1908), S. 89.

—S. 89, O. 23, R. 3—*Applicability—Arbitration.*

S. 89, C. P. C. does not preclude the application of O. 23, R. 3 to cases in which there has been a reference to arbitration. (*Spencer and Devadoss JJ.*) CHINTALAPALLI CHINNA DORAYYA v. VENKANNA. 76 I. C. 502 : 1925 Mad. 50.

—S. 91—*Scope of—Highway—Obstruction—Suit for compensation.*

S. 91 of the C. P. Code is a provision for procedure. It does not purport to create a right which does not exist before. It does not purport to deprive anybody of a right derived from the general law of the land. It merely prevents a person from asserting a right except in a particular way. If a plaintiff brings a suit for damages and injunction against the defendant in respect of the latter's obstruction of a highway, without reference to S. 91, C. P. Code, the plaintiff must prove that he has suffered a more particular kind of obstruction or inconvenience beyond that of the general public by reason of the act of the defendant. (*Walsh, A. C. J. and Ryves, J.*) MAHOMED RAZAKHAN v. MAHOMED ASKARI KHAN. 46 A. 470 : 22 A. L. J. 729 : 1924 A. 599.

—S. 92—*Addition of parties—Stranger as defendant—If vitales suit.*

If a suit is brought under S. 92 with the sanction of the Advocate-General, the addition of a stranger as defendant does not render the suit bad. (*Newbould and Ghosh, JJ.*) ABU MAHOMED BARAKAT v. ABDUR RAHIM. 80 I. C. 44.

—S. 92—*Applicability—Suit against trespasser.* 1924 Lah. 131.

—S. 92—*Public trust—Mosque—Private institution—Proof.*

A Mahomedan mosque is *prima facie* a public trust and in the absence of proof that it was a private mosque and that the public had no right to congregate therein without special permission S. 92 C. P. Code, would apply (*Broadway and Abdul Raoof, JJ.*) TAFAZZAL BEG v. MAJID ULLAH. 5 Lah. 59 : 79 I. C. 120 : 1924 Lah. 432.

—S. 92—*Public trust—Evidence of—Inam statement—Inam register—Relative values of—Devadayam—Description of Inam as—Effect of—Scheme suit for, and for removal of trustees—Decree in plaintiff's favour owing to default of prosecution of defence—Setting aside of—Jurisdiction—Scheme—Framing of—Decree for, when granted.*

An Inam statement is only a statement made by a party to the inquiry before the Inam Commissioner and is merely an assertion of his alleged title before a tribunal which has to decide it. The Inam register, on the other hand, embodies the result of the finding of the Inam Commissioner based partly on the statements put in by the parties and partly on the other evidence. The recitals in the Inam register are the force of greater evidentiary value than the entries in the Inam Statement.

Whether or not the word "Devadayam" implies a public endowment, there is no doubt that the use of the word "Devadayam" is a very strong

C. P. CODE (1908), S. 92.

piece of evidence that the inam in connection with which the word is used is a public endowment.

Held, on the evidence, that the institution in question was a mosque.

Where, in a suit for framing a scheme for a mosque and for removal of the defendants from their trusteeship, it appeared that the defendants had not applied the inam granted for the mosque in the proper manner and that they had denied the title of the mosque to the inam, *held* that the defendants ought not to be allowed to continue to manage in the same way as before and that it was necessary to frame a scheme for the management of the trust.

Quere, whether when in such a suit a decree is given in favour of the plaintiffs owing to the failure of the defendants to prosecute their defence, the Court has jurisdiction to revise its original order. (*Phillips and Venkatasubba Rao, JJ.*) PIR PACHA SAHEB v. MAHOMED RUHIMUDDIN SAHEB. 19 L. W. 174 : (1924) Mad. 491 : 1924 M. W. N. 217 : 77 I. C. 777 : 34 M. L. T. (H. C.) 347 : 46 M. L. J. 245.

—S. 92—*Removal of trustee—Mutwali—Founder of trust—Removal—Power of Court.*

The Court will be guided solely by considerations of the welfare of the trust and will not hesitate to remove a trustee who has purchased the trust property or concurred in a breach of trust or has wrongfully alienated trust property or has been guilty of wanton waste and neglect of duty or shows a total lack of capacity to manage and has from old age left the management in the hands of incompetent persons. This is so even where the mutwali was the founder of the mosque. 21 M. 10; (1917) M. W. N. 552 Ref. (*Mukerjee and Rankin, JJ.*) JOYGUNNESSA BIBI v. MAHLULLAH MAMED PROMANIK. 28 C. W. N. 781 : 81 I. C. 800 : 1924 Cal. 1024.

—S. 92—*Right to sue—Suit under—Maintainability—Plaintiffs having no interest in trust—Advocate-General's sanction to institution of suit—Effect—Object of the legislature—Trustee—Appointment of—Validity of.*

The consent in writing of the Advocate-General to the institution of a suit will not bring the suit within the meaning of S. 92 of Civil Procedure Code of 1908 unless the plaintiffs have an interest in the trust in respect of which the suit is instituted. Descendants, although only in female lines of the founder of a chatram dedicated to the public with a trust created for public purposes of a charitable nature have an interest in the proper administration of the trust sufficient to enable them to maintain a suit under S. 92, C. P. C., although they themselves may never find it necessary to use the chatram as a rest house or to obtain food there. Public Hindu temples are *prima facie* to be taken to be dedicated for the use of all Hindus resorting to them. To hold that the bare possibility, however remote that a Hindu might desire to resort to a particular temple gives him an interest in the trust will defeat the object with which the Legislature inserted those words in the section. Mahomedans who worship regularly in the mosque of a village have a direct interest in the trust relating to the mosque.

C. P. CODE (1908), S. 92.

The object of the Legislature in inserting the words "Persons having an interest in the trust" in S. 92 was to prevent people interfering by virtue of the section in the administration of charitable trusts merely in the interests of others and without any real interest of their own.

Semble: The last survivor of the descendants in the male line of the founder of a chatram charity has a right to appoint a trustee of the charity. Where such last survivor appointed a manager of the charity properties falsely alleging them to belong to himself as proprietor, and did not purport to appoint him as a trustee of properties which were already trust properties, *held*, that the manager had not been properly appointed a trustee of the chatram. (*Sir John Edge*.) *VAIDYANATHA AIYAR v. SWAMINATHA AIYAR*, 47 Mad. 884; (1924) M.W. N. 749 (2); 26 Bom. L.R. 1121; 22 A. L. J. 983; 20 L. W. 803; 40 C. L. J. 454; 29 C. W. N. 154; 1 O. W. N. 617; 10 O. & A. L. R. 1076; 82 I. C. 804; 35 M. L. T. (P.C.) 189; 1924 P. C. 22 (2); 47 M. L. J. 361 (P. C.)

— S. 92—*Right to sue—Worshippers—Mahant, if a trustee—Right to remove Mahant from his office of trustee—Jurisdiction of Civil Court.*

Worshippers at a temple are persons having an interest in the religious trust and one entitled to sue under S. 92 C. P. Code. A mahant is a trustee and it is competent to a court in a suit under S. 92, C. P. Code to remove him from the control of a religious or charitable endowment, though it cannot interfere with his special functions as mahant. (*Wazir Hasan and Neave, A. J. C.*) *SARABJI BHARTI v. BABU GAURI NATH KARAJI*, 10 O. & A. L. R. 1; 10 O. L. J. 619; 80 I. C. 674; 27 O. C. 149; 1924 Oudh 261.

— S. 92—*Sanction—Hukdars of a temple—Persons in wrongful possession—Suit for accounts and directions—Necessity for sanction.*

The plaintiffs alleged that they and defendants 11 and 12 were really the Hukdars or some of the Hukdars in the income of a Hindu temple and that defendants Nos. 1 to 10 had been managing wrongfully and appropriating the proceeds of the temple. After referring to their Huk to appropriate the proceeds of the temple they claimed a declaration that they and defendants Nos. 11 and 12 were Hukdars of the temple, an account of the income received by defendants Nos. 1 to 10 and an order that the defendants should make over the income received by them to the plaintiffs. *Held*, that the suit involved an enquiry into and the taking of the accounts of the public trust and that it was not maintainable without the sanction referred to in S. 92 (*Shah, O. C. J. and Fawcett, J.*) *NARAYAN v. VASUDEO*, 26 Bom. L. R. 950; 1924 Bom. 518.

— S. 92—*Sanction to specific individuals—If some of them alone can sue or appeal—Procedure.*

Where more than two persons have obtained sanction under S. 92, C. P. C., any two of them alone cannot sue or appeal. The proper course in such a case is to obtain the sanction of the Advocate General for the deviation or to ask for

C. P. CODE (1908), S. 92.

permission under O. 1, R. 10 to add new parties. (*Kennedy and Aston, A. J. C.*) *VISHONDAS v. DAMOMAL*, 1925 Sindh 1.

— S. 92—*Scheme suit—Decree in—Receiver appointed under decree—Appeal from decree—Confirmation of decree on appeal—Effect on receivership.* 46 M. L. J. 343.

— S. 92—*Scheme—Alteration of—Power of Court.* (*Mookerjee and Rankin, J.J.*) *MANADANANDA JHA v. IHARAKANANDA JHA*, 1924 Cal. 330.

— S. 92—*Scheme—Majority of worshippers of certain denomination—Number of trustees.* 1924 Bang. 134.

— S. 92 and O. 22, R. 3—*Scheme suit—Appeal—Death of one of the relator appellants—Effect of—Abatement.*

Where during the pendency of an appeal against a decree in a suit under S. 92, Civil Procedure Code, one of the plaintiff-appellants dies, there is no abatement resulting from such death. 40 M. 110; 41 M. 237 followed. 37 All. 296 at 298 dissented from.

An application for dismissal of the appeal on the ground the appeal had abated by reason of such death does not come within the scope of O. 22, R. 3, Civil Procedure Code. (*Spencer and Srinivasa Iyengar, J.J.*) *SAYYED GULAM GHOUSE SHA SAHAIB KADIRI v. DOST MUHAMMAD KHAN SAHIB*, 20 L. W. 882; 47 M. L. J. 745.

— S. 92—*Scheme suit—Kattalais—Management—Right to frame a scheme.* 1924 Mad. 168.

— S. 92—*Scheme—Hindu temple—Grant of land—Lands burdened with service—Absolute grant to temple—Dealing by trustees—Evidentiary value of Scheme—Framing of—Provision for permanent supervision and control by court—Undesirability of.*

Where the question was whether a certain land was granted a Hindu temple as an endowment or to certain Archakas (who were also its trustees) burdened with the service of maintaining the worship of the temple, *held*, that having regard to the inam title deed describing the lands as "Devadavam" and the other documentary evidence in the case, the lands were granted to the deity as an endowment and not to the Archakas. The evidence of user and enjoyment, however long, uninterrupted and unquestioned, would be evidence of the grant only in the absence of any reliable or cogent evidence with regard to the terms of the grant itself or in case of any ambiguity in the grant. The fact that during a long period of time the Archakas dealt with the properties as if they were their own, and partitioned them amongst themselves is not of much evidentiary value in the absence of any parties or persons interested in setting up the rights of the temple as distinguished from the Archakas. A scheme framed under S. 92 of Civil Procedure Code for a Hindu temple provided *inter alia* for vacancies in the office of trusteeship being filled up by the court, for the appointment of an auditor by the court annually, and for the court sanctioning mortgages or leases of temple properties and a further clause gave general liberty to

C. P. CODE (1908), S. 92.

apply to the court with regard to any matter arising out of the scheme or modifications thereof. *Held* that the provisions were objectionable both in principle and in practice. It is not desirable that courts should assume to themselves the continued supervision of institutions for the management of which they are called upon to frame schemes. (*Spencer and Srinivasa Aiyangar, JJ.*) NARAYANAMURTHI v. ACHAYYA SASTRULU.

20 L. W. 687; 47 M. L. J. 714.

—S. 92—Scheme suit—Decree in—Suit to declare decree nullity—Sanction of Advocate-General if necessary.

Quære: whether the decree in a scheme suit can be challenged in another suit without obtaining the consent of the Advocate-General. (*Newbould and Ghosh, JJ.*) ABU MAHOMED BARAKAT v. ABDUR RAHIM. 80 I. C. 44.

—S. 92—Suit for a scheme—Right to sue—Persons interested in a trust—Dharmasala

In respect of a dharmasala, which is an institution meant for purposes of charity to the public, religious purposes and public utility, persons entitled to attend there for purposes of worship are persons having a sufficient interest entitling them to sue under S. 92, C. P. Code, for a scheme in respect of the institution. (*Aidul Raoof and Harrison, JJ.*) NARINJAN SINGH v. KIRPAL SINGH. 5 Lah. 455.

—S. 92—Scope of—Dispute about management of temple—If within section.

A suit between two rival claimants as to the right of management of the temple does not fall within S. 92, C. P. Code. (*Das and Macpherson, JJ.*) DEOKINANDAN v. BRIJ NANDAN JHA.

5 Pat. L. T. 231; 76 I. C. 89; 1924 P. 502

—S. 92—Scope of—Relief against alienee—If can be awarded—Trusts de son tort

No relief can be granted against alienees of trust property in a suit under S. 92, C. P. Code. But if the alienee is also a trustee de son tort a suit will lie for he is in effect a trustee de facto though not de jure. (*Phillips and Venkatasubba Rao, JJ.*) PERIA NATTAI MALKAJIGUNDA v. TIPPA RAMASWAMI CHETTIAR. 78 I. C. 950.

—S. 92—Scope of—Public trust—Denial of trust and assertion of private title by trustee—Power of Court.

In order to make S. 92, C. P. Code, applicable it is not necessary that the existence of the trust for public, charitable or religious purposes alleged by the plaintiff should be admitted by the defendant. If the trust is disputed, the question falls to be decided by the Court upon evidence. 2 C. L. J. 431; 91 C. 358 Ref. Where a trustee not only mis-manages the trust property but sets up a title adverse to the trust there is no reason why S. 92, C. P. Code, should not be invoked. (*Iswa'la Prasad and Kulwant Sahay, JJ.*) DEO SARAN BHARTI v. DEOKI. 3 Pat. 842;

5 Pat. L. T. 305; 80 I. C. 980; 1924 P. 657.

—S. 92—Trustee-de-son-tort—Suit against—Maintainability—Advisory committee not in the possession of trustees.

A suit under S. 92, C. P. Code, is maintainable against a trustee de-son-tort. A Hindu testator

C. P. CODE (1908), S. 97.

set apart certain properties for a charity and appointed his widow trustee of the charity. He directed that after her death, the person to whom she gave her own property should be trustee. The widow died intestate and the nephews of the testator entered into possession of the endowed property as being the nearest reversioners to the widow. *Held*, that on failure of the widow to nominate a trustee, the trusteeship of the charity reverted to the heirs of the founder and that the nephews of the testator must be regarded as trustees. Consequently the nephews were liable as trustees in a suit instituted under S. 92, C. P. Code, for their removal and dispossession and for accounts. (*Mukerji and Dalal, JJ.*) BHARI LAL v. SHIVA NARAIN. 22 A. L. J. 866;

L. R. 5 A. 697; 1924 A. 884.

—S. 96, O. 9—Failure of party to avail of the remedies under R. 7 and 13—Right to challenge the propriety of the order in appeal—Dismissal of application under R. 7—Propriety of the ex parte decree, whether challengeable in appeal.

A party who has failed to avail himself of the remedy given by R. 7 or R. 13 of O. 9 of the Code of Civil Procedure is not entitled on appeal under S. 96, C. P. Code, to urge that the Court was wrong in proceeding to hear the suit *ex parte* against him. The two remedies given by the Code are not cumulative. 12 O. C. 25; 39 A. 143 and 39 M. L. J. 697 followed; 30 M. 55 and 26 O. C. 10. dissented from.

Where an application to set aside an *ex parte* trial is dismissed under R. 7 of O. 9, the party is not bound to take proceedings under R. 13 as such a course would be futile. The order, however, can be challenged in appeal. 12 O. C. 25 relied on, 21 M. 824; 20 A. L. J. 41 and 20 A. L. J. 270; 33 A. 560 distinguished. (*Dalal, J. C.*) SYED MAZHAR HUSAIN v. SHEIKH RAFIQ HUSAIN.

10 W. N. 835; 10 O. & A. L. R. 1142.

—S. 96—Party not aggrieved—If can file appeal. 77 I. C. 477 (1).

—S. 96 (3) and O. 1, R. 10—Compromise decree—Appeal by persons not parties to compromise—Maintainability of.

A person who is not a party to the compromise, though a party to the suit can appeal against the compromise decree which binds only those who are parties to the compromise.

The bar imposed by S. 96 (3) applies only when the appellant has, by himself or through counsel, consented in the trial Court to the decree he seeks to impeach before the superior tribunal. The court has very wide powers under the new C. P. Code in respect of addition or transfer of parties. This discretionary power must be exercised in such a way as to achieve the ends of substantial justice. (*Mookerjee and Rankin, JJ.*) NIRODE CHANDRA BANERJEE v. PROFULLA CHANDRA BANERJEE. 40 C. L. J. 535.

—S. 96 (3)—Consent order—Setting aside—Grounds for. 26 Bom. L. R. 189;

L. R. 5 P. C. 30; 75 I. C. 355; 47 M. L. J. 164.

—S. 97—Preliminary Decree—Determination of matters in controversy—Decree not drawn up—Appeal.

C. P. CODE (1908), S. 97.

Where during the trial of a suit judgment is given against some of the parties on a certain date but no decree is passed until the whole suit is disposed of, the time for purposes of appeal runs from the date of the decree and not from the date of the interlocutory judgment. (*Mookerjee and Rankin, JJ.*) *IRRANI MUNDLY v. NAIMUDDIN SARDAR.* 39 C. L. J. 251 : 81 I. C. 527 : 1924 Cal. 1006.

—S. 97—*Preliminary decree—Final decree—Appeals from—Effect of reversal or modification of preliminary decree—Court fee—Refund of.*

Where the appeal from the preliminary decree in a mortgage suit is pending it is unnecessary for the mortgagee to file another appeal from the final decree. The result of the appeal in the preliminary decree would govern the final decree as well; 36 A. 532 foll. The appellant is entitled to a refund of the court-fee paid on the appeal. (*Dalal, J. C. and Neave, A. J. C.*) *RAJA SETH SWAMI DAYAL v. MAHOMED SHERKHAN.* 11 O. L. J. 148.

—S. 97—*Preliminary decree not appealed against—Final decree—Appeal against—If preliminary decree can be challenged.*

Where a preliminary decree is not appealed against, S. 97 bars its correctness being challenged in an appeal against the final decree. (*Baker, O. J. C. and Pradeaux, A. J. C.*) *GANPATRAO v. MT. TULSABAI.* 1924 Nag. 419.

—S. 97—*Preliminary and final decrees—Appeals from.*

Where there has been a preliminary and a final decree and the dates permit the appellant to challenge both in time it is unreasonable to allow the appellant to avoid the provisions of the Court Fees Act and obtain a reversal of the final decree by a circuitous method when the direct method was open of appealing against both. But where the appeal from the preliminary decree was filed before the final decree was made and the dates do not allow appeals against both, the subsequent passing of the final decree does not render the appeal against the preliminary decree nugatory, if the appeal is successful the final decree also falls with it. (*Kincaid, J. C. and Aston, A. J. C.*) *ISHAK v. FATMA.* 78 I. C. 978.

—S. 97—*Preliminary and final decree—Appeal against preliminary decree—After passing of final decree—Conversion of appeal into one from both decrees.*

The right of appeal from interlocutory orders ceases after the disposal of the suit. This rule is equally applicable to cases of suits in which there is first a preliminary decree and ultimately a final decree. Where after the passing of the final decree in a suit, an appeal is preferred against the preliminary decree, the appeal is incompetent. But the Court allowed the memorandum of appeal to be amended and converted into a combined appeal against the preliminary as well as the final decree (*Mukerjee and Suhrawardy, JJ.*) *NANIBALLA DASI v. ICHHA MOYEE DASI.* 40 C. L. J. 291.

C. P. CODE (1908), S. 100.

—S. 98—*Applicability of—Division Bench of two Judges of the High Court hearing an appeal—Senior Judge in favour of dismissal of appeal—Junior Judge in favour of allowing the appeal in part—C. P. Code, S. 98 not applicable—Letters Patent, Cl. 36 applicable. See. LETTERS PATENT (CAL.) CLS. 15 AND 36.* 28 C. W. N. 637.

—S. 98—*Applicability of—Small Cause revision—Difference of opinion among members of a Division Bench hearing the case—Opinion of Senior Judge prevails—S. 98, C. P. Code, not applicable—See LETTERS PATENT (MAD.) Cl. 36.* 47 M. L. J. 876.

—S. 98—*Reference under S. 66 of the Income Tax Act—Difference of opinion among members of Division Bench—C. P. Code S. 98 not applicable—Letters Patent, Cl. 36 governs the case—See INCOME-TAX ACT, S. 2.* 51 C. 504.

—S. 99 and O. 1, R. 3—*Single suit against several defendants—Misjoinder—Effect of—Duty of appellate Court.*

The lower Court consented to try a suit jointly against all the defendants and the plaintiff in course of time lost his opportunity by cause of limitation of bringing separate suits against the defendants. *Held*, that no party having been prejudiced by the joint trial, the appellate Court would not reverse the decree on account of misjoinder. It is for the reason of preventing injustice of such a character that S. 99, C. P. Code, has been enacted. (*Dalal, J. C.*) *MANSADIN a. MANNU LAL.* 27 O. C. 35 : 1924 Oudh 387.

—Ss. 99 and 100—*Second Appeal—Admission of additional evidence by the Lower Appellate Court without recording reasons—Duty of the High Court.*

Where there was a body of evidence both ways in the Trial Court, and the Lower Appellate Court without giving any reasons admitted in evidence additional documents and on the strength of the additional evidence came to a different conclusion the High Court on Second Appeal will not try the case on the evidence and then say whether the additional evidence had produced a different result but will remand the appeal for rehearing by the Lower Appellate Court. (*Rankin and Mukerji, JJ.*) *KEBAL NAMADAO v. RAJANI KANTA ROY.* 81 I. C. 999 : 31 C. L. J. 261.

—S. 103—*Acquiescence—If a question of fact.*

Acquiescence is not a question of fact but of legal inference from facts found and hence can be gone into in second appeal. (*Mukerji, J.*) *BANESWAR BANDOPADHYA v. AMULY CHARAR.* 82 I. C. 309.

—S. 100—*Adverse possession—Not pleaded—Decree based on—Absence of prejudice—Effect.*

Where in a suit for possession based on ownership, the court finds a title by adverse possession in the plaintiff, though the allegation was not contained in the plaint itself, and there is nothing to show the defendant was prejudiced or taken by surprise, it is not open to set up in

C. P. CODE (1908), S. 100.

second appeal that the plea of adverse possession was not raised in the pleadings. (*Odgers and Hughes, JJ.*) MUKAMBIKA SHETTITHI v. SHIDDAYA SHETTI. 75 I. C. 613.

—S. 100—*Burden of proof—Second appeal—Suit in ejectment—Evidence adduced on both sides—Effect of.*

Where the initial burden of proving possession within 12 years of suit was wrongly placed on the plaintiff but nevertheless both the parties had adduced evidence, the question of onus loses its importance. The finding on the issue of possession is largely one of fact with which the High Court will not interfere in second appeal. (*Neave, J.*) SHIVA PRASAD SINGH v. MR NESHVAR DUBE. L. R. 5 A. 354 : 1924 A. 924.

—S. 100—*Construction of document—Question of fact and law—Erroneous finding of fact—Interference.*

The construction of a document may bear either the meaning of the words or its legal effect. The first is a question of fact and the second a question of law.

The High Court cannot entertain a second appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be, if the Court had before it evidence proper for its consideration in support of the finding. (*Moli Sagar, J.*) SHANKAR DAS v. MANSA RAM. 78 I. C. 36.

—S. 100—*Construction of document—Question of fact or law.*

Where the question in second appeal is not one of misinterpretation of any document or of documents of title, but one of inference from documentary evidence, the question is one of fact and not of law. (*Sulaiman, J.*) GUPTA NAND BHARTHI v. HARI SHANKAR. 78 I. C. 1016.

—S. 100—*Custom—Question of law and fact.*

A question of custom can be gone into in second appeal as it involves both fact and law. (*Pullan, A. J. C.*) MAJID HUSAIN v. MT. SAFDARI BEGAM. 81 I. C. 1033.

—S. 100—*Custom, question whether a question of fact and not challengeable in second appeal.*

Question of custom is one of mixed fact and law, and may be discussed in second appeal. 26 A. C. 387 followed, 13 O. C. 183; 2 O. L. J. 388; 2 O. L. J. 607 and 42 Cal. 285 referred to. (*Kendall, A. J. C.*) BHIKHARI LAL v. MOLVI HADI ALI KHAN. 1 O. W. N. 520 : 82 I. C. 810 : 10 O & A. L. R. 1159 : 11 O. L. J. 738.

—S. 100—*Custom—Whether High Court should consider the admissibility and quantum of evidence to establish custom.* 75 I. C. 657.

—S. 100—*Delay—Finding of fact—Legal result—Question of law.*

Though a finding as to delay may be one of fact, the conclusion to be drawn therefrom as to whether it disentitles a party from claiming a particular relief is a matter for second appeal. (*Kinkhede, A. J. C.*) ABDUL MAJID KHAN v. BALAPPA. 82 I. C. 105.

C. P. CODE (1908), S. 100.

—S. 100—*Evidence—Absence of—Failure to deny plaintiff allegation.*

Where the allegations in the plaint as to the status of certain ryots were not denied and a finding was given on the basis of the same, it cannot be said the finding has not supported by evidence. (*Ross and Sen, JJ.*) SHAIKH MAHOMED ALAN v. NATHU SAHU. 2 Pat. L. R. 284.

—S. 100—*Evidence—Admissibility—Objection to—When allowed on second appeal.*

It would be in the interest of the administration of justice if it were generally understood that questions dealing with the admissibility and the legal effect of evidence, will not as a general rule be entertained in second appeal in the High Court, if they have not been taken at least at the stage of first appeal in the Court below. (*Mears, C. J. and Piggott, J.*) SAT NARAIN PRASAD v. RAM AVTAR. L. R. 5 A. 44 : 78 I. C. 221 : 22 A. L. J. 153 : 1924 A. 709.

—S. 100—*Evidence—Objection to—When considered on second appeal.*

It would be in the interest of administration of justice in this province if it were generally understood that questions dealing with the admissibility and the legal effect of evidence will not, as a general rule be entertained in Second Appeal in this Court if they have not been taken at least at the stage of First Appeal in the Court below. (*Kanhaiya Lal, J.*) MULANI v. MAULA BUX. 46 A. 260 : 22 A. L. J. 149 : L. R. 5 A. 104 : 78 I. C. 222 : 1924 A. 370.

—S. 100—*Finding based on misreading of judgment.* MR BASANTI v. CHANDA SINGH. 77 I. C. 475.

—S. 100—*Finding of fact—Custom—Evidence, support of.*

It is always open to the High Court in second Appeal to see whether an opinion or custom which has been pronounced by the Lower Court is or is not based on sufficient evidence. 30 A. 311 Ref. (*Mukerjee, J.*) ALI HUSAIN v. SYED MAZABIR HUSAIN. L. R. 5 A. 155 (Rev.) : 79 I. C. 134 : 1924 A. 477.

—S. 100—*Finding of fact—Conclusiveness of.*

However erroneous or grossly improper a finding may be it is unassailable in second appeal provided it is supported by evidence proper for consideration. (*Kinkhede, A. J. C.*) NARAYAN v. LAKSHMAN. 80 I. C. 885.

—S. 100—*Findings of fact—Consideration of evidence—Kabuliyat.* NATHUNI RAI v. SIR RAMESHWAR SINGH BAHADUR. 1924 Pat. 147.

—S. 100—*Finding of fact—Misreading of evidence.* 76 I. C. 553.

—S. 100—*Finding of fact—Not based on legal evidence—Interference.*

A finding of fact not based on legal evidence can be interfered with in second appeal. (*Suhrawardy and Chotzner, JJ.*) AHIDANNABI v. NAGENDRA LAL GANGOBADHYA. 80 I. C. 903.

G. P. CODE (1908), S. 100.

— S. 100—*Finding of fact—Documentary evidence—Inference from—Function of the High Court.*

Where in a second appeal a great many documents have to be canvassed in the course of the case, it is not true that the inferences of fact to be drawn from the numerous documents are themselves to be regarded as inferences of law. It is quite true that it is part of the duty of the High Court to see that the lower appellate Court has not omitted to take into account all the important and relevant items of evidence. (*Rankin and Ghose, JJ.*) MIDNAPORE ZEMINDAR Co., LTD. v. TRILOKYA NATH HALDAR. 51 Cal. 110.

81 I. C. 501 : 40 C. L. J. 238 : 1924 Cal. 562.

— S. 100—*Finding of fact—Evidence not considered—Interference.*

Where a finding of fact is arrived without taking into consideration the whole of the evidence or where the finding is such that it cannot reasonably be deduced from the evidence, it is to be set aside in second appeal. (*Moti Sagar, J.*) NAGINA SINGH v. JIWAN SINGH.

79 I. C. 107.

— S. 100—*Finding of fact—Inadmissible evidence—Finding based on—Second appeal.*

Where a finding of fact arrived at by the lower appellate court is based on inadmissible evidence, and there is no other evidence in support of it, the High Court will not accept the finding. (*Shadi Lal, C. J. and Le Rossignol, J.*) SRI RAM v. CHANDO.

6 Lah. L. J. 204 : 80 I. C. 705 (1) : 1924 Lah. 470.

— S. 100—*Finding of fact—Fraud—Inference without evidence—Finding open to attack in second appeal.* See LIMITATION ACT, S. 18.

5 Pat. L. T. 61.

— S. 100—*Finding of fact—Distorted view of evidence—Interference.*

Though the High Court is averse to upsetting in second appeal the decision of the Court below on a question of fact, it can do so in a case where the lower court was not justified in coming to the conclusion it did. (*Macleod, C. J. and Crump, J.*) IRABASAPPA BIN GANGAPPA DALAL v. BHADSAWA KON DOD BASAPPA.

80 I. C. 189.

— S. 100—*Finding of fact—Recitals in deed—Evidence—New point if allowed.*

Recital in a document form a piece of evidence on the basis of which a finding of fact can be supported.

A point not raised in the pleadings or in the issues cannot be raised for the first time in second appeal. (*Abdul Raoof, J.*) SHUGAN CHAND v. SIKHAR CHAND.

6 Lah. L. J. 467.

— S. 100—*Finding of fact—When open to attack.*

A finding of fact cannot be interfered with unless it can be shown that there is no evidence to support it or that it has been influenced by an erroneous view of the law. (*Suhrawardy and Graham, JJ.*) HARIRAM MAHATA v. MAHESH CHANDRA MAHATA.

80 I. C. 290 (1).

G. P. CODE (1908), S. 100.

— S. 100—*Findings of fact—When open to attack in second appeal.*

Although the findings of fact of the lower appellate Court are not open to question in second appeal, it is always open to the High Court to consider whether there is in fact any evidence to support the findings. (*Miller, C. J. and Multick, J.*) DHANRAJ v. FIRM OF SANEHI RAM PANNA LAL.

1924 Pat. 687.

— S. 100—*Findings of Court below—When can be challenged.*

The High Court in second appeal is bound by the findings of the lower appellate court unless it be shown that the Court went wrong in law or that there was no evidence to support the findings. (*Miller, C. J. and Multick, J.*) RAMSUNDER KUER v. SATRUHAN PRASAD CHAUDHURI.

1924 P. 691.

— S. 100—*Finding of fact—Conjectures and presumptions—Unsafe basis for decision.*

A judgment based upon mere conjectures and presumptions was liable to be set aside even in Second Appeal. (*Scott Smith and Hosde, JJ.*) MT. BASANTI v. KABUL SINGH.

6 Lah. L. J. 127 : 80 I. C. 329 : 1924 Lah. 465.

— S. 100—*Finding of fact—Amount of damages.*

Ordinarily the question as to the amount of damages is a question of fact and the finding as to amount of damages arrived at by the lower appellate Court is binding on the High Court, but when the amount is fixed arbitrarily, it cannot be taken as an amount arrived at on a finding which is binding on the High Court. (*Sulaiman, J.*) JUGAL KISHORE v. RAM NARAIN.

1923 All. 199.

— S. 100—*Finding as to custom—When open to attack on second appeal—Scope of the enquiry.*

The decision of the lower appellate Court on a point of custom is liable to attack on second appeal on the ground that in the determination of the question in controversy, illegal principles or tests have been erroneously applied, for instance, that the Court has not correctly appreciated the essential attributes of a custom or usage. Consequently, the question whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage is a question of law, which may be discussed in second appeal.

It is clear that on second appeal an enquiry must be made whether all the attributes of a local custom have been established or not by the evidence which is accepted by the Lower Court. (*Dalal, J. C.*) MANNA LAL v. THAKUR JAI INDR BAHADUR SINGH.

26 O. C. 386 : 76 I. C. 774 : 1924 Oudh 157.

— S. 100—*Finding of fact—Fraud—Not pleaded—Finding.*

Fraud must be expressly pleaded and positive facts and circumstances must be set out clearly giving rise to the application of fraud. Where it was not so pleaded in the case and no issue was framed as to fraud and it was never urged in the

C. P. CODE (1908), S. 100.

primary Court the finding of the Lower Appellate Court to the effect that the surrender was actuated by "dishonest and improper motive" is not a real finding of fact binding upon the High Court in Second appeal. (*Iwala Prasad and Ross, JJ.*) *RAM URAON v. DOMAN KALAL*.

1924 Pat. 117.

—S. 100—*Finding of fact—Gross or inexcusable error—Omission to consider evidence—Interference on second appeal.*

An erroneous finding of fact, however, gross or inexcusable the error may be, cannot be made the basis of a Second Appeal. The High Court would be precluded from disturbing the findings of fact in the judgment of the Lower Appellate Court, however, strongly it may think they were opposed to any really sane view of the evidence, provided the facts found were relevant and the findings were based on evidence proper for consideration. It is not necessary that the whole of the evidence given in the case should have been considered in the Lower Appellate Court and still less that every part of it should have been mentioned in the judgment; interference is not justified by an apparent omission to consider some material part or even the main part of it. (*Hallifax, A. J. C.*) *TUKARAM v. CHINTARAM*.

20 N. L. R. 17 : 1924 Nag. 91.

—S. 100—*Finding of fact—Real contract between parties.*

Where question in dispute is merely whether the real contract between the parties was something different from the contract entered in the deed, the finding on this point is clearly a finding of fact, with which the High Court will not interfere in second appeal. (*Martineau, J.*) *KAPUR CHAND v. CHET RAM*. 5 Lah. L. J. 541 : 80 I. C. 494 : 1924 Lah. 260.

—S. 100—*Finding of fact—Misconception as to the evidence in the case.*

A finding on an issue of fact by the lower appellate Court which is based on a misconception of what the evidence is, cannot be accepted in second appeal as a legal finding upon it. 20 B 753 Ref. (*Daniels and Neave, JJ.*) *SUBEDAR v. DUBEY JAGAT NARAIN*. 46 A. 773 : 22 A. L. J. 739 : 80 I. C. 25 : L. R. 5 A. 533 : 1924 A. 848

—S. 100—*Finding of fact—Question whether land is a grove.*

Whether a plot is or is not grove is a more a question of fact than of law. (*Fremantle, S. M.*) *DEBI SAHAI v. QANNAUJI*. L. R. 5 A. 94 (Rev).

—S. 100—*Finding of fact—Reversal by Appellate Court—Omission to consider all the circumstances—If ground of Second Appeal.*

Where the judgment of the Appellate Court reversing a finding of fact of the trial court does not refer to all the circumstances relied upon by the trial court, that alone, without any error of law or procedure does not give a ground of Second appeal. (*Wazir Hasan, J. C.*) *SHEORAJ v. BECHEY LAL*. 10 O & A. L. R. 798 : 1 O. W. N. 352.

—S. 100—*Finding based partly on inadmissible evidence—Duty of High Court.*

C. P. CODE (1908), S. 100.

Where a finding of fact is arrived at by the Court below partly on the basis of inadmissible evidence, the High Court should remand the case for a fresh finding after excluding the inadmissible evidence. (*Mookerjee and Rankin, JJ.*) *JAGADISH CHANDRA DE v. HARIHAR DE*.

40 C. L. J. 39 : 78 I. C. 219 : 1924 Cal. 1042.

—S. 100—*Inferences of fact—Reliability of Entries.*

Inferences from the entries of the pocket book to the effect that the debit entries were unreliable are inferences of fact and not of law and High Court cannot interfere even if inferences are not correct. (*Moti Sagar, J.*) *PORHER MAL v. JAI BHAGWAN*. (1924) Lah. 719.

—S. 100—*Joint Hindu family—Status of Joint or separate—Not a finding of fact.*

A finding that there has been no disruption of a joint Hindu family is not a finding of fact but an inference of the legal effect of fact found and the inference can be challenged in second appeal but not the facts found. (*Hallifax, A. J. C.*) *BED PRASAD v. NAKCHEED PRASAD*.

1924 Nag. 410.

—S. 100—*Limitation—Mixed question of fact and law—Question if to be raised suo motu.*

Where a question of limitation is not purely one of law but of mixed fact and law, the High Court in second appeal cannot go into the question of its own accord under S. 3, Lim. Act. (*Kinkhede, A. J. C.*) *BHUWAN LAL v. MANHORI*. 78 I. C. 960.

—S. 100—"Necessaries"—*A mixed question of fact and law.*

The question of what are "necessaries" under S. 68, Contract Act is a mixed question of law and fact and cannot be allowed to be raised for the first time in second appeal. (*Kinkhede, A. J. C.*) *FULSIRAM v. ANUSUYA*.

1924 Nag. 360.

—S. 100—*New case—When open—Question of jurisdiction of Courts below—Consideration of other evidence not necessary. See PRACTICE APPEAL.* 78 I. C. 63.

—S. 100—*New point—Mixed question of law and fact—Not raised in the court below—If can be raised on Second Appeal.*

A mixed question of law and fact not raised in the Courts below will not be allowed to be raised for the first time in second appeal in the High Court. (*Daniels, J.*) *RAMKARAN SINGH v. RAJA RAM*. L. R. 5 A. 225 (Rev.) : 1924 A. 877.

—S. 100—*New point—When can be raised.*

A pure question of law, based on the construction of documents or facts admitted or proved can be raised in second appeal for the first time; but if its determination requires investigation into facts the matter is different. (*Kinkhede, A. J. C.*) *NARAYAN v. MT. TULSHI*. 80 I. C. 607.

—S. 100—*Objection to legal representative—Not raised in court below—Effect.*

Where on the death of a party, a person was brought on record as his legal representative without any objection it cannot be questioned in

C. P. CODE (1908), S. 100.

second appeal by persons who failed to object in the court below (*Krishnan, J.*) *HARIHARA AIYAR v. UKKANDAN WARIA*. 81 I. C. 498.

— S. 100—Perverse finding not binding. *MAUNG HLAING v. MAUNG CHIT SU*. 76 I. C. 449.

— S. 100—Question of fact—Another inference possible—If ground for second appeal.

The mere fact that a court of appeal draws one of two possible inferences on a question of fact does not entitle the High Court in second appeal to interfere with finding. If only one inference is possible and that has not been drawn, it may be ground for second appeal. (*Kinkhade, A. J. C.*) *MT. MATHURABAI v. LAL SINGH*. 1924 Nag. 160.

— S. 100—Point of law—When allowed to be newly raised on second appeal.

If there is a point of law arising on the issues as framed and on the evidence as led in the trial court, the second appellate court would entertain that point though not raised in the lower courts. But where the point of law could not be decided without remanding the case for further evidence, the point of law is not competent. (*Macleod, C. J. and Shah, J.*) *KALAPPA MALLAPPA v. KALAPPA NINGAPPA*. 26 Bom. L. R. 494; 1924 Bom. 469.

— S. 100—Question of law—Point newly raised for the first time in second appeal.

Where the point is one of law it can be raised for the first time in second appeal even though it had not been raised in the courts below if it does not render necessary the taking of further evidence. (*Motisar, J.*) *SHAMA-UD-DIN v. ALLAH DAD KHAN*. 6 Lah. L. J. 351.

— S. 100—Reversing Judgment—Evidence held meagre—No reasons given—Finding of fact—If open to attack.

Where the lower appellate court reverses a finding of fact of the trial court merely saying the evidence was meagre and without giving any reasons the finding can be challenged in second appeal. (*Suhrawardy and Chotzner, JJ.*) *CHAN DRA MOHNN MAITI v. KINARAM MAITI*. 79 I. C. 412.

— S. 100—Suit to recover tax illegally levied—If of a small cause nature—Second appeal.

A suit to recover tax illegally levied is one of a small cause nature and where the subject matter is less than Rs. 500 in value, no second appeal lies. (*Broadway, J.*) *THE MUNICIPAL COMMITTEE, PIND DADANKHAN v. BHAGWAN SINGH*. 1924 Lah. 619.

— S. 100—Weight of evidence—Thak map and survey map—Question of fact.

The question with regard to the weight to be attached to thak maps and survey maps is a question of fact. (*Suhrawardy and Chotzner, JJ.*) *KALI PROSANNA BHADURI v. RANI HEMANTA KUMARI DEBI*. 1924 Cal. 977.

— S. 100 (2)—Ex parte decree in appeal—Second appeal—Maintainability—Other remedy open—Effect.

A party whose appeal is decided *ex-parte* can maintain a second appeal against the decision, though he has two other courses open to him *viz.* to apply for restoration under O. 41, R. 21 or to

C. P. CODE (1908), S. 102.

apply for review. (*Suhrawardy and Chotzner, JJ.*) *KALI PROSANNA CHAKRAVARTY v. NAJABULLA JAMADAR*. 80 I. C. 14.

— S. 102 — Second appeal — Mortgagee abandoning claim on mortgage—Money decree.

Where a mortgagee suing on a hypothecation bond expressly abandons all claim against the mortgaged property and frames his suit purely as a money suit for the recovery of Rs. 252 and odd S. 102, C. P. Code applies to the case and no Second Appeal lies. (*Daniels, J.*) *LAKHAN SINGH v. LAL SINGH*. 78 I. C. 652; L. R. 5 A. 293.

— S. 102—Small Causes Court—Suit cognisable by—Award—Money payable under—Suit to recover—Second Appeal in—Award—Suit to enforce—If suit to enforce contract.

A suit to recover money payable under an award, is a suit of Small Cause nature, and no second appeal lies against the decree in such a suit.

Semble: A suit to enforce an award is not the same as one to enforce a contract. (*Spencer and Devadoss, JJ.*) *THIRUMURTHY CHETTY v. PONNAN CHETTY*. 46 M. L. J. 51; 19 L. W. 210; (1924) M. W. N. 46; 75 I. C. 843; 1924 Mad. 485 (1).

— S. 102—Suit of Small Cause nature—Test of.

In deciding the question whether a suit is of a small cause nature or not, attention has to be paid to the nature of the suit, as it was presented in the first court and not to the subsequent shape that it may have taken as a result of the findings of the lower Courts. A suit for specific performance of a contract or for damages in the alternative is not a suit of a small cause nature. (*Madhanan Nair, J.*) *SANKER PEDDAPPA v. VENKATAPPA*. 20 L. W. 321; 1924 M. W. N. 691; 82 I. C. 123; 1924 Mad. 844.

— S. 102 — Suit of small cause nature—Joint Patta—Payment of Kist and water-cess by a co-pattadar—Suit for contribution—Second appeal if lies—Provincial Small Cause Courts Act, Sch. II, Art. 41.

Plaintiff sued for recovery of a certain sum of money on the ground that he and the defendants had divided their properties, though the property still remained under the same patta, and that his property was attached for arrears of rent and water-cess under this patta, which were due from defendants 1 to 6, they not having paid the Kist on their property under the same patta and that plaintiff, to save his own property therefore, had to pay up the arrears. *Held*, (1) that the suit was not of the nature contemplated by Art. 41 of Sch. II to the Provincial Small Cause Courts Act; (2) that there was no joint property, since plaintiff and defendants, on plaintiff's own showing were divided; (3) that the mere fact that the patta was still joint and therefore the liability under it was joint would not affect the manner in which the property was held and (4) that there was no Second Appeal to the High Court. 12 M. 349 Foll. (*Wallace, J.*) *SOORAPANENI SEETHARAMA BRAHMAM v. SOORAPANENI KRISTABRAHMAM*. 80 I. C. 253 (1); 19 L. W. 547; 1924 M. W. N. 478; 1924 Mad. 790.

C. P. CODE (1908), S. 102.

— S. 102 — *Suit of small cause nature—Contribution—Suit for—Second appeal.*

Plaintiff and defendant jointly borrowed money on a mortgage of their property but the plaintiff having discharged the whole debt sued the defendant for recovery of his half share of the debt which was a sum below Rs. 500. *Held*, that the suit was of a small cause nature and that no second appeal lay to the High Court. (*Walsh, A.C.J. and Sulaiman, J.*) *GAYA PANDE v. AMAR DEO PANDE.*

22 A. L. J. 855 : L. R. 5 A 673 : 1924 All. 787.

— S. 103 and O. 41, R. 25—*Issue of fact—Question of title—Not decided by lower appellate Court—Power of High Court to decide—Question of law—Inference from documents.*

Where an issue of fact or law has been tried by the trial court and decided but is left undecided by the lower appellate court, it is open to the High Court in second appeal to determine that issue itself. Where the question of plaintiff's title is one purely of interpretation of certain documents and the legal inferences to be drawn therefrom the High Court could interfere in second appeal. (*Wazir Hasan, J. C.*) *INDARPAL SINGH v. THAKURIN SINGH.*

78 I. C. 895 : 10 O. L. J. 646 : 27 O. C. 77 : 1924 Oudh 266.

— S. 104—*Arbitration—Stay of suit pending award—Appeal if lies.*

Disputes which had arisen between certain parties were referred to arbitration, but pending the same, one of them filed a suit. The opposite party applied for stay of suit under S. 19 Arbitration act and the same was ordered but in appeal the stay order was set aside on a question arising whether the appeal was competent, *held* the provisions of the C. P. Code applied to proceedings under the Arbitration Act and hence an appeal lay under S. 104. (*Mukerji and Dalal, JJ.*) *KACHARI MAL KALYAN MAL v. WALI MUHAMMED ABDUL LATIF.*

22 A. L. J. 1031.

— S. 104—*Second Appeal—Question of law.*

The amount of inquiry necessary for a creditor to make when lending money to a Hindu widow is a question of law and can be examined in second appeal. (*Dalal, A. J. C.*) *RAMAN v. BARATI.*

1 O. W. N. 654 : 10 O. & A. L. R. 965.

— S. 104 (d) O. 9, R. 13, O. 43, R. 1 (d) Schedule II, Para 16 (2)—*Arbitration—Application to set aside under O. 9, R. 13 Appeal.*

Where arbitration proceedings took place with the intervention of the Court and the defendants being absent and an award was made, an application to set aside the decree under O. 9, R. 13 was made, and the Lower Court rejected the application, *Held* on appeal, that S. 104 (f) of the Code which provides an appeal from an order filing or refusing to file an award without the intervention of the court, cannot be applied in the present case, which was made with the intervention of the court and that under O. 43, R. 1 which gives a right of appeal only to cases which are appealable only where the decree sought to be set aside

C. P. CODE (1908), S. 104.

is appealable and is regarded as having been passed *ex parte* and neither of the conditions is satisfied. (*Das and Ros, JJ.*) *RAGUNTAH RAI DISUKRAI v. BRIDICHAN SRILAL.*

3 Pat. 839.

— S. 104—*Order filing the award—What is.*

1924 Lah. 231.

— Ss. 104 (1) (f) and 115—*Revision against an order open to appeal, whether entertainable—Revision filed after the expiry of the period of appeal, whether can be treated as an appeal.*

Where it is open to a party to appeal against an order, a revision does not lie. An application in revision cannot be treated as an appeal where an appeal filed on the date which the application in revision bears would be beyond time. (*Dalal, J. C. and Wazir Husan, A. J. C.*) *JAGESHAR SINGA v. THAKUR JWALA BUKHSH SINGH.*

1 O. W. N. 802.

— S. 104 (1) (f) and Sch. II, Para. 21 (2)—*Decision as to Filing of award—Right of appeal—Distinction between the two provisions.*

MAUNG TAN U. v. MAUNG PO SHOK.

76 I. C. 504.

— S. 104 (1) (f), O. 9, R. 13 and O. 43 R. 1 (d)—*Reference to arbitration Award—Application to file—Objections—Objector not present—Decree—Ex parte—Setting aside—Refusal—Appeal.*

The matters in dispute between the parties were referred to the arbitration of certain persons by order of Court and the arbitrators filed their award. The defendants filed their objections and applied for time which was refused. The defendants thereupon withdrew from the contest and the court pronounced judgment according to the award and a decree followed in accordance with law. The defendant's applied to set aside the award under O. 9, R. 13 but the application was rejected. *Held* that no appeal lay against the order. As the arbitration was with the intervention of the Court S. 104 (1) of the C. P. Code had no application. An appeal was incompetent under O. 43, R. 1 (d) C.P.C. inasmuch as there was no appeal from the decree and the decree itself could not be deemed to have been passed *ex parte*. The Court was bound to pass judgment according to the award when the defendants did not choose to prosecute an application under Sch. II, para (15), C. P. Code. (*Das and Adams, JJ.*) *ROSHAN LAL MARWARI v. FIRM OF BRIDHICHAN SRI LAL.*

1924 P. H. C. C. 170 : 1924 P. 603.

— Ss. 104 (2) and 109—*Scope of—S. 104 does not restrict S. 109.*

The provisions in sub-S. 2 of S. 104 deal with internal appeals within the limits of British India. The application to file an award may be made in the Court of the Subordinate Judge; if any dispute arises, and the amount at stake is below a certain figure, the appeal would lie from him to the District Judge. If it were above that figure, it would lie to the High Court. The provision is intended to prevent any appeal beyond the District Judge where the sum in dispute is small. In this respect it runs parallel with S. 100, which limits second appeals from

C. P. CODE (1908), S. 105.

appellate decrees by District Judges. That section deals with decrees only while the decisions on arbitration questions are styled orders. There is therefore nothing in S. 104 to take away the general right of appealing to the Crown given by S. 109. (*Lord Phillimore*.) *RAM LAL HARGOPAL v. KISANCHANDRA*. 51 Cal. 361 :

26 Bom. L. R. 586 : 22 A. L. J. 386 :
19 L. W. 549 : 34 M. L. T. (P. C.) 62 :
20 N. L. R. 33 : 7 N. L. J. 62 : 51 I. A. 72 :
7 N. L. J. 62 : 28 C. W. N. 977 :
L. R. 5 P. C. 216 : (1924) M. W. N. 79 :
1924 P. C. 95 : 46 M. L. J. 628.

———S. 105—*Decision affecting the merits of the case—Order setting aside abatement—Appeal.*

An order setting aside an abatement and allowing substitution even though the order is passed simultaneously with the decree in the suit cannot be questioned in an appeal from the decree for it does not affect the decision of the case with reference to its merits. 22 C. 984 ; 22 A. 430 Ref. (*Suhrawardy and Cuming, JJ.*) *MAHOMED NUKUL AMIN v. MONDHAR SORAN DEB MOHANTA*. 40 C. L. J. 588.

———Ss. 109, 110—*A firmation by High Court of the decision of trial Court on different grounds, whether covered by S. 110, C. P. C.—Document interpretation of, whether involves substantial question of law—Leave to appeal to His Majesty on Council.*

Where the High Court in dismissing an appeal proceeds in some respects on grounds different from those adopted by the trial Court, the decision of the High Court virtually amounts to an affirmation of the decree of the first Court within the meaning of S. 110; 24 O.C. 164 foll. 30 L. R. I. A. 35 Ref. 14 I. C. 269 (All.) Dist.

The interpretation of a single document in which the parties alone are interested and which is neither of frequent use nor raises any question of general interest cannot be said to involve a substantial question of law so as to justify the granting of leave to His Majesty in Council. (*Datal J. C. and Neave, A. J. C.*) *MOHAMMAD SHERKHAN v. MUSSAMMAT KAMALIN-NISA*. 10 W. N. 602.

———S. 109—*Final order—Order of High Court refusing to interfere in revision.*

An order of the High Court refusing to interfere in revision with the order of a Subordinate Court restoring to file a suit which had been first disposed of upon an alleged compromise between the parties is not a "final order" within the meaning of S. 109, C. P. C.

S. 105, C. P. C. does not apply to appeals to His Majesty in Council and does not supply a guide to the interpretation of the word "final" in S. 109. (*Spencer, O. C. J. and Devadoss, J.*) *JOHN JOSEPH BRITO v. BRITO*. 19 L. W. 458 :

34 M. L. T. (H. C.) 112 : 1924 M. W. N. 380 :
73 I. C. 938 : 1924 Mad. 701 :
46 M. L. J. 357.

———S. 109—*Interlocutory order—Locus standi to maintain suit—Remand—If appealable.*

In a suit for removing a Shebail and for accounts the Court below dismissed the suit hold-

C. P. CODE (1908), S. 109.

ing plaintiff could not maintain the suit. The High Court reversed and remanded the suit for trial on the merits. *H'd* it was only an interlocutory order to the effect that plaintiff had sufficient interest to call for an investigation and as such was not appealable to the Privy Council. (*Sanderson, C. J. and Richardson, J.*) *HARI NARAYAN DE v. HARI BHUSAN DE*.

78 I. C. 117,

———S. 109—*Insolvency—Appeal from original side—Leave to appeal to the Privy Council.*

Where the High Court passes an order under S. 8 of the Presidency Towns Insolvency Act annulling its own prior order, the order of the High Court is appealable to the Privy Council and leave can be granted under Cl. 39 of the Letters Patent if not under S. 109 of the C. P. Code. (*Ramesan and Wallace, JJ.*) *OFFICIAL ASSIGNEE OF RANGOON v. OFFICIAL ASSIGNEE OF MADRAS*. 35 M. L. T. 57 (H.C.).

———S. 109 (a)—*Leave to appeal to the Privy Council—Order of remand.*

Where the High Court in remanding a suit merely decided that the plaintiffs had a locus standi to institute the suit under S. 92, C. P. Code and directed the Court below to try the other issues. *H'd*, that the order of the High Court was not a final order and leave to appeal to the Privy Council could not be granted. The test of finality is whether the order as made finally disposes of the rights of parties. Cases reviewed. (*Shadi Lal, C. J., Broadway and Harrison, JJ.*) *RAI BAHADUR LALA SULTAN SINGH v. LALA MURLI DHAR*. 6 Lah. L. J. 240.

———S. 109—*Leave to appeal to Privy Council—Order transmitting a preliminary decree of the Privy Council to the lower Court for final decree—Whether it is an order passed on appeal under cl. (a) of S. 109.*

Held, that no appeal lies to the Privy Council against an order of the High Court on an application to pass a final decree, in terms of a preliminary decree of the Privy Council, as it is not an order passed by the Court on appeal so as to fall within cl. (a), S. 109, C. P. Code and that the case is not a fit one for appeal under clause (e) of S. 109, as the appeal relates to a pure technicality and not a substantial question of law. (*Per Krishnan, J. and Odgers, J.*) *SRI RAJA SATRUCHERIA GANGARAZA BAHADUR v. SRI SRI RAMACHANDRA DEO MAHARAJULU*.

20 L. W. 753.

———S. 109, cl. (a) and (e)—*Leave to appeal to the Privy Council—Order of remand—When appealable.* 1924 Oudh 81.

———S. 109 (a)—*Meaning of final order—Order of remand by High Court—If final order—Test.*

In a suit brought by the Plaintiffs under S. 92 for the removal of the defendants from the office of executors appointed under a will, and it was contended that the Plaintiffs had no locus standi having no interest in the trust, and the High Court remanded the case for trial holding they had locus standi, the defendants applied for leave to sue to the Privy Council. It was contended that the order of the High Court was not a

C. P. CODE (1908), S. 109 (a).

'final order' within the meaning of S. 109 (a). C. P. C. *Held*, on a reference to the Full Bench *Sir Shadi Lal, C. J. Broadway and Harrison, JJ.*—Refusing application for leave to appeal under S. 107 (a), C. P. C.—that the principle deduced from the judgment in *Rahimbhoy Nabhoy v. S. A. Turner* (15 Bom. 155 P. C.) *Saiyad Muzhag Hussain v. Mussamat Bodha Bibi*, (17 All. 112) and *Ramchand v. Goverdhandhas*, 47 C. 918 is to the effect, that an order comprising the decision of the High Court upon a cardinal issue in a suit and which while that decision stands cannot be disputed again is a final order for purpose of appeal to Privy Council. *Held*, further that a matter of procedure can never be treated as a cardinal point in the suit and that an order of remand in this case is not a final order and the test of finality is a whether the order as made finally disposes of the rights of the parties.

Per *Broadway, J.*—It is the nature of the order sought to be appealed against that determines the right to appeal, and that an order is a final order, only, if it puts an end to the litigation between the parties or disposes of substantially the matter in issue so as to leave merely subordinate matter for decision (*Sir Shadi Lal, C. J. Broadway and Harrison, JJ.*) *SULTAN SINGH v. MURLIDHAR*.
5 Lah. 329 : 80 I. C. 366 :
1924 Lah. 571 (F. B.).

————S. 109 (a)—Order appointing Receiver—Appeal to Privy Council.

An order appointing or refusing to appoint a Receiver is not a final order within the meaning of S. 109 (a) as it is in no way finally determines the rights of the parties (*Miller, C. J. and Foster, J.*) *MAGNI RAM BUNGAR v. SRIDHAR CHOUDHURY*.
82 I. C. 178.

————S. 109 (c)—Considerations governing.

Where the value involved in the case is very large and the decision of the High Court was based on findings of fact which reversed the findings of the Trial Court and the High Court acted on evidence which was not at all before the Trial Court and there was a question of procedure of a somewhat unusual character upon which a higher tribunal was likely to take a different view, the combined effect of these matters made the matter a fit one for certification under S. 109 (c), though the powers under the sub-section are to be used sparingly. (*Miller, C. J. and Mullick, J.*) *RAO BAHADUR MAN SINGH v. NAWLAKHBATI*.

75 I. C. 58 : 5 Pat. L. T. 17 : 2 Pat. L. R. 48 :
1924 P. 468.

————Ss. 109 (c) and 110—Leave to appeal to His Majesty in Council—"Substantial question of law"—Acknowledgment of debt.

Where following other case previously decided, the High Court held that an acknowledgment of a debt was not given to supply evidence of such debt within the meaning of Art. 1 of Sch. I of the Stamp Act, it cannot be said that the case is of public or great private importance or such an important precedent as to justify the grant of leave to appeal to His Majesty in Council under S. 109 (c) of the Civil Procedure Code. 44 M. L. J.

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C. P. CODE (1908), S. 110.

217, foll. (*Schwabe, C. J. and Ramesam, J.*) *ANANTALAL DAMANI v. SURJIMULL MURLIDHAR CHANDICK*.
19 L. W. 372 :

34 M. L. T. (H. C.) 1 (1924) M. W. N. 319 :
78 I. C. 165 : 1924 M. 616 : 46 M. L. J. 239.

————S. 109 c)—Construction of agreement—Question affecting rights of considerable private importance. (1924) M. W. N. 3 : 76 I. C. 311 :
1924 Mad. 231.

————S. 110—Affirming decision—What is—Findings reserved—Effect.

In an appeal the High Court though it affirmed the decision of the Court below, reversed many of the findings arrived at by the trial court. *Held*, even in the absence of concurrent findings, the decision of the High Court is not affirming decision for the purposes of S. 110, C. P. C. It is not necessary that a judgment of affirmance should be based upon precisely the same reasons as those given by the Court below. The term "decision" in the section means only the decree or order passed and not the reasons therefor. (*Miller, C. J. and Mullick, J.*) *RAO BAHADUR MAN SINGH v. NAWLAKHBATI*.
75 I. C. 58 :
5 Pat. L. T. 17 : 2 Pat. L. R. 48 : 1924 P. 468.

————S. 110—Leave to appeal to the Privy Council—Valuation—Market. *NAWAZ ALI v. ALLU*.
6 Lah. L. J. 44 : 75 I. C. 530 :
1924 Lsh. 82.

————S. 110—Partnership—Suit for dissolution and accounts—Valuation for purposes of appeal.

For the purposes of valuation of an appeal to His Majesty in Council against the decree in a suit for dissolution of partnership and accounts, it is the value of the appellant's share and not the value of the whole of the partnership property that has to be taken into account. (*Shah, A. C. J. and Kincaid, J.*) *NARIMAN RUSTOMJI v. HASHAN ISMAYAL*.
26 Bom. L. R. 1261.

————S. 110—Question of law—Substantial—General interest—Leave to appeal to His Majesty in Council.

Where owing to the faulty procedure of the Board of Revenue a specific property belonging to a disqualified proprietor was not taken over under management by the Court of Wards and the ward gave a mortgage of that property and the High Court having held that the ward was incompetent to contract under S. 11 of the Indian Contract Act and the presumption under S. 15 of the Courts of Wards Act III of 1899 (Local) was un rebuttable the question involved in the appeal, through raising questions of law, were not substantial in the sense that they may be debatable, of general interest, on without previous decisions of the Privy Council to guide Indian Courts so as to justify grant of a certificate. 30 C. 539 and 26 O. C. 223 Ref. to. (*Dalal, J. C. and Neave, A. J. C.*) *LALA HARI KISHUN DAS v. CH. MOHAMMAD SAFI JAN*.
1 O. W. N. 608.

————S. 110—Question of procedure—Point not allowed to be raised for the first time in second appeal—Appeal. *UDH NARAIN SINGH v. KALESHWAR SINGH*.
76 I. C. 516.

C. P. CODE (1908), S. 113.

—S. 110—*Substantial question of law—Question of custom depending on evidence*

When the Courts in India have held that a custom of pre-emption claimed in a suit had been established by overwhelming evidence and there was not a single instance where a claim of pre-emption had not been allowed, there is no substantial question of law justifying the grant of leave to appeal to the Privy Council. (*Abdul Raof and Campbell, JJ.*) GOKAL CHAND v. SANWAL DAS. 5 Lah. 260 : 6 Lah. L. J. 180 : 78 I. C. 417 : 1924 Lah. 473.

—S. 110—*Substantial question of law—Issue given up re-opened.*

Where an issue given up in the trial court is allowed to be re-opened in appeal and fresh evidence let in, the propriety of the same is not a substantial question of law within the meaning of S. 110. (*Miller, C. J. and Mullick, J.*) RAO BAHADUR MAN SINGH v. NAWLAKHBATI. 75 I. C. 58 : 5 Pat. L. T. 17 : 2 Pat. L. R. 48 : 1924 P. 468.

—S. 110—*Substantial question of law—Sale with option to re-purchase—Mortgage by conditional sale.*

Where broad general principles applicable to a case have already been subjected to much discussion and analysis and there is no difficulty in ascertaining what are the principles, but the difficulty arises in their application, the difficulty of application is not a matter which can come under the words "substantial question of law" in S. 110, C. P. Code. Thus the High Court refused to grant leave to appeal to the Privy Council in a case where the question was whether a transaction amounted to a mortgage by conditional sale or a sale with an option for re-purchase. (*Mears, C. J. and Piggott, J.*) BISHAMBHAR NATH v. MD. UBaidULLAH. 46 A. 227 : L. R. 5 A. 158 : 79 I. C. 213 : 1924 A. 559.

—S. 110—*Valuation for appeal—Annuity.* MIRZA ABID HUSSAIN KHAN v. AHMAD HUSAIN. 75 I. C. 502 (1) : 28 C. W. N. 289.

—S. 115—*Amendment of plaint—Interference.*

An amendment of the plaint under O. 6 R. 17 being one discretionary with the court, such order cannot be interfered with in revision. (*Prideaux, A. J. C.*) ANWAR KHAN v. YAKUB KHAN. 79 I. C. 911.

—S. 115—*Amendment—Refusal of—Interference.*

A refusal by a court to exercise its lawful powers and thus refusing a party an application to amend the pleadings which he is entitled to do amounts to a material irregularity justifying interference in revision. (*Jackson, J.*) SOMASUNDARA BHATTAR v. MUTHU THEVAR. 80 I. C. 278.

—S. 115—*Amendment of decree—Variance with Judgment—Refusal to award—Interference.*

Where a decree is at variance with the judgment a refusal to amend the same and bring the same into conformity with each other is a refusal

C. P. CODE (1908), S. 115.

to exercise a jurisdiction vested by law and can be interfered with in revision. (*Suhrawardy and Chotzner, JJ.*) KABIR-UD DIN MONDOL v. ENTAJ. MANDOL. 79 I. C. 586.

—S. 115—*Appeal—Conversion into revision—Discretion of Court.*

Where District Court hears and disposes of an appeal without jurisdiction, the High Court can interfere in revision and for this purpose convert an appeal from the decision of the District Court into a revision petition, 38 C. 421 Ref. (*Rankin and Ghose, JJ.*) MOHINI MOHAN RAY v. RAMDAS PARAMHANSA. 28 C. W. N. 271 : 80 I. C. 210 : 39 C. L. J. 532 : 1924 Cal. 487.

—S. 115—*Arbitration—Award given and decree passed—Interference.*

There is no general rule to the effect that in no case in which an award has been filed and decree passed could the High Court interfere under S. 115 C.P.C. If the arbitrators or the court exceed jurisdiction or act with material irregularity in the conduct of the proceedings, the High Court can interfere. (*Suhrawardy and Page, JJ.*) DEBIR-UD-DIN v. AMINA BIBI. 78 I. C. 335.

—S. 115—*Assignees of decree—Disputes between—Adjudication on—Revision.*

A dispute between two persons who claimed to be assignees of a decree was taken up under S. 47, C.P. Code, and was subsequently treated as a suit. An application was filed by the defeated party to revise the order. *Held*, whether it fell under S. 47 or whether was passed in a regular suit the order was appealable. If it were to be treated as falling under O. 21, R. 16 the Court had jurisdiction to decide the dispute in favour of one of the parties. (*Jwala Prasad and Kulwant Sahay, JJ.*) RUN BAHADUR SINGH v. BAJNANJEE PRASAD SINGH. 3 Pat. 344 : 1924 P. H. C. C 193 : 78 I. C. 495 : 1925 P. 16.

—S. 115—*Award accepted—Revision.*

Where an award has been accepted and a decree passed, it is doubtful if it can be interfered with in revision. (*Krishnan and Waller, JJ.*) VAITHIA NATHA AIYAR v. SUBRAMANIA AIYAR. 78 I. C. 238.

—S. 115—*Award—Order taking it off the file—No error on face of award—Interference.*

Where there is no error patent on the face of an award and a court still directs it to be taken off the file of court, it assumes a jurisdiction not vested in it by law, and the order is revisable. (*Kennedy and Bilaram, A. J. C.*) RAMJIBHOY & Co. v. YUSUFALI MAHOMEDALI. 1924 S. 151.

—S. 115—*Award—Revision—On objection that arbitrators had made secret enquiries—Court's decision apart from award is not revisable.*

Where an award was attacked as vitiated by misconduct on the ground that the arbitrators had made secret enquiries and the Court thereupon took up the case and proceeded to dispose of it without reference to the arbitration. *Held* no revision lay. (*Daniels, J.*) RAM LAL SINGH v. BEHARI SINGH. (1924) All. 761 (1.)

C. P. CODE (1908), S. 115.

—S. 115—*Case decided—Order refusing to try a preliminary issue.*

Where a Court refuses to try an issue of *res-judicata* a preliminary issue but proceeds to go into the merits, there is no "case decided" within the meaning of S. 115, C. P. C. nor is there a question of jurisdiction involved to justify interference in revision. (*Wazir Hasan, A.J. C.*) GAJADHAR LAL v. REOTI RAMMAN.

80 I. C. 628 (1).

—S. 115—*Case decided—Order refusing to stay suit under S. 10—If capable of revision.*

An order refusing to stay a suit under S. 110, C. P. Code is not "a case decided" within the meaning of S. 115, C. P. Code and as such not open to revision. (*Abdul Raoof, J.*) BAGH SINGH v. BHAGWAN DAS.

1924 Lah. 567.

—S. 115—*Case decided—Order on application for transfer.*

The order on an application to transfer a suit is a case decided within the meaning S. 115 C. P. C. (*Martineau, J.*) LABHU RAM v. KARTA RAM.

78 I. C. 614 (1).

—S. 115—*Case decided—Order fixing fee of Commissioner.*

An order fixing the fee of a Commissioner is not a case decided within the meaning of S. 115 C. P. C. Even if the court fixes a high fee it is not an exercise of jurisdiction illegally or with material irregularity. (*Daniels and Wazir Hasan, A. J. C.*) GIRDHARI GOPAL v. LACHMI NARAYAN.

1924 Oudh 348.

—S. 115—*Case decided—Refusal to amend pleadings.*

The refusal to allow an amendment disposes of the case so far as the question of amendment is concerned and the order is capable of being revised. (*Kinkhade, A. J. C.*) SHANKAR v. MURARJI.

78 I. C. 510.

—S. 115—*Case decided—Interlocutory orders—Revision.*

Interlocutory orders do not amount to the decision of a case within the meaning of S. 115, C. P. C. and are not revisable. (*Shadi Lal, C. J. Le Rossignol, Broadway, Abdul Raoof and Martineau JJ.*) FIRM LAL CHAND MANGAL SAIN v. FIRM BEHARI LAL MEHAR CHAND.

5 Lah. 288 : 1924 Lah. 425 (F. B.)

—S. 115—*Case decided—Meaning of—Question of jurisdiction—Interference.*

The word "case" must be understood in its broadest and most ordinary sense. Where a refusal to interfere with an interlocutory order on the question of jurisdiction might result in a waste of public time and parties' "money" the court can interfere in revision if the order is wrong. (*Prideaux and Kinkhade, A. J. C.*) SHEOPRATAP SHRINIVAS v. SUKHDEO KANHAIYALAL.

1924 Nag. 292.

—S. 115—*Compromise decree—Order extending time—Revision.* MT. NAND RANI KUER v. DURGA DAS NARAIN.

1924 P. H. C. G. 122 : 5 Pat. L. T. 401 :

82 I. C. 505 : 1924 P. 387.

C. P. CODE (1908), S. 115.

—S. 115—*Correction in decree—Inclusion of mortgage item—Interference.* MAUNG CHIT HLAING v. N. A. R. M. CHETTY.

1924 Rang. 104.

—S. 115—*Court—Land Acquisition Act, S. 18—Arbitrary refusal of Collector to refer application to the Court—Revision—Interference by High Court.* See LAND ACQ. ACT, S. 18.

46 M. L. J. 209.

—S. 115—*Court—Persona a designat—Election of President of a Taluq Board—Objection to election—Scope of the enquiry—Decision of District Judge—Persona designata.* See MADRAS LOCAL BOARDS ACT, S. 57.

46 M. L. J. 201.

—S. 115—*Court fee—Order directing payment of—Revision—Interference.*

An order of the lower Court calling upon the plaintiffs to pay *ad valorem* Court-fee, which led to the plaintiffs asking permission to continue the suit in *forma pauperis*, is erroneous, it is liable to be set aside in revision under Section 115 Civil Procedure Code. (*Kinkhade, A. J. C.*) MINAJI v. SITARAM.

7 N. L. J. 91 : 81 I. C. 643 :

1924 Nag. 105.

—S. 115—*Decision on individual issue can't be revised unless it goes to the root of jurisdiction of the trial Court.*

A case should not come to High Court until all the issues are determined and the case finally disposed of; but this is upon the ground of convenience and does not bar the revisional jurisdiction of the High Court when the determination of one of the issues in the case goes to the root of the jurisdiction of the trial Court to determine the remaining issues. (*Jwala Prasad and Fester, JJ.*) MANI LAL v. DURGA PRASAD

5 Pat. L. T. 425 : (1924) P. H. C. G. 254 :

3 Pat. 930 : 80 I. C. 667 (2) : 1924 P. 673.

—S. 115—*Election dispute—Order of Election Commissioner directing prosecution of petitioner for offence under S. 553, I. P. C.—No revision by High Court.* See U. DIST. MUN. ACT, S. 23 (3).

22 A. L. J. 497.

—S. 115—*Erroneous decision—Wrong provision of law applied—Order justifiable under other provision—Revision—Interference.*

Where an order of the Lower Court which purports to be passed under a particular provision of law is not justifiable with reference to that provision but can be made under some other provision of law not invoked by the parties and where the order complained against has been passed after full enquiry into the merits of the case and does substantial justice between the parties, the High Court will not interfere in revision with that order. (*Spencer and Devadas, JJ.*) JOHN JOSEPH BRITO v. S. C. BRITO.

19 L. W. 532 : 75 I. C. 888 (2) :

1924 Mad 586.

—S. 115—*Error of law—Limitation—No ground for revision.* MT. BIBI ZAINAB v. PARAS. NATH.

1924 P. 37.

C. P. CODE (1903), S. 115.

———S. 115—*Error of law—Interference in revision.*

A mere error of law is not necessarily an illegality and is not an exercise by a Court of a jurisdiction not vested in it by law so as to entitle the person aggrieved to apply for revision. Where an application to set aside an *ex parte* decree is on the face of it barred, but the court still sets it aside, the order cannot be interfered with in revision. (*Moti Sagar, J.*) SURJIT SINGH v. TORRIE 1924 Lah. 666.

———S. 115—*Error of law—If revisable.*
See Pro. Sm. C. C. Act, S. 25. 1924 All. 691.

———S. 115—*Error of law—Notice of suit—Necessity for—Decision on if a point of jurisdiction—Railways Act.* S. 77.

It cannot be said that a Court by holding that a notice under S. 77 of the Railways Act is not necessary on the facts of the case assumes a jurisdiction which had not been vested in it by law. Even if there was an error in the decision of the suit by the Court it was an error on a point of law and the High Court would not interfere under S. 115, C. P. Code. (*Ghose, J.*) EAST INDIAN RY. Co v. KANAI LAL.

28 C. W. N. 292 : 80 I. C. 205 : 1924 Cal. 493.

———S. 115—*Error of law—Setting aside ex parte decree—Interference.*

In an application to set aside an *ex parte* decree where the Court below fails to determine an essential point of limitation, it acts with material irregularity to justify interference in revision. (*Campbell, J.*) THE FIRM OF MAGHI MAL KHARAITI RAM v. THE FIRM OF GOPI RAM RAM CHAND. 1924 Lah. 603.

———S. 115—*Erroneous rejection of plaint—Construction of Court fees and Suits Valuation Acts—Interference.*

Where by an erroneous construction of certain sections of the Court Fees Act and Suits Valuation Act, a court refuses to accept a plaint and directs it to be filed in another court, it refuses to exercise a jurisdiction vested in it by law and the order is revisable. (*Greaves and Chakravarti, JJ.*) RAJANI KANTA BAG v. RAJABALA DASI. 29 C. W. N. 76.

———S. 115, O. 33, R. 1—*Evidence of both plaintiff and defendant examined—Case set down for arguments—Application for withdrawal of suit with liberty to bring a fresh suit, grant of—Irregularity—Revision.*

Where in a suit all the witnesses for the plaintiff and the defendant had been examined and the Court had fixed a date for hearing the arguments on which date the plaintiff's guardian put in an application for withdrawal of the suit with liberty to bring a fresh suit which the Court granted.

Held, that the Court had exercised its jurisdiction with gross irregularity and the High Court was bound to set aside the decree in revision. (*Dalal, J. C.*) MUST. RABUL ARFAIN v. BABU RAZA. 10 W. N. 861 : 10 O. and A. L. R. 1 180.

———S. 115—*Execution sale—Setting aside after 7 years—Fraud—Question not considered—Interference—Justice to parties.*

C. P. CODE (1903), S. 115.

Where the appellate court set aside an execution sale after 7 years during which the decree-holder purchaser was in possession on the ground that the judgment debtor was kept out of knowledge of the proceedings by the fraud of the decree holder, but the judgment did not deal with the evidence, it is a case in which the High Court can interfere in revision and direct a remand, as otherwise the decree holder will lose all the benefit of his decree and fresh execution would be barred. (*Suhrawardy, J.*) GIRIBALA DASI v. TARAK NATH JATAN. 78 I. C. 149.

———Ss. 115 and 148—*Extension of time fixed by decree Revision.*

An order dismissing an application for extension of time fixed by a decree is open to revision (*Wazir Hasan, A. J. C.*) TRIBHUWAN DUT SINGH v. SURAJ BALI. 11 O. L. J. 119. 10 O. & A. L. R. 650 : 1924 Ouch 330.

———S. 115—*Grounds for revision—Omission to consider effect of prior decision.*

The omission to consider the effect of a prior decision bearing on the question in issue affords a ground for revision. (*Young, J.*) MAUNG LEE GALE v. PROHTADO BARICKAN, 8 Bur. L. J. 127 : 1925 Rang. 97.

———S. 115—*Injustice or hardship to be proved.*

Even where the order of the court below is illegal, it will not be revised unless it has caused injustice or hardship. (*Hallifax, A. J. C.*) RAMJI PATEL v. KARKAJI. 1924 Nag. 293.

———S. 115—*Interference—Aid of justice.*

The powers of interference under S. 115 should not be used except in aid of justice, (*Das, J.*) SHEIKH HAMIDUR RAHMAN v. SHAHANAND DAS. 80 I. C. 575.

———S. 115—*Interference—Order of a Judge directing an award to be taken off the file.*

Per Madgavkar, A. J. C.—An application lies against an order directing an award to be taken off the file of court provided it falls within the purview of S. 115 of the Civil Procedure Code. (1907) 1 S. L. R. 86 Ref. (*Kincaid, A. J. C.*) Aston and Madgavkar, A. J. Cs.) GUNNIS & Co. LTD. v. AMANMAL TULSIDAS. 1924 S. 75.

———S. 115—*Interference by High Court—When justified—Error of law—Not a ground for revision.*

It is well settled that the scope of S. 115, C. P. Code, is very limited. Unless the Lower Appellate Court can be said to have exercised a jurisdiction not vested in it by law or to have acted in the exercise of its jurisdiction illegally or with material irregularity, this Court has no power to interfere in revision. It is manifest that an error of judgment on questions of law does not come under either of these categories. (*Sulaiman, J.*) LALA MATHURA PRASAD v. B. B. & C. I. RY. Co. 78 I. C. 434 : L. R. 5 A. 252.

———S. 115—*Interlocutory order—Appeal—Revision—Interference when justified.*

1924 Pat. 176.

C. P. CODE (1908), S. 115.

—S. 115—Interlocutory order—Court Fee—Order directing payment of—Interference in revision. See COURT FEES ACT, S. 7 (1) (v) (o). 46 M. L. J. 450.

—S. 115—Interlocutory order is not revisable where there is other remedy unless irreparable loss will occur (Case law discussed.)

Ordinarily an interlocutory order is not capable of revision particularly when there is another remedy available to the injured party; but where the order complained against is such as is calculated to cause irreparable loss to the injured party and there is no right of appeal and no remedy available to the party, an interlocutory order may be revised under S. 115 read with S. 15 of the Charter Act. (Case-law discussed.) (*Jwala Prasad and Foster, JJ.*) MANI LAL v. DURGA PRASAD. 5 Pat. L. J. 425 : 1924 P. H. C. C. 254 : 3 Pat. 930 : 80 I. C. 667 (2) : 1924 P. 673.

—S. 115—Interlocutory order—Revision.

No revision will lie against an interlocutory order which does not determine the case but which is made with the object of collecting materials upon which the case is to be determined thereafter. (*Kendall, A. J. C.*) PT. DHARAM NARAIN v. UMAO COMMERCIAL BANK.

1 O. W. N. 472 : 10 O. and A. L. R. 835 : 80 I. C. 612 (1) : 11 O. L. J. 692.

—S. 115—Interlocutory order—If open to revision. 75 I. C. 107.

—S. 115—Interlocutory orders—Interference.

Where the correctness of an interlocutory order can be challenged by way of appeal from the final decree in the suit, it is not usual to interfere with them in revision. (*Prideaux, A. J. C.*) BANOORI v. YAKABKHAN. 80 I. C. 375.

—S. 115—Interlocutory order—Interference. 1924 Rang. 2.

—S. 115—Issues—Framing of—Interference by High Court—Interlocutory order.

It is no doubt the settled practice of the High Court to interfere as little as possible with interlocutory orders where an alternative remedy exists. It cannot however be laid down as a hard and fast rule that the court will under no circumstances interfere. On the contrary there is ample authority for the view that the High Court can and will interfere with such orders where they may lead to a failure of justice 14 C. 768 : 14 C. W. N. 147 : 15 C. W. N. 353 : 42 C. 926 Rel. Where the trial of the suit was sought to be complicated by dragging in issues which were outside its scope and wholly irrelevant and unnecessary, and the trial of which would inevitably prolong the litigation to the prejudice of the plaintiffs, the High Court would interfere in revision. (*Pearson and Graham, JJ.*) SM. SARAJU-BALLA DEBI v. MOHINI MOHAN GHOSE.

28 C. W. N. 991 : 82 I. C. 1008 : 40 C. L. J. 191.

—S. 115—Jurisdiction—Failure to enterain plea of illegality *suo motu*. 19 L. W. 617 :

76 I. C. 306 : 1924 Mad. 159.

C. P. CODE (1908), S. 115.

—S. 115—Jurisdiction—Misconstruction of law—Interference.

Where the decision of a Court is the very basis and foundation of jurisdiction, the case falls within S. 115, C. P. Code. Where a Court by misconstruction of the provisions of law holds that a person is not entitled to maintain an application under O. 21, R. 100, it declines a jurisdiction vested in it by law and the matter is revisable. (*Das, J.*) RAM KISHUN SINGH v. DAMODAR PRASAD. 5 Pat. L. T. 107 : 75 I. C. 856 : 1924 P. 506.

—S. 115—Jurisdiction—Order granting special allowance to guardian for services rendered—is revisable. See GUARDIANS AND WARDS ACT, S. 47 (g). 78 I. C. 138.

—S. 115—Jurisdiction—Objection to—Trial of small cause suit as a regular suit without objection. 1924 Nag. 17.

—S. 115—Jurisdiction—Return of plaint for presentation to proper Court—Appeal—Revision.

In an application for revision the High Court is not confined to an enquiry as to the jurisdiction exercised by the lower appellate Court alone. The High Court has power to enquire whether the Court of first instance has failed to exercise jurisdiction in returning a plaint presented to it. (*Dalal, J. C.*) ABDULLA v. MAHOMED NAZIR. 80 I. C. 694 (2) : 10 O. & A. L. R. 19.

—S. 115—Jurisdiction—Section to be interpreted liberally—Refusal to stay suit pending arbitration—Interference.

Where a court refused to stay a suit under S. 19 Arbitration Act on the sole ground that there was a breach of warranty on the part of one of the contracting parties it is an irregular exercise of jurisdiction and the party has no remedy, if the High Court does not interfere in revision. The powers of the High Court should receive a liberal rather than a narrow interpretation when the applicant has no other remedy. (*Raymond and Bilaram, A. J. C.*) MESSRS FORBES, FORBES CAMPBELL & CO., LTD. v. VERSIMAL DIWANMAL. 1924 Sindh 49.

—S. 115—Jurisdiction—Allowing suit to be withdrawn—Conditions of O. 23, R. 1 not satisfied—Effect.

If an order under O. 23, R. 1 is passed without the conditions required by the section being complied with, the order is without jurisdiction and can be set aside in revision. The case is different from interfering with the exercise of a judicial discretion. (*Daniels, J. C.*) DAULA v. DWARKA PAL. 78 I. C. 121.

—S. 115—Jurisdiction—Illegality in the exercise of—Error of law.

Where a court decides a case on a mistaken view that a benamidar could not maintain a suit it acts illegally in the exercise of its jurisdiction and the order can be revised. (*Abdul Raouf, J.*) BALMOKAND v. SHANKAR DAS. 76 I. C. 125.

—S. 115—Jurisdiction—Suit tried wrongly by small cause Court—No Objection by parties—Interference.

C. P. CODE (1908), S. 115.

Where a court of Small Causes disposes of a suit on the merits though it has no jurisdiction to entertain the suit, but neither of the parties objected to it or brought it to the notice of the court, the High Court will not interfere in revision. (*Boys, J.*) *RAGHURAJ SINGH v. MT. SHAM DEI.*

81 I. C. 870 (1) : L. R. 5 A. 685.

—S. 115—Order without jurisdiction—Interference—Suit after setting aside *ex parte* decree tried on merits—Effect.

If an *ex parte* decree is set aside without jurisdiction, the High Court can interfere in revision. The fact that after the *ex parte* decree was set aside, the suit had been decided on the merits and a decree was passed which was again the subject of an appeal, does not matter. (*Wallace, J.*) *MANIKKAM PILLAI v. MAHUDAM BATHUMMAL.*

47 Mad. 819 : 20 L. W. 829.

—S. 115—Local investigation—Commission for—Interference in revision by High Court.

Where the issue of a commission for local investigation by the lower court would lead to the determination of the rights of the parties on an improper basis and would inevitably and unnecessarily prolong a litigation and cause irreparable loss and expense to the parties, the High Court would interfere in revision and set aside the order. (*Miller, C. J. and Fester, J.*) *RAMJI RAM v. RAMASRE.*

1924 P. H. C. C. 217 :

1924 P. 761.

—S. 115—Material irregularity—Refusal to set aside *ex parte* decree.

Where a court refuses to set aside an *ex parte* decree on the ground that no sufficient cause was shown for failure to appear, there is no illegal or irregular exercise of jurisdiction justifying interference in revision. (*Mullick and Bucknill, JJ.*) *BHAI CHAND FUL CHAND v. DAWOOD AYUB.*

1924 P. 816.

—S. 115—Material irregularity—Reversing decision of trial court on new point—Absence of material for decision.

Where an appellate court reverses the decision of the trial court on a new question which was not raised by the parties and for which there were no sufficient materials before the court, it exercises jurisdiction with material irregularity. (*Madhavan Nair, J.*) *NARANO MAHAPATRO v. RAMACHANDRA MARDARAJA DEO GARU.*

80 I. C. 724.

—S. 115—Miscarriage of justice—Interference.

Where a decree is claimed against a person in a representative capacity and judgment is given accordingly, but in drafting the decree, a personal liability was cast on the defendant and the court refused to amend it, the High Court can interfere in revision to prevent a gross miscarriage of justice. (*Zafar Ali, J.*) *CHANDA SINGH v. FATEH CHAND.*

1924 Lah. 621.

—S. 115—Miscarriage of justice—Interference.

Where a court erroneously holding the decision in a certain case operated as *res judicata* dismissed an appeal on the ground it was barred, there

C. P. CODE (1908), S. 115.

is a miscarriage of justice amounting to a material irregularity in the exercise of jurisdiction and this will justify interference in revision. (*Pipon, J. C.*) *MT. BABO v. JEHANGIR.*

75 I. C. 479.

—S. 115, O. 32, Rr. 2 and 3—Minor applying to be impleaded as legal representative—Application without next friend—Dismissal—Impleading legal representative without notice to another claimant—Rival claims not adjudicated on—Orders if revisable—Right of appeal—Order if amounts to decree.

Where on the death of the plaintiff in a suit, his minor widow applied to be brought on record as legal representative without being represented by a next friend and the court rejected the application on the analogy of O. 32, R. 2 C. P. Code it cannot be held to have acted irregularly in the exercise of its jurisdiction.

On the death of a party, two persons applied to be impleaded as legal representatives. The court dismissed the application of one on the ground she was a minor and was not represented by a next friend and allowed the other petition without determining the question of rival claims on the merits and without notice to the minor claimant. Held the mere fact of being a minor is no ground for not considering the claim of the minor and the order is revisable under S. 115, there being no right of appeal against the same. (*Jackson, J.*) *RUCKMANI AMMAL v. VEERASAMI AIYANGAR.*

35 M. L. T. (H. C.) 82 : 1924 M. W. N. 763 :

80 I. C. 942 : 1924 Mad. 813 : 47 M. L. J. 370.

—S. 115—No cause of action—Revision—Interference by High Court.

Where there is no cause of action for a suit or where the cause of action is illegal, the High Court can in revision set aside the decree of the lower court. 25 A. 209 Relied on. (*Baker, O. J. C.*) *KASHI RAM v. BARKYA.*

7 N. L. J. 13 : 77 I. C. 46 : 1924 Nag. 101.

—S. 115—Order refusing stay of suit under S. 10—Interference.

An order refusing to stay the trial of a suit under S. 10 C. P. C. is revisable, if the court refuses to exercise the jurisdiction vested in it by law. (*Zafar Ali, J.*) *MERTAB SHAH v. ALI HAIDAR SHAH.*

82 I. C. 234.

—S. 115—Other remedy open—Suit—Interference by High Court in revision.

1924 P. 134.

—S. 115—Other remedy open—Dismissal for default of both parties—Application for restoration dismissed—Revision.

The High Court does not interfere in revision when the applicant has, by suit or otherwise, another remedy open.

Where a suit is dismissed for default of both parties under O. 9, R. 3, fresh suit can be filed under Rule 4 and an order refusing to restore it to file cannot be revised. (*Baker, J. C.*) *SHEIKH BALDAR v. IMAM.*

76 I. C. 46.

—S. 115—Other remedy open—Substantial Justice done in the Court below—No interference in revision.

C. P. CODE (1908), S. 115.

The ordinary rule is that where an applicant has other remedies by way of suit or otherwise the intervention of the High Court under Section 115 of the Civil Procedure Code is not called for. Where a Court's order is based on the merits of the case, though in the exercise of a jurisdiction wrongly assumed and where it is not shown how the party aggrieved will be unfairly prejudiced by being made to resort to a suit, the High Court will refuse to interfere in revision. (*Moti Sagar, J.*) *NAND KISHORE v. SANDAR NARAIN SINGH.*

6 L. L. J. 137 : 73 I. C. 350 : 1924 Lah. 471.

—S. 115—*Other remedy open—Rejection of plaint—Non-payment of additional court fee—Application to continue suit in forma pauperis rejected—Revision*

Where there is another remedy open to the aggrieved party, the High Court will not interfere in revision.

The plaintiff in a suit was asked to pay additional court fee, when he applied to continue the suit *in forma pauperis*—This was rejected and later as he did not pay the court fee, the plaint was rejected. The plaintiff then filed a revision petition against the order refusing to allow him to sue *in forma pauperis*. Held he could appeal from the order rejecting the plaint and therein attack the validity of the order refusing to allow him to sue *in forma pauperis* (*Moti Sagar, J.*) *MT. AZIM BIBI v. MT. IMTIAZ BEGAM.*

78 I. C. 604.

—S. 115—*Another remedy open but barred—Interference.*

There are cases in which justice requires interference in revision even where another remedy is open to the aggrieved party, much more so would interference be necessary and justifiable where another remedy is barred. (*Kinkhede, A. J. C.*) *AYODHYA PRASAD v. THE SECRETARY OF STATE.*

1924 Nag. 298.

—S. 115—*Other remedy open—Appeal—Interference.*

Even if some other remedy such as an appeal is open to an aggrieved party, the High Court can interfere in revision where the ends of justice require it. (*Kinkhede, A. J. C.*) *VITHAL SINGH v. AGARCHAND.*

79 I. C. 908.

—S. 115—*Order granting adjournment—If revisable.*

An order adjourning the hearing of an application is not revisable, as there is no case decided. Nor is such a case covered by S. 151, C. P. C. S. 115 refers only to cases of failure to exercise or improper exercise of jurisdiction. (*Baker, J. C.*) *RAJABAI v. JAGANATH.*

7 N. L. J. 183 :

78 I. C. 969 : 1924 Nag. 417.

—S. 115—*Order refusing to extend time for payment fixed in decree—If revisable.*

Where a decree fixes a certain time for payment of money and an application to extend the time for payment was dismissed, there is no appeal against the order, but it is revisable. (*Wazir Hasan, A. J. C.*) *TIRBHAWAN DIT SINGH v. SURAJ BAI.*

78 I. C. 387.

C. P. CODE (1908), S. 115

—S. 115—*Permission to withdraw with liberty—Interference.* *NANHU v. ROSHAN SINGH.*

1924 All. 121.

—S. 115—*Rateable distribution—Exercise of powers in defiance of conditions in S. 73—Interference.*

Where a court orders rateable distribution in defiance of the conditions laid down in S. 73, C. P. Code, the High Court can interfere in revision (*Wazir Hasan, A. J. C.*) *MOHAN LAL v. AMAR NATH.*

1 O. W. N. 729 :

80 I. C. 40. 10 O. and A. L. R. 1168.

—S. 115—*Refusal to hear objection to award justifies interference.*

If a Court refuses to hear a valid objection properly raised before him or entertains matters which are outside his jurisdiction then the High Court can interfere under S. 115 not with the arbitrators nor with the award but with the exercise of the jurisdiction of the Court in dealing with the application. (*Walsh, A. C. J. and Ryves, J.*) *GOBIND SINGH v. BHIRGU-NATH SINGH.*

22 A. L. J. 676 : L. R. 5 A. 465 :

82 I. C. 16 : 10 O. and A. L. R. 820 :

46 All. 686 : 1924 A. 788.

—S. 115—*Remand—Order incompetent—Interference.*

Where a court of appeal passes an order of remand which it was incompetent to pass, it can be interfered with in revision if an appeal does not lie. (*Krishnan and Waller, JJ.*) *ADURI CHELAM-AYYA v. LAKSHMI DEVAMMA.*

79 I. C. 857

—S. 115—*Rent Court—Order if revisable.*

L. R. 5 A. 78 (Rev.)

—S. 115—*Revision filed after delay of more than 3 years, entertainment of.*

A revision filed after an unexplained long delay of more than 3 years cannot, apart from merits be entertained. 4 A. 154 foll. (*Dalal, J. C.*) *MAHADEO PRASAD v. MUSSAMMAT GANESHI.*

1 O. W. N. 799.

—S. 115—*Revision—Grounds for—Order in excess of prayer.*

Where the Court below passed an order granting reliefs not prayed for, without reference to any provision of law the High Court will interfere in revision. (*Wallace, J.*) *MINNEKANTI KOTAYYA v. T. KRISHNAYYA.*

1924 M. W. N. 547 :

20 L. W. 488 : 1924 Mad. 911 (1).

—S. 115—*Rejection of evidence—Appeal—Revision—Interference.*

Where the trial Court after the examination of the witnesses for both parties was over, rejected an application of the plaintiff to call further witnesses without assigning any reasons and the lower appellate Court on appeal disposed of the appeal without considering the ground of appeal based on such irregularity, the High Court would interfere in revision and remand the case to allow plaintiff an opportunity of producing further evidence. (*Heald, J.*) *U. NGE v. MG. TUN HLAING.*

3 Bur. L. J. 125 : 1924 B. 318.

C. P. CODE (1908), S. 115.

—S. 115—*Refusal to exercise jurisdiction—Valuation in probate matter—Refusal to adjudicate if property is debutter—Interference.*

Where in the course of valuing properties under S. 19, Court Fees Act, it is objected that certain properties are *debutter* and as such not liable to be valued but the Judge gives no adjudication thereon, he refuses to exercise a jurisdiction vested in him by law and the order is revisable. (*Ravkin and Mukerjee, JJ.*) CHINMATHA NATH PAL CHOUDHURI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL. 78 I. C. 901.

—S. 115—*Review—Refusal to grant—Revision.*

Where the Judge of the Court below refuses to grant a review finding that the additional evidence sought to be adduced could have been adduced at the original hearing the High Court will not interfere in revision. (*Macleod, C.J. and Shah, J.*) LAKSHMAN MARUTI v. MARUTI LAXMAN. 26 Bom. L. R. 284; 1924 Bom. 344.

—S. 115—*Revision—Wrong provision of law—Application of.*

Where a court has applied its mind to the law and decides wrongly then there is no ground for revision; but, where it disregards some provision of law and has not applied its mind to that provision, then there is ground for revision. (*Young, J.*) RASU v. KATTARA. 2 Rang 902; 82 I. C. 658; 1924 R. 349.

—S. 115—*Second appeal—Memorandum—If can be converted into Revision petition.*

A memorandum of second appeal can in proper cases as where the courts below have exercised jurisdiction not vested in them by law be converted into a revision petition. (*Kinkhede, A.J.C.*) HARBAX v. LACHMAN. 82 I. C. 201.

—S. 115—*Stay of execution—Dismissal on the ground of delay—Merits not gone into—Revision.*

An application for stay of execution filed more than 9 months after the appeal, was dismissed solely in the ground of delay the merits not being gone into. *Held per Suhrawardy, J.* (*Graham, J. contra*) it was a failure to exercise jurisdiction in a regular way and hence the order was revisable. (*Suhrawardy and Graham, JJ.*) BIRESH CHANDRA DAS v. HARI DAS BOSE. 82 I. C. 435.

—S. 115—*Subordinate Court—Rent Controller—Power of the High Court to interfere in revision with decision of Rent Controller. See CALCUTTA RENT ACT, S. 4 (III).*

39 C. L. J. 85.

—S. 115—*Suit—Maintainability—Erroneous decision—Failure to exercise jurisdiction.*

Where a Court declines to give a decision on the merits of a case and throws it out on the erroneous ground that the suit could not be maintained it fails to exercise a jurisdiction vested in it by law and the order is revisable. (*Martineau, J.*) IMAM DIN v. DITTU. 78 I. C. 445 (1).

C. P. CODE (1908), S. 115.

—Ss. 115, 151, O. 6, R. 16—*Suit for recovery of occupancy and under-proprietary rights—Under-proprietary rights decreed and claim for occupancy rights to be struck out—Order whether can fall under inherent powers—Jurisdiction—Revision.*

Where a party claimed possession of certain under proprietary and occupancy interests in different plots of land and the Court holding that the suit for recovery of occupancy land did not lie in the Civil Court, decreed the claim as regards under-proprietary rights and ordered the claim for possession of occupancy lands to be struck out from the plaint.

Held (1) that the order was without jurisdiction and the provisions of O. 6, R. 16, C. P. C. did not apply to the case as the particular pleading referred to above was not unnecessary so as to be deleted;

(2) That the order did not fall under the provisions of S. 151 C.P.C.

(3) That the order striking off part of the claim amounted to an order in a case and was open to revision under S. 115, C. P. C. (*Dalal, J.C.*) MUSSAMMAT MALUKA v. PATESHWAR SINGH. 1 O. W. N. 754; 10 O. & A. L. R. 1062.

—S. 115—*Want of jurisdiction a good ground for revision—Wrong decision not ground for revision.* 76 I. C. 504.

—S. 115 and O. 23, R. 1—*Withdrawal of suit—Order by Appellate Court—Reasons not given—Revision.*

Where an appellate court without finding any of the reasons specified in O. 23, R. 1 of the C. P. Code allows the plaintiff to withdraw his suit with liberty to bring a fresh suit in spite of the fact that the suit was fought out strenuously in the trial Court, the order of the Appellate Court is without jurisdiction and is liable to be set aside in revision, 44 C. 454 Ref. (*Suhrawardy and Chofzner, JJ.*) SUBASINI DEVI v. ASHUTOSH LAHIRI. 39 C. L. J. 371; 1924 Cal. 751.

—S. 115 and Sch. II, para. 20—*Filing award without jurisdiction is a good ground.*

Filing an award by a Court having no jurisdiction to entertain a suit on the cause of action, with respect to which the award was made, is a good ground for revision. (*Kennedy, J. C. and Raymond, A. J. C.*) FIRM OF KHALSA BROS v. HARIRAM SRI RAM & Co. 1924 S. 29.

—S. 115 (c)—*Acting illegally—Meaning of—Irregularity in procedure.*

"Acting illegally" in S. 115 (c) C. P. Code does not merely imply the committing of an error of procedure such as "acting with material irregularity" does. This part of the clause was admittedly left in indefinite language in order to empower the High Courts to interfere and correct gross and palpable errors of subordinate Courts the justification for the interference being determined upon the grossness and palpableness of the error complained of and upon the gravity of the injustice resulting from it. (*Wolmsley and Mukerjee, JJ.*) JAGUNNESSA BIBI v. SATISH CHANDRA BHUTTA-CHARJEE. 28 C. W. N. 559; 39 C. L. J. 434; 51 Cal. 690; 78 I. C. 958; 1924 Cal. 633.

C. P. CODE (1908), S. 135.

—S. 135—*Witness—Attendance in court—Return—Arrest—Exemption from.*

The protection given by S. 135 C. P. Code is expressed as protection "while returning from such tribunal". It is clear that it cannot be claimed by a witness who is claiming privilege to return by any route he pleases. It is clear that his return must be straight from the Court to the place where he came in obedience to summons. It cannot possibly be open to a witness claiming privilege to dictate as to how far out of the straight route he may or may not go. (*Boys, J.*) *BEHARI SINGH v. EMPEROR.* L. R. 5 A. 94 (Cr). 22 A. L. J. 638 : 46 All. 663 : 1924 All. 676 (2).

—S. 135—Arrest in execution of two decrees by different decree holders—Legality of. See C. P. CODE, SS. 47 AND 135. 47 M. L. J. 678

—S. 141—Applicability to proceedings under S. 105 of the Beng. Tenancy Act.

3 Pat. 67 : 2 Pat. L. R. 169 : 79 I. C. 5 : 1924 P. 104.

—S. 141 and O. 18, R. 1—Mesne profits—Enquiry into—Burden of proof—Rebutting evidence—Right to adduce. See C. P. CODE, S. 2 (12) ETC. (*Spencer and Venkatasubba Rao, JJ.*) *RAMAKKA v. NAGASAM.* 47 M. 800.

—S. 141—Permission given to mutawalli to lease—Order if appealable. 1924 Cal. 327.

—S. 141 and O. 46, R. 1—Reference to the High Court—Rent controller—Proceedings before.

Before a reference under O. 46, R. 1, C. P. Code is made it must be shown that the court making the reference is a Court of Civil Jurisdiction and the reference must be made in a suit or appeal or execution proceeding. The Court of the Rent Controller is in certain respects a Court of Civil Jurisdiction, but a Rent Controller is not competent to make a reference under O. 46, R. 1, C. P. Code. An enquiry in an application by a tenant for standardisation of rent under S. 15 of the Calcutta Rent Act in respect of rooms is not a suit within the meaning of O. 46, R. 1, C. P. Code. (*Sukhrady and Duttal, JJ.*) *TANCRED v. RAI BAHADUR D. N. MULLICK.* 40 C. L. J. 578.

—S. 141 and O. 43, R. 1 (c)—Scope of—Dismissal for default—Application to set aside—Dismissal. 75 I. C. 589.

—S. 141—Succession certificate proceedings—Appointment of Receiver—Incompetent. See SUCCESSION CERTIFICATE ACT, SS. 19 (3) AND 26 (3). L. R. 5 A. 238.

—S. 141 and O. 9, R. 9—Application to restore suit—Application to restore application.

Having regard to the provisions of S. 141, C. P. Code, an application to set aside an order, rejecting a prior application for the revival of a suit dismissed for default is maintainable. (*Burn, J. M.*) *TASADDUQ HUSAIN v. BHAGWAN BAKSH SINGH.* L. R. 5 O. 89 (Rev.) : 11 O. L. J. 232 : 1 O. W. N. 109 : 10 O. & A. L. R. 1134.

Y D 1924—15

C. P. CODE (1903), S. 144.

—S. 141 and O. 9, R. 13—Application for setting aside *ex parte* decree—Dismissal of, for default—Order refusing to restore—Appeal.

There is no appeal from an order dismissing an application which is put in for restoration of an application for setting aside an *ex parte* decree. Such a right of appeal is not given by S. 141 of the C. P. Code. (*Sulaiman, J.*) *CHANDAR SAHAI v. DURGA PRASAD.*

22 A. L. J. 427 : L. R. 5 A. 331 : 46 A. 538 : 1924 All. 682 (2).

—S. 144—Applicability of—Decree against minor with costs—Decree subsequently set aside in suit—Restitution—Costs.

The plaintiff in a partition suit brought on record as the legal representative of the deceased defendant, his minor adopted son without having a guardian *ad litem* appointed for him. A decree was obtained against the minor with costs and an appeal preferred by the minor against the decree was also dismissed with costs. Subsequently the minor sued to set aside the decree and obtained a declaration that it was null and void against him. Thereupon the minor applied under S. 144, C. P. Code, for restitution of the costs realised from him by the plaintiff. *Held*, that S. 144, C. P. Code was not in terms applicable to the case, that the court had jurisdiction apart from S. 144 to order restitution, but that in the circumstances of the case and having regard to the conduct of the party, restitution should not be ordered. (*Mookerjee and Dalal, JJ.*) *TARA CHAND v. CHAMPA.*

22 A. L. J. 673 : L. R. 5 A. 659 : 46 All. 767 : 10 O. & A. L. R. 905 : 1924 All. 713.

—S. 144—Applicability—No properly taken out of applicant's possession—Act of Court.

The appellant applied for letters of administration to the estate of one M and the respondent set up a will of the deceased. The moveable properties in dispute were at that time in the possession of the respondent. An inventory was made by the Commissioner appointed by Court and the properties were locked up in a room under seal. Letters were granted to the appellant and probate was refused to the respondent. This decision being reversed on appeal to the High Court the respondent applied for removal of the seals and for delivery of the properties to her, and the District Judge made an order accordingly. The order of the High Court granting probate was, however, reversed by His Majesty in Council. The Letters of Administration to the appellant were thereupon restored, and the appellant applied for restitution of the properties to him.

Held, that the properties were never in the possession of the appellant, they were not taken out of his possession and made over to the respondent under any decree or order of Court, and therefore, S. 144 had no application. (*Chatterjee and Panton, JJ.*) *BAIKUNTHA NATH CHOTTORAI v. PROSANNA MOYI DAS.*

51 Cal. 324 : 81 I. C. 571 : 1924 Cal. 769.

C. P. CODE (1908), S. 144.

—S. 144—Application for restitution—Limitation—Art. 181 and not Art. 182 applicable. See LIM. ACT, ARTS. 181 AND 182.

1924 Pat. 33.

—S. 144—Pre-emptor depositing money—Amount enhanced in appeal—Failure to pay—Right to withdraw original deposit.

A pre-emptor deposited in court the amount fixed by the trial Court. In appeal, the amount was enhanced and on failure to deposit the excess amount the suit was dismissed. *Held*, the pre-emptor could apply under S. 144, C. P. Code, for the refund of the amount already deposited. (*Martinez, J.*) DIWAN CHAND v. HIRA NAND

78 I. C. 971.

—S. 144—Restitution—Mortgage decree—Increase of mortgage money on appeal—Rights of person in possession—Mesne profits—Interest. NEELAKANDA NAMBUDERI v. VASUDEVAN.

1924 Mad. 87.

—S. 144—Restitution—Execution sale—Reversal of decree—Expenses of sale—Right to refund.

In execution of a decree for money moveable and immovable properties of defendant were attached and sold. The defendant appealed and the decree was reversed. He then applied for restitution and the properties which had been purchased by the decree-holders themselves were restored and sale proceeds of properties which had been purchased by third parties refunded. The defendant now applied for mesne profits and interest for the period during which the properties and sale proceeds remained in the possession of the plaintiffs and asked for the refund of the commission paid to the auctioneer.

Held, that the defendant was entitled to restitution of mesne profits, interest and commission paid to the auctioneer. (*Moti Sagar, J.*) RALYA SINGH v. TUNIA MAL

6 L. L. J. 142 :

80 I. C. 316 : 1924 Lah. 486.

—S. 144—Restitution as against auction-purchaser—Sale not bona fide.

While as against a decree-holder who is himself the auction-purchaser a sale can be set aside and restitution made, an innocent purchaser through court cannot ordinarily be so disturbed. But where a stranger purchaser declined to join as defendant in a suit against decree-holder to set aside the sale though expressly invited and was therefore absent in the suit by the appellant

Held, that he was a representative of decree-holder to that extent, that he had notice of the claim and therefore restitution should be granted even as against him 29 Bom. 435 (F. B.) Dist. (*Kennedy, J. C. and Madgavkar, A. J. C.*) JAMNOMAL GURDINOMAL v. GOPAL DAS.

17 S. L. R. 73 : 80 I. C. 1002 : 1924 S. 101.

—S. 144—Restitution—If can be ordered against bona fide auction-purchaser.

Restitution cannot be ordered under S. 144, C. P. Code, as against a bona fide auction-purchaser an auction sale held by a court which has jurisdiction to hold the same. (*Moti Sagar, J.*) MT ASGHARI BEGUM v. IRSHAD-UD-DIN.

79 I. C. 57.

C. P. CODE (1908), S. 145.

—Ss 144 and 151—Powers of court to order restitution—If confined to S. 144—Inherent power to do justice.

A Court interpreting a decree in a certain way gave possession of the property to the decree holder. Subsequently a higher court held the interpretation to be erroneous. *Held*, though the decree is not reversed the court can order restitution in the interests of justice by virtue of its inherent powers, as its power to do so is not confined to cases falling under S. 144. (*Das and Ross, JJ.*) KAMLANATH JHA v. UDIT NARAIN JHA.

5 Pat. L. T. 555 : 78 I. C. 310 : 1924 P. 800.

—Ss. 144 and 151—Restitution—Inherent power—Cases not falling under S. 47 or S. 144, C. P. Code.

Even in cases not falling under S. 47 or S. 144, C. P. Code the Court has ample powers to make an order for restitution in appropriate cases. An application under O. 21, R. 99, C. P. Code to set aside an execution sale was dismissed by the first Court and the sale was confirmed with the result that the auction purchaser was put in possession. On appeal the order of confirmation was set aside and the application under O. 21, R. 90, C. P. Code, was remanded for enquiry. *Held*, that the applicant who had lost possession under the order of the first Court was entitled to be restored to possession by way of restitution under the inherent powers of the Court. (*Plumer, O. C. J. and Subbanna, JJ.*) KRISHNASWAMI RAO v. T. A. SANJEEVIAH, Mys.

—S. 145 and O. 21, R. 40—Judgment-debtor released on giving surety for appearance—Failure to produce debtor—Effect. NAGIER v. KRISHNA CHETTIAR.

1924 Mad. 241.

—S. 145 and O. 41, R. 5—Stay of execution by appellate Court—Security bond—Interest—Liability for.

The decree of the trial Court did not provide for payment of interest on the principal but only on the costs decreed. Defendant appealed against the decree and on an application by him for stay of execution, he was directed to furnish security. The security bond recited that he was liable to pay interest both on the principal and costs. The amount of costs was paid in cash. The appeal was eventually dismissed. *Held*, that the decree-holder was not entitled to claim interest on the principal sum inasmuch as the original decree which was simply affirmed on appeal did not provide for such interest. (*Mullick and Kulwant Sahay, JJ.*) MANGAL PATHAK v. MESAR SINGH.

1924 P. H. C. C. 273.

—S. 145—Security bond—Execution against surety—Notice to surety. See C. P. CODE, SS. 54 AND 145.

78 I. C. 447.

—S. 145—Surety for appearance of Judgment-debtor—Execution against surety—Notice—Attachment—Substantial compliance with the terms of the surety bond—Sufficiency of.

Where the sureties for the appearance of a judgment debtor substantially comply with the terms of their bond even though they were two days late in producing the debtor, it is not a case in which the extreme course of executing the

C. P. CODE (1908), S. 145.

decree against their property should properly be allowed. Where execution is ordered against the sureties by attachment of their property notice should be issued to the sureties calling upon them to show cause why execution should not issue against them and an attachment effected without such notice is *ultra vires* (*Duckworth and Godfrey, JJ.*) *TANKIN SHAN v. U. CHE SRI.*

2 Rang. 567.

—S. 145—Surety for production of the Judgment-debtor—Affidavit of illness—False—Subsequent production of judgment-debtor.

A surety for the production of the judgment-debtor obtained more time from the Court on the allegation made in his affidavit that the judgment-debtor was laid up with fever. The court adjourned the case to another date when the judgment-debtor duly appeared. The decree-holder filed an affidavit challenging the correctness of the affidavit filed by the surety with regard to the judgment-debtor's illness on the former occasion. *Held*, that the terms of the surety bond had been complied with and if the surety's affidavit was false that may be a ground for separate proceedings against the surety. (*Young, J.*) *MA TA DIN v. U K. SHIVALKAR.*

3 Bur. L. J. 99 : 1924 R. 347.

—S. 145 and O. 41, R. 5—Execution of decree—Immovable property given as security for stay of execution realisable in execution without a suit under S. 67 of the T. P. Act. See C. P. CODE, SS. 44 AND 145.

51 Cal. 150.

—S. 146—Applicability. See C. P. CODE, S. 50, O. 9, R. 13.

1 O. W. N. 699.

—S. 146—Claiming under—Meaning of transferee of property covered by decree—If can execute.

The words "claiming under" in S. 146 are wide enough to cover even cases of devolution mentioned in O. 22, R. 10.

A transferee of property covered in a decree can execute the decree though the decree itself is not transferred to him. (*Oldfield and Devadass, JJ.*) *MANNEM SESHADRI REDDI v. PUTTA VENKATA REDDY.*

19 L. W. 410 : 76 I. C. 809 : 1924 Mad. 708.

—S. 146 and O. 21, R. 89—Right to apply—Private purchaser after court auction—Dismissal of application by judgment debtor—Appeal, if can be continued by private purchaser.

A private purchaser of properties after a court sale cannot apply under O. 21, R. 89, C. P. Code to set aside the execution sale 44 M 554 F. B. Ref. Where the judgment-debtor had appealed against an order under O. 21, R. 89, C. P. Code refusing to set aside the execution sale and he withdrew his appeal, it is not open to the private purchaser to apply to continue the appeal in the place of judgment debtor. 41 M. 510 R.f. (*Phillips, J.*) *VENKATESA AIYAR v. VENKATRAMA AIYAR.*

(1924) M. W. N. 62 : 1924 Mad. 470.

—S. 148—Applicability of—Costs of appeal to be paid in one week—Power to extend time.

An appeal was allowed and the case remanded to the Court below on condition the appellant paid the respondent's costs within one week, and

C. P. CODE (1908), S. 148.

on default the appeal was to stand dismissed. *Held*, the Court had no power to extend the time for payment under S. 148, C. P. Code, as the section applies only to the case of an act by the party under the Code itself. (*Das, J.*) *SHEIKH HAMIDUR RAHMAN v. SHAHANAND DAS.*

80 I. C. 575.

—SS. 148, 149 and O. 7, R. 11—Court-fee—Deficiency in—Payment of Court-fee after time granted—Discretion of court—Interference with.

The plaint in a suit for rent was filed on 11-9-1919. This was admittedly in time to save limitation, even for the first year's rent. The court-fee paid with the plaint was, however, deficient and grossly deficient. On 19-9-1919 upon an application to the Court the Munsif allowed one week's time to pay the deficiency in the court-fee. On 23-9-1919 before the expiry of the week the Court closed for the vacation and reopened again on 27-10-1919 when the deficiency ought to have been made good. It was not, however, tendered in Court until 29-10-1919. The Court fee was accepted on that day without further order and subsequently in November the plaint was ordered to be registered. Sometime between the 11th September and the date when the deficit fee was paid the claim to the first year's rent became barred. *Held*, that as the court did not reject the plaint under O. 7, R. 11, C. P. Code it must be deemed to have extended the time for payment of the court-fee. It is of the utmost importance that questions of this sort should be left to the discretion of the court which has to determine them in the first instance. (*Miller, C. J. and Mullick, J.*) *RAGUNANDAN SAHAY v. RAM SUNDAR PRASAD.*

6 Pat. L. T. 4 : 1924 P. B. C. C. 355.

—S. 148—Mortgage-decree—Preliminary decree for foreclosure—Extension of time.

It is open to the court under S. 148, C. P. Code to extend the time fixed for payment by a preliminary decree for foreclosure in a mortgage suit. (*Walsh, A. C. J. and Ryves, J.*) *BALGOBIND v. SHEOKUMAR.*

L. R. 5 A. 545 : 22 A. L. J. 791 : 82 I. C. 184 : 1924 All. 818 (2).

—S. 148—Setting aside *ex parte* decree—Extension of time to pay money.

1924 Lah. 222.

—S. 148—Time fixed by decree—Court if can extend.

Where a decree fixes a certain time for payment of money the court has no jurisdiction to extend the time under S. 148, C. P. Code as otherwise it would have the effect of altering the terms of a decree which has become final between the parties. (*Wazir Hasan, A. J. C.*) *TRIBHUVAN DIT SINGH v. SURAJ BALL.*

11 O. L. J. 119 : 78 I. C. 387 : 10 O & A. L. R. 650 : 1924 Oudh 330.

—S. 148—Time fixed by decree—Extension of—Payment into court—Right to execution.

Under a decree the appellants were directed to pay within a month from the date of the decree into Court a sum of Rs. 1,203 and odd and on such payment being made the respondent was

C. P. CODE (1908), S. 149.

ordered to reconvey a piece of property. The money was not paid into Court within the time fixed and no application was made either to the original court or to the Appellate Court for extension of time. The appellant tried to execute the decree later on depositing the money in Court. *Held*, that the appellant not having made the payment within the time fixed by the decree was not entitled to execute the decree, 31 M. 28; 72 I. C. 868 followed. (*Young and Baguley, JJ.*) MA PU MAI v. KO SIT TIN. 3 Bur. L. J. 163 : 1924 Rang. 375.

———S. 149—Delay in payment of court-fee—Extension of time—*Bona fide* mistake. 1924 Lab. 325.

———S. 149—Extension of time given for payment of Court-fee—Expiry of time during vacation—Payment on reopening day.

Under an order of the Appellate Court an appellant was ordered to deposit the proper Court-fee payable on his memorandum of appeal within one month and on default, the appeal was to stand dismissed. The month's time expired during the vacation and on the reopening day, the appellant could not get stamp for the required value from the stamp-vendor. So on the next day the appellant furnished the required stamp. *Held*, that there was no laches or negligence on the part of the appellant, that the time fixed for payment of the court-fee should be extended till the date when it was furnished and that there was sufficient cause for reinstating the appeal. (*Miller, C. J. and Bucknill, J.*) AMIR MANDAL v. MOHAN CHANDRA MANDAL. 3 Pat. 337 : 80 I. C. 1030 : 1924 P. 663.

———S. 151 and O. 46, R. 1—Application for reference—*Inherent power of Court.*

The applicant when he filed his suit in the court of the Subordinate Judge was bold to go to the Court of the munsif and when he went to the court of the munsif was told that the munsif had no jurisdiction. The orders passed were very old and an application for reference did not lie under O. 46, R. 1. *Held*, at the same time the High Court could take action under S. 151, C.P.C. and pass such orders as may be necessary for the ends of justice. (*Dalal, J. C.*) JAFAR HUSAIN KHAN v. MT. CHOUTI. 10 O. & A. L. R. 1191.

———S. 151—Arbitration proceedings—Power of court to appoint receiver. See C. P. CODE, SCH. II, PARA 3 (2). 78 I. C. 84.

———Ss. 151 and 152—Clerical error—Decree—Duty of court to rectify. MT. MAHESHA v. RAMESHAH. 1924 Oudh 144.

———S. 151—Consolidation of suits—Joint promisees suing separately—Power of Court.

Where joint promisees sue separately for the share of each in a debt due, the court has power to consolidate the suits. (*Prideaux, A. J. C.*) KISENLAL v. CHENDRA. 1924 Nag. 196.

———S. 151—Error deliberately introduced—Power of Court to amend.

C. P. CODE (1908), S. 151.

Where a deliberate error is introduced in the pleadings and the same creeps into the decree the court *ex debito justitiae* can correct it under S. 151, C. P. Code, subject to safeguarding rights of third parties acquired in the interval. In such cases, the wronged party should not be left to remedy by means of a suit. (*Wazir Husain, A. J. C.*) MATA DIN SINGH v. SHEO DARSAN SINGH. 78 I. C. 96.

———S. 151—Execution application dismissed for default—Restoration—Appeal.

Where an execution application was wrongly dismissed for default and was restored on an application being put in under S. 151 and O. 47 R. 1, the restoration is under the inherent powers and no appeal lies. (*Suhrawardy, J.*) SARADINDU MUKERJEE v. GIRISH CHANDRA TEWARI. 78 I. C. 816.

———S. 151—Execution of decree—Compromise decree—Subject-matter outside suit included—Power of Court to prevent abuse of process and insist on execution of the decree as a whole—Execution. See DECREE. 10 O. L. J. 443.

———Ss. 151 and O. 21, R. 11—Execution proceedings—Power to grant time to judgment-debtor for payment of decree amount.

The Court has got an inherent power to grant time to the judgment-debtor for payment of the decree amount even after the passing of the decree and before he is arrested and brought before it in execution. (*Kumaraswami Sastri, J.*) PERURI SOORYAPRAKASAM v. MUNISWAMI CHETTY. 20 L. W. 175 : 1925 Mad. 42.

———S. 151—Inherent power—Compromise—Mistake—Allegations of fraud—Setting aside compromise.

Where the Court acting on the assurance of counsel that the plaintiff has agreed to a compromise and after issuing notice to the plaintiff ordered a decree to be passed in terms of the compromise and sometime later the plaintiff applied to the court to review its order alleging that the petition of compromise and the affidavit in support thereof were put in without her knowledge. *Held* that the court was not bound to exercise its inherent power in the case and set aside the compromise on an application. (*Piggott, J.*) DWARKA DHISH PRASAD SINGH, *In re*. 46 A. 245 : 22 A. L. J. 118.

———S. 151—Inherent power of court—Decree—Attaching decree-holder—Right to set off as against. See C. P. CODE, Ss. 2 (2) AND 144. 28 C. W. N. 988.

———S. 151—Inherent power of court—Execution of decree—Application dismissed in default—Restoration without notice to judgment-debtor.

An order restoring an execution application dismissed for default without issuing notice to the judgment-debtor and without examining the merits cannot be maintained.

In restoring an application for execution of a decree dismissed in default the Court should specifically state under what section of the law the order is made.

G. P. CODE (1908), S. 151.

A Court acting under S. 151 of the Code of Civil Procedure must state in what manner the ends of justice require the revival of the proceedings. It must satisfy itself that as strong grounds exist for acting under S. 151, C. P. Code as would be required on an application for review. (*Dalai, J. C. and Neave A. J. C.*) SITAPAT RAM v. LAL MAHABIR PRASAD, 1 O. W. N. 747.

—S. 151—*Inherent power—Rehearing—Decree against minor impleaded as a major.*

Plaintiff sued to eject defendant who was in fact a minor without describing him as such. A decree was passed. On an application by the minor the decree was subsequently cancelled and the case was posted for rehearing. *Held*, that the court had jurisdiction to pass the order under S. 151, C. P. Code. (*Burn, J. M.*) SHAMI v. JAI DEEI KUAR, L. R. 5 A. 331 (Rev.).

—S. 151—*Inherent power of court—Variation between judgment and decree—Preliminary decree not in accordance with judgment—Remedy of aggrieved party—Amendment—Power of Court.*

Where the judgment of the court contained an express direction that there was to be a preliminary decree for sale, the decree that was actually drawn up was a decree for foreclosure. The notices issued to the defendants (mortgagors) were notices to show cause why a final decree for sale should not be passed. Finally an *ex parte* final decree for foreclosure was passed. The defendants subsequently applied to set aside the *ex parte* final decree on the ground that the notices had not been served and that the preliminary decree for foreclosure not being in accordance with the judgment, all subsequent proceedings were void. The court below rejected the application. *Held*, on appeal that the applicants (defendants) had no proper notice of the proceedings for drawing up the final decree inasmuch as the notices were misleading documents having no relevance to the real proceeding which were contemplated and having no reference to the order eventually passed. The preliminary decree for foreclosure was not in accordance with the judgment and the mistake being due to an error on the part of the officers of the court must be rectified by the High Court in the exercise of its inherent jurisdiction. There can be no estoppel against a litigant arising out of the wrongful acts of the court, permitted or performed by its own officials. (*Walsh, A. J. C. and Ryves, J.*) BAL-SOBIND v. SHEO KUMAR, 22 A. L. J. 791. L. R. 5 A. 545; 82 I. C. 184; 1924 All. 818 (2).

—S. 151—*Inherent power—Restitution—Improper appointment of Receiver—Refund of salary paid to Receiver.*

The plaintiff in a suit applied for and obtained the appointment of a Receiver over properties belonging to A and also properties belonging to B. B was subsequently held to have been wrongly joined and was dismissed from the suit. B thereupon applied to the Court that the plaintiff should return the Receiver's commission and other charges incurred by her in respect of the Receivership. *Held*, that the Court had inherent power to order the restitution prayed for. The

G. P. CODE (1908), S. 151.

Receiver's possession was wrongful *ab-initio* and such restitution should be ordered as will so far as may be, place the parties in the same position that they would have occupied if such decree had never been passed. But for the order the applicant would never have been called upon to pay to the Receiver fees for taking charge of the property and realising its profits, and she was entitled under the law to be put in the same position so far as may be as if the order had never been passed. (*Young, O. C. J. and May Oung, J.*) NAIKWARA v. MA AYE BYU, 1 Bang. 770; 79 I. C. 724; 1924 Rang. 181.

—S. 151—*Inherent power—Scope of—Other remedy open under the Code—Inherent power not to be invoked.*

S. 151, C. P. Code, declares the existence of an inherent jurisdiction in all Courts to go beyond the law of procedure in the ends of Justice. But S. 151 does not lay down, and could not lay down that a Court may act in defiance of the law of procedure. A Judge is bound by the Code of Procedure and the law of limitation. Where the Code of Civil Procedure is silent it is possible and frequently desirable to apply the provisions of S. 151. But the following qualification should always be applied. S. 151 cannot be applied where the rule of procedure is already laid down, and where owing to the appellant's laxity they waited until it was too late to apply under that rule, and endeavour to obtain the relief they desire by ignoring the specific provisions of the law. (*Stuart, J.*) JOSHI SHIB PRAKASH v. JHINGURIA, 46 All. 144; 78 I. C. 416; 1924 All. 446.

—S. 151—*Inherent power—Limits to the exercise of.*

S. 151, C. P. Code, cannot be called into aid to justify an act, which, instead of being necessary for the ends of justice or to prevent the abuse of the process of the Court, not only causes or is likely to cause incalculable mischief, but also perpetuates injustice to third persons who are neither parties to the suit nor bound by the decree passed therein. (*Kinkhede, O. A. J. C.*) PANNA LAL v. M. T. BHAGIRATHIBAI, 20 N. L. R. 11; 78 I. C. 601; 1924 Nag. 98.

—S. 151—*Inherent power—Revival of suit—Minor—Decree against, set aside—Effect of.*

A decree passed against a minor was set aside in a subsequent suit on the ground that the minor was not properly represented in the prior suit and that his guardian *ad-litem* had not consented to act as such. After the decree in the subsequent suit the court below purported to restore the prior suit and revive it in the exercise of its inherent powers. *Held*, that the court had no inherent power to re-open the suit, 10 L. W. 471; 39 A. 8; 5 L. W. 482 Ref. (*Spencer, J.*) ARUMUGA GOUNDAN v. PERIANANHAPPA GOUNDAN, 19 L. W. 238; (1924) M. W. N. 289; 78 I. C. 76; 34 M. L. T. (H. C.) 94; 1924 Mad. 489 (1); 46 M. L. J. 348.

—S. 151—*Inherent power—Scope of—Order for payment of amount sued for before decision of suit.*

S. 151, C. P. Code saves the Court's inherent power to make such order as may be necessary

C. P. CODE (1908), S. 151.

for the ends of justice or to prevent abuse of the process of the Court, but there is no rule of law or equity which requires, in the interest of justice that a plaintiff suing to enforce a contract for the payment of money, where the claim is disputed should be awarded a portion of the amount claimed before his right has been established by the suit brought for that purpose. (*Miller, C. J. and Kuluwant Sahay, J.*) GOPAL SARAN NARAIN SINGH v. SITA DEVI. 2 Pat. L. R. 159 (Civil); 5 Pat. L. T. 560.

——— S. 151—Inherent power, Scope of—*Statute of limitation not to be overlooked.*

S. 151, C. P. Code is not intended to override the express provision of law. In other words, where the law provides for a period of limitation for a particular class of application, the Court cannot ignore the provisions of the law of limitation by appealing to S. 151, C. P. Code. That section is intended for cases for which the strict letter of the law provides no remedy 46 A. 144; 1 Pat. 277; 1 Lah. 263; 42 B. 367; 47 M. 171 Rel. (*Daniels, J.*) TOTA RAM v. PANNA LAL. 22 A. L. J. 583; L. R. 5 A. 347; 79 I. C. 997; 46 A. 631; 1924 All 668 (2).

——— S. 151—Inherent power—Restitution—Power to order.

Even in cases which are not covered by S. 144, a court has inherent power to order restitution if the interests of justice require it. (*Dass and Ross, JJ.*) KAMALANATH JHA v. MOBIT NARAIN JHA. 5 Pat. L. T. 553; 78 I. C. 310; 1924 P. 800.

——— S. 151—Inherent power—Stay of proceedings—Decision of another tribunal.

The Court has inherent power to postpone the hearing of a suit pending the decision of a selected action and to make an order for stay of cross suits on the ground of convenience 38 C. 927; 40 C. 965 Ref. This inherent power is not to be exercised capriciously or arbitrarily and is to be exercised to facilitate that real and substantial justice for the administration of which alone Courts exist. 17 C. 272; 16 M. 380; 33 C. 927, 932 Rel. (*Mockerjee and Chotzner, JJ.*) SYED ABDUL ALIM v. BADARUDDIN. 28 C. W. N. 295; 1924 Cal. 757.

——— S. 151—Inherent power—When can be invoked—Specific provision in the Code.

A Court cannot invoke its inherent jurisdiction where there is a provision in the Code which would meet the requirements of the case. (*Baker, J. C.*) MT. MULIA v. PARTAB. 1924 Nag. 325.

——— S. 151—Inherent power—Scope of—No power to add to or alter judgment except by way of review. See C. P. CODE Ss. 115 AND 151, ETC. 3 Pat. 778

——— S. 151—Inherent power—Remand—Specific provisions of Code.

Where the Code contains specific provisions which would meet the necessities of a case, an order of remand under inherent powers should not be made. (*Sanderson, C. J. and Chakravarty, J.*) RAJANI KANTA SAHA v. RAJENDRA KUMAR BOSE. 82 I. C. 663.

C. P. CODE (1908), S. 151.

——— S. 151—Injunction—Powers of High Court.

The High Court has an inherent power to grant an injunction in suitable cases irrespective of the provisions of O. 39, C. P. C. (*Abdul Raouf, J.*) SAMANDAR v. FAZAL. 78 I. C. 602 (1).

——— S. 151—Injunction—Inherent power—Election to Municipal Council—Inquiry by civil court into disputes—Power of court to issue interim injunction—No inherent power. See MAD. DT. MUN. ACT, S. 303. 47 M. L. J. 261.

——— S. 151—Injunction restraining sale—Sale ignoring injunction (*Olafeld and Devadoss, JJ.*) MAMILLAYYA v. VENKATARATNAM. 1924 Mad. 100.

——— S. 151—Powers under—When to be invoked.

S. 151, C. P. Code, cannot be invoked except in cases where there is no specific provision in the Code. (*Zafar Ali, J.*) MEHTAB SHAH v. ALI HAI-DAR SHAH. 82 I. C. 234.

——— S. 151—Rectification of mistake—Ignorance of fact. MAROTI SONAR v. CHITAMAN SONAR. 1924 Nag. 58.

——— S. 151—Remand—Inherent powers—When to be used.

A remand under the inherent powers of a Court can be made only when the justice of the case requires it. (*Walmsley and Ghose, JJ.*) SASI MUKHI DAS v. ABINASH CHANDRA HOLDER. 80 I. C. 172.

——— S. 151—Remand—Powers of—Inherent power.

Quære if there is an inherent power to remand vested in a Court of appeal. (*Krishnan and Waller, JJ.*) ADURI CHELAMAYYA v. LAKSHMI DEVAMMA. 79 I. C. 857.

——— S. 151 and O. 47, R. 1—Dismissal of a suit on a technical ground, and subsequent restoration under S. 151—Its inherent power—Proper procedure under O. 47, R. 1—Revision.

In a suit by a Landlord against his tenant which was dismissed on a preliminary ground he after remedying the defect applied under S. 151 instead of under O. 47, R. 1 and the Lower Court restored the suit. Held by the High Court that there is no inherent jurisdiction in the Court to set aside its own decree under S. 151 and the proper procedure was for the plaintiff to apply under O. 47, R. 1 and that the High Court ought not to exercise revisional powers in such cases. (*Das and Ross, JJ.*) RAMESWAR MAHTON v. LALA DWARKA PRASAD. 3 Pat. 778; 1925 P. 36.

——— S. 151—Restitution—Powers of Court.

The power of a Court to grant restitution is not confined to cases covered by S. 144 but may be extended to other cases under S. 151 read along with S. 144. (*Campbell, J.*) GANGA RAM v. NATHA RAM. 1924 Lah. 583.

——— S. 151—Remand under inherent power—Appeal—Maintainability—If can be re-considered. There is no appeal against a remand made under the inherent powers of a court, but when the matter comes up for final disposal the court has power to reconsider the correctness of the

C. P. Code (1908), S. 151.

order. (*Das and Ross, JJ*) BABU RAM RAI v. MAHESWAR PRASAD SINGH. 78 I. C. 466.

— S. 151—Scope of other provision of law applicable

Where there is a specific provision of law applicable to a case S. 151, C. P. Code ought not to be invoked. (*Pipon, J. C.*) CHANDAN v. MT. BIBI. 75 I. C. 198.

— S. 151—Stay of execution—Leave to appeal to Privy Council not granted—Exercise of powers

A court has inherent power under S. 151, C.P.C. in appropriate circumstances to stay execution on receipt of an application for leave to appeal to the Privy Council pending the passing of orders on the application. But such inherent powers should be sparingly used and only on good grounds being established. Language of O. 46, Rr. 5 and 13 considered. (*Kincaid, J. C. and Aston, A. J. C.*) NARUMAL v. JAGATMAL. 82 I. C. 739.

— S. 151—Stay of suit—Inherent power—Vexatious and oppressive suit—Natural forum avoided by plaintiff—Evidence accessible outside Jurisdiction. 1924 Bom. 90.

— S. 151—Suit dismissed for default in absence of both parties owing to reorganisation of Courts and change of venue—Application to restore case filed out of time—Whether Court has power under S. 151, C.P.C., where no ground available under S. 8, Limitation to excuse delay.

The provisions of S. 151, Civil Procedure Code, cannot be invoked in cases in which a party has had a definite remedy open to him but has failed to resort to it within the time allowed by law and so has lost it. (*Lentaigne and Carr, JJ.*) MRS. S.G. M. SAMSON v. SILVARAN. 3 Bur. L. J. 47 : 82 I. C. 418 : 1924 Rang. 274.

— Ss. 151, 152—Powers under—Decree not in conformity with judgment—Review if necessary.

Where a decree is not in conformity with the judgment, a court has jurisdiction under Ss. 151 and 152 to rectify the mistake and an application for review is not necessary. Nor is the inherent power of the court restricted to Ss. 151 and 152, C. P. Code. (*Suhrawardy and Chotner, JJ.*) KABIR-UD-DIN MONDOL v. ENTAY MONDOL. 79 I. C. 586.

— Ss. 151 and O. 20, R. 3—Suit for partition—Issue as to Court-fee—Defence of impartibility—Decision on issue as to court-fee—Transfer pending suit—Rights of transferee.

In a suit for partition by a younger brother against his elder brother, the defence was that the property was impartible. An issue was raised as to the sufficiency of the court fee and the subordinate judge before whom this suit originally came, decided this issue in favour of the plaintiffs holding that the suit was one for partition only. No appeal was made against this order. In the meantime the elder brother died and his sons were substituted in his place as his representatives. The plaintiffs moreover sold a portion of the property to other persons who were added as plaintiffs. The suit then came before another subordinate judge who took up the question as to the sufficiency of the court-fee again and decided that

C. P. Code (1908), S. 152.

the plaintiff was bound to pay an *ad valorem* court-fee. *Held*, that the order of the prior subordinate Judge was a judgment and could not be altered save as provided by S. 152 or on review. S. 151, C. P.C., cannot confer jurisdiction on the Court to do what is prohibited by positive law. S. 152, C. P. Code refers merely to clerical or arithmetical mistakes and was of no assistance in the case. The devolution of interest pending the suit could make no difference in the court-fee to be paid. The plaintiffs came in the interest of their vendor, the original plaintiff, and their position was identical with his. (*Das and Ross, JJ.*) HARIHAR PRASAD NARAIN DEO v. MAHESWARI PRASAD NARAIN DEO. 3 Pat. 654 : 82 I. C. 813 : 1925 P. 47.

— S. 151 and O. 7, R. 11—Rejection of plaint—Inherent power of Court—Suit by next friend of minor.

The instances given in O. 7, R. 11, C. P. Code empowering the Court to reject a plaint are not exhaustive and they do not limit the powers of a Court. A Court has jurisdiction in a proper case to dismiss a suit filed by the next friend of a minor on the ground that it is not in the interests of the minor that the suit should be allowed to go on. (*Wazir Hasan and Neave, A. J. Cs.*) THAKUR HARIHAR BAKHSH SINGH v. THAKUR JAGANNATH SINGH. 11 O. L. J. 260 : 1924 Oudh 413.

— S. 152—Decree—Amendment—Discretion—Variance between judgment and decree.

It is made obligatory on the court, if there is any variance between judgment and decree to bring them into conformity. The word "may" in S. 152 does not make it discretionary with the court to order the correction but merely enlarges the powers of the court by providing that such correction can be done at any time ; or in other words, the section simply emphasises that no lapse of time would disentitle the court to make the correction. (*Suhrawardy and Graham, JJ.*) CHANDRA KUMAR MUKHOPADHYA v. SUDHANSU BADANI. 28 C. W. N. 873 : 80 I. C. 55 : 1924 Cal. 895.

— S. 152—Clerical or arithmetical mistakes—Mistakes in pleadings, etc.

A mistake in the final form of an order may well be due to an original mistake made by the party or his lawyer in making the application. That is not a reason for refusing to correct a mistake ; otherwise there should be no object in the legislature giving the Courts jurisdiction to correct mistakes. Mistakes of the kind which may be described as clerical, or due to an oversight between a decree *visi* and a decree absolute, are in the majority of cases the mistake or slip of the party who sets the Court in motion. (*Walsh and Ryves, JJ.*) ALLAH DIA v. RAHIMUDDIN. 22 A. L. J. 215 : L. R. 5 A. 102 : 78 I. C. 166 : 1924 A. 520.

— S. 152—Decree not in accordance with judgment—Amendment.

In a suit on a bond against the legal representative of the deceased obligor, judgment was given against him in that capacity but a decree was drafted making him personally liable. *Held* the

C. P. Code (1908), S. 152.

Court should amend the decree under S. 152, C.P.C. to bring it in conformity with the judgment (*Zafar Ali, J.*) *CHANDA SINGH v. FATEH CHAND*. 1924 Lah. 621.

—S. 152—Decree—Amendment—Pendency of appeal.

Even though an appeal is pending from a decree it is open to the Court that passed the decree to amend it. (*Das and Ross, JJ.*) *REVA MAHTO v. DALU MAHTO*. 2 Pat. L. R. 6; 78 I. C. 794 (1); 5 Pat. L. T. 588; 1924 P. 528.

—S. 152—Error in plaint—Description of property—When can be amended—Lapse of time—Effect.

S. 152 applies only to the correction of accidental slips or omission. If the error is made deliberately, a Court will not lend its aid to correcting the same. But even accidental errors will be not corrected if third parties have acquired rights under the judgment in the interval. Lapse of time has nothing to do with the question. (*Wazir Hasan, A. J. C.*) *MATA DIN SINGH v. SHEO DARSAN*. 78 I. C. 96.

—S. 152—Omission of one of the mortgage properties in plaint and decree—Power to correct. *MAUNG CHIT HLAING v. N. A. R. M. CHETTY*. 1924 Rang. 104.

—S. 153 and O. 1, R. 10—Deadman—Appeal against—Addition of legal representatives—Procedure. 1924 Mad. 56.

—S. 153 and O. 2, R. 2—Valuation deliberately inflated to get round a previous decision—Whether an abuse of process—Plaint to be returned to the proper Court.

The plaintiff instituted a suit for rent and an ejectment suit against his tenant which were dismissed by the district judge on the ground of want of plaintiff's title.

He instituted a second suit, with a view to get over the plea of *res judicata*, for recovery of possession of the house from the tenant which was also dismissed. The District Judge on appeal, allowed the appeal, decreeing the suit on the ground that S. 11 of C. P. Code was no bar. The High Court in Second appeal, reversing the decision of the lower appellate Court held,

Per *Walsh, A. C. J.* that the plaintiff's attempt to dodge the previous judgment ought to be defeated, and that the suit was an abuse of the process of Court within the meaning of S. 153 C. P. Code.

Per *Sulaiman, J.*—The valuation was deliberately inflated in order to provide a ground for getting round a previous decision and the proper course was to direct the plaint to be returned for presentation to the proper Court. (*Walsh, A. C. J. and Sulaiman, J.*) *MOHAN LAL v. BHUTESHWAR*. L. R. 5 All. 709 (Civil).

—S. 153 and O. 6, R. 17—Plaint—Amendment—Power of court after decree is made. 1924 Bom. 166.

—O. 1, R. 3 and 5—Misjoinder of parties and causes of action—Suit for possession—Different persons in possession of different plots. 1924 Nag. 55.

C. P. Code (1908), O. 1, R. 3.

—O. 1 R. 3—Requirements. 77 I. C. 1028.

—O. 1, R. 8—Leave of Court—Grant of—Form of.

It is not necessary that the leave of court required under O. 1, R. 8 (1), C. P.C. should be express. It is enough if it could be gathered from the proceedings 21 C. 180; 29 C. 100 Ref. (*Mukerjee, J.*) *KRISHNA KUMAR DEB v. ATUL CHANDRA GHOSE*. 39 C. L. J. 612; 1924 Cal. 998.

—O. 1, R. 8—Object of—Applicability—Conditions—Right to sue in original plaintiff and community of interest between him and members of the class—Suit in name of wrong plaintiff—Effect—O. 1, R. 10—Application of—Conditions—Bona fide mistake in institution of suit—Necessity—Pleadings—Amendment of, by introducing case of fraud—When granted and when not.

The plaintiff, describing himself as a creditor of a person who had been adjudicated an insolvent, and whose estate was represented by the Official Assignee of Rangoon, sued for a declaration that a sale-deed executed by the Official Assignee in favour of the defendant was null and void. The defendant pleaded that the plaintiff was not a creditor of the insolvent and had no *locus standi* to maintain the suit.

When the trial was about to commence, one K. who had all along represented the plaintiff, applied to be added as a plaintiff to obviate the technical objection raised by the defendant.

Held, that if the plaintiff was not a creditor of the insolvent, the application was not sustainable under O. 1, R. 8, Civil Procedure Code; that, if the plaintiff was a creditor, the assumed necessity for the application did not exist and it equally failed; and that the application could not be allowed under O. 1, R. 10, as there was no allegation even that the suit was instituted originally in the name of a wrong person through a *bona fide* mistake.

O. 1, R. 8, Civil Procedure Code, presupposes the existence of a right of suit in the plaintiff who instituted the suit, and the community of interest between him and the others of the class is the prerequisite necessary to enable him to represent the class. If the plaintiff turns out not to be a member of the class on whose behalf he professed to institute the suit, the suit is not a representative suit and no member of the class is constructively a party to it.

Quære :—Whether O. 1, R. 10, Civil Procedure Code, applies to cases falling within O. 1, R. 8.

On the same date on which the abovementioned application was made, another application was made by the original plaintiff for leave to amend his plaint by saying that the defendant was a *benamidar* for the insolvent and that the agent of the Official Assignee who conducted the sale on his behalf made a pretence of selling the property by public auction but really sold the property by private contract to the insolvent, the defendant being merely a *benamidar* for the insolvent. The materials, if any, which substantiated the allegations of fraud, thus sought to be added were not referred to in the affidavits filed in support of the application.

Held, that in the circumstances and in view of the great delay in making the application from

C. P. CODE, (1908) O. 1, R. 8,

which want of *bona fides* might be inferred, the Court below was right in rejecting the application. (*Venkatasubba Rao, J.*) KRISHNA AIYAR v. PACHAIYAPPA CHETTI. 1924 M. W. N. 522 : 82 I. C. 492 : 1924 Mad. 883 : 47 M. L. J. 540.

—O. 1, R. 8 and O. 22, R. 4—*Representative suit—Death of some of the respondents—Omission to implead legal representatives—Abatement*

Where certain defendants were parties to the suit and the appeal in a representative capacity under O. 1, R. 8, C. P. C. and some of them impleaded as respondents in second appeal die during the pendency of the second appeal, the appellants are not relieved from the necessity of impleading their legal representatives within the time prescribed by law. The omission to do so in time will cause an abatement of the suit. (*Martineau and Motisagar, JJ.*) WALI MAHAMAD v. MAHLU. 6 Lah. L. J. 360 : 5 Lah. 429.

—O. 1, R. 8—*Permission given to 15 individuals to sue on behalf of community—Suit filed by 12 only—If maintainable—Notice—Service of.*

Permission was given under O. 1, R. 8, C. P. Code to 15 specific individuals to sue on behalf of the village regarding a customary pasture right. The suit was actually filed by only 12 of them. Held, the suit was not maintainable without fresh permission of Court. Principle regulating representative suits discussed. The issuing of a notice under O. 1, R. 8 is not a mere matter of formality. The community on whose behalf the suit is brought has a right to know who is representing them and if anybody is not satisfied that his interests are properly represented he can take steps to protect his position and this object will be nullified if the Court does not see to a proper service of the notice 17 C. 935 followed. (*Mukerjee, J.*) ABDUL HAKIM v. ABDUL GANI. 80 I. C. 26.

—O. 1, R. 9—*Applicability to mortgage suits.*

The provisions of O. 1, R. 9 apply to proceedings under O. 34, C. P. Code. (*Suhrawardy and Graham, JJ.*) KHERODAM DAS v. HABIB SHAHA. 82 I. C. 638 : 29 C. W. N. 51.

—O. 1, R. 9—*Non-joinder—Effect—Form of decree.* 76 I. C. 577.

—O. 1, R. 9—*Parties to suit—Persons interested in easement—Joinder of.*

Where the plaintiffs sued for a declaration of their right to certain land as against the defendants who under a claim of easement were alleged to have obstructed plaintiffs in the enjoyment of the land. Held that the contention that all persons interested in the right of easement were necessary parties to the suit was without substance. The cause of action on the pleadings was against those persons only who were alleged to have interfered with the plaintiff's right. 25 C. W. N. 249 : 19 C. W. N. 1211 Ref. (*Suhrawardy and Graham, JJ.*) SURJA NARAIN BERA v. CHANDRA BERA. 40 C. L. J. 74 : 1924 Cal. 1050.

—O. 1, R. 10—*Addition of parties—Power of Court—Discretion how exercised—Change in*

C. P. CODE (1908), O. 1, R. 10.

the nature of suit—Effect of—Voidable title—Plea in defence.

O. 1, R. 10, C. P. Code, confers a discretion upon the Court and that discretion must be exercised in view of the special circumstances of the particular litigation subject, however, to the general rule that parties cannot be added so as to alter the nature of the suit. It is further plain that a person may be added as a party to the suit only in two cases first, when he ought to have been joined and has not been so joined or secondly when without his presence the question in the suit cannot be completely decided. Where in a suit for rent the added defendants were neither necessary nor proper parties and the plaint as framed did not disclose a cause of action against them and there was no allegation that they had prior to the suit set up a claim to realise rent from the tenant defendant, much less that they had actually intercepted the rent payable by him. Held, that the defendants who had been added were improperly impleaded. (*Mukerjee and Suhrawardy, JJ.*) ABDUL GAFUR v. ALI MIAH. 28 C. W. N. 805 : 82 I. C. 369 : 1925 Cal. 26.

—O. 1, R. 10 and O. 22, R. 10—*Mortgage suit—Preliminary decree—Addition of parties.*

It is competent to the Court to add a person interested in the equity of redemption as a party to a suit on a mortgage even after the passing of the preliminary decree therein and to re-open the prior proceedings so far as he is concerned. (*Keith v. Bulch* 25 Ch. D. 750 followed, 31 I. C. 849 dissented from. (*Phillips and Odgers, JJ.*) KRISHNA AIYAR v. SUBRAMANYA AIYAR.

34 M. L. T. (H. C.) 114 : 1924 M. W. N. 364 : 1924 Mad. 648 : 46 M. L. J. 368.

—O. 1, R. 10—*Partition suit—Defendants struck out of the record at the instance of the Plaintiff—Whether an appeal lies.*

Where in a partition suit the defendant contended that one of them B had no interest in the suit items, and B sold his alleged interest to R, the Dt. Munsif added R as a party defendant. Subsequently the plaintiff applied for striking out B and R and the Munsif without deciding the question whether B had any interest in the property, ordered that B and R should be struck out which was set aside on appeal. Held, on revision by the High Court that R was entitled to appeal from the order striking out his name from the array of defendants in as much as the order should be looked upon as a decree declining to adjudicate upon the claims of B and therefore of R. (*Rama Rao v. Raja of Pithapur* 1, L. R. 42 M. 219 relied upon. (*Das and Ross, JJ.*) RANJIT PANDAY v. ALAKHAM. 3 Pat. 859.

—O. 1, R. 10—*Partnership—Suit for dissolution—Death of defendant—Application by son to be impleaded—Delay in applying—Procedure.*

Subsequent to the preliminary decree in a partnership suit, the defendant died and the son applied to be impleaded more than 3 months after the death but within less than 6 months, which was the period allowed before the amendment of art. 177, Limitation Act. Held in the interest of

C. P. CODE (1908). O. 1, R. 10.

justice the court can take action under O. 1, R. 10 to add all the parties interested. (*Spencer, J.*)
RAMASWAMI CHETTIAR v. ADAPPA CHETTIAR.

78 I. C. 168.

——— O. 1, R. 10—*Plaintiff—Major wrongly described as minor—Amendment of plaint—Order striking off name of plaintiff—Appeal.*

Certain reversioners sued to set aside alienations of property after the death of a Hindu widow. One of the plaintiffs was described in the plaint as a minor but he was actually a major. The defendant pointed out the defect whereupon the Court ordered the plaint to be amended by describing the said plaintiff as a major. The order was not complied with and the Court struck off the record the name of that plaintiff. Eventually the suit was dismissed on the merits. Held that the order of the lower Court was correct. Though the order was not appealable its validity could be questioned on appeal from the final decree in the case. (*Simpson, A. J. C.*)
LACHMI NARAYAN v. SALIG RAM.

11 O. L. J. 154 :
 1924 Oudh 428.

——— O. 1, R. 10—*Plaintiff if can be transposed as defendant.*

A Court has power under O. 1, R. 10 to trans pose a plaintiff as a defendant. (*Suhrawardy and Daval, J.J.*)
PADMA LOCHAN PAL v. KALI KAMAL PAL.

82 I. C. 649.

——— O. 1, R. 10 (1)—*Addition of parties—Sub stitution of plaintiff—No cause of action for original plaintiff—Effect of.*

Under O. 1, R. 10 (1), C. P. Code the Court has power to substitute or add parties in cases where there has been a *bona fide* mistake as to the person in whose name the suit has been instituted. The condition of such substitution or addition is that it is necessary for the determination of the real matter in dispute to do so. When the matter in dispute cannot be determined without the joinder or substitution of some other person as plaintiff, this may be ordered ; but where the joinder or substitution is sought not for this purpose but merely as an occasion or pretence for altering the character or scope of the real matter in dispute, by introducing fresh matters of dispute then the Court ought not to grant permission. The existence or otherwise of a good cause of action or of any cause of action at all is, no doubt, a point touching the merits, with which the Court is not at that particular stage directly concerned ; but the rule in question is not intended, and ought not to be used to enable a person who has no right of action to introduce another person in whom there is a right of action as plaintiff along with or in lieu of himself, as this would be entirely altering the character and scope of the matter in dispute and virtually converting the suit instituted by one person into a new suit by another person. 1 M 383 ; 6 C. 370 ; 6 C. 827 ; 6 B. 538 ; 6 B. 672 Rel. (*Chandrasekhara Aiyar, C. J. and Ramaswamy Iyengar, J.*)
GUNDAPPA v. MANJAPPA.

2 Mys. L. J. 1.

——— O. 1, R. 10 (5)—*Suit against agent—Ad dition of principal—Limitation.*

Where there is a misdescription of the defend ant in the cause title there is complete power in

C. P. CODE (1908). O. 2, R. 2.

the Court to make the necessary correction without any regard to lapse of time, for in a case of misdescription the Court will not have any diffi culty in coming to the conclusion that the defend ant had been substantially sued though under a wrong name. But there is a great difference be tween misdescribing a party intended to be sued and suing a wrong party. Where in the suit as laid a personal decree was sought for against the Agent, East Indian Railway Co. and there was no suggestion in the plaint that it was sought to bind the Railway Company by any decree that the plaintiff might obtain against the defendant, an application to bring on record the Railway Co. as represented by the agent is in substance one for the addition of a new party and the East Indian Ry. Co. would be entitled to set up the plea of limitation.

When there are two known persons in existence and the plaintiff brings the suit against one of them and afterwards applies to have the other brought on record as a defendant on the ground that he all along intended to sue the other and that in substance he sued the other and no ques tion of representation arises in the case it is im possible to maintain the view that the case is one of misdescription. (*Das and Ross, J.J.*)
EAST INDIAN RAILWAY CO. v. RAM LAKHAN RAM.

3 Pat. 230 : (1924) F. H. C. C. 9 : 78 I. C. 312 :
 1925 F. 37.

——— C. 2, R. 2—*Bar of suit—First suit for possession—Subsequent suit for mesne profits.*
 1924 Cal. 442.

——— O. 2, R. 2—*Bar of suit—Mortgage—Suit by mortgagee for possession on default of pay ment of interest—Subsequent suit under S 12 of Punjab Act 11 of 1913—Maintainability.*

1924 Lah. 21.

——— O. 2, R. 2—*Cause of action, meaning of—Cause of action, whether identical or different, criterion of—Usufructuary mortgage—Failure to get possession—Right to sue for possession as well as mortgage money—Transfer of Property Act (IV of 1882), S. 68 (c)—Omission to sue for alter native reliefs—Suit for money after dismissal of suit for possession, whether barred.*

A cause of action for a suit is the bundle of essential facts which it is necessary for the plaintiff to prove in order to succeed.

In judging whether the causes of action in two suits are identical, the criterion is to see whether the same evidence will maintain both actions. 40 B. 351 referred to.

In the case of usufructuary mortgage where possession is not delivered in pursuance to the mortgage contract, the mortgagee has a right to sue for either of two reliefs (1) recovery of possession (2) recovery of mortgage money and in both suits he will be entitled to the reliefs on proof of the same facts, viz. (1) execution of mortgage, (2) failure to deliver possession.

Consequently where a mortgagee sued merely for possession and on the dismissal of the suit filed a suit for recovery of money.

Held, that the cause of action in the two suits being the same, viz. failure of the mortgagee to

G. P. CODE (1908) O. 2, R. 2.

get possession the suit was barred by O. 2 R. 2, C.P.C. (*Neave, A. J. C.*) SHEO RATAN SINGH v. BABU RAM SINGH. 10 W. N. 749 : 10 O. & A. L. R. 1165.

—O. 2, R. 2—Causes of action—Splitting of—Different cause of action—No bar. MT. BHAGJOGINI v. SAKHI MAHTON. 77 I. C. 500 (1).

—O. 2, R. 2—Cause of action—Properties different—Separate acts of ouster—Separate suits whether barred.

A cause of action is defined as constituting every fact which plaintiff has to prove to get judgment in his favour. It refers to the grounds set forth in the plaint and has no relation to the defence set up. It must be antecedent to the date of suit. Where two houses were sold to a person under one document and he was ousted therefrom on different occasions, there are two separate causes of action and he can bring two separate suits in respect thereof. (*Kinkhede, A. J. C.*) VENKAT BHAT v. MT. YAMUNA. 80 I. C. 286.

—O. 2, R. 2—Cause of Action—Meaning of—Different causes of action—Suit for possession—Mahomedan heir—Suit for dower.

A Mahomedan lady died leaving considerable property and her husband R, her sister Q and a minor daughter K as her heirs. The sister Q sued for recovery of possession of her share of certain zamindari property as heirs to the deceased impleading R and K as defendants and alleging that R had taken possession of the whole property improperly in the name of K. Two years later the same plaintiff brought a suit against the same defendants alleging that as the dower debt due from R to the deceased lady had been unpaid on the date of her death plaintiff was entitled to a share of it for her own benefit and another share for the benefit of K. The defence was that the suit was barred by the provisions of O. 2, R. 2, C.P. Code. *Held*, that the causes of action for the two suits were not identical and that the second suit was not barred by O. 2, R. 2, C.P. Code. (*Mears, C. J. and Piggott, J.*) ABDUR RASHID v. QUADRATUNNISA BIBI. 22 A. L. J. 432 : L. R. 5 A. 321 : 79 I. C. 338 : 46 A. 542 : 1924 All. 713.

—O. 2, R. 2—Damages—Claim for, against vendor—Dismissal of prior suit for possession.

Where a prior suit for possession under a conveyance of immovable property is dismissed a subsequent suit for damages against the vendor is not barred under O. 2, R. 2, C. P. Code at any rate where the claim for damages has been reserved in the previous suit. (*Mookerjee and Suhrawardy, JJ.*) LAKSHAM CHANDRA MANDAL v. TAKIM DHALL. 39 G. L. J. 90 : 1924 Cal. 558 : 28 C. W. N. 1033.

—O. 2, R. 2 and S. 11—Dismissal of suit—Misdescription—First suit—Bar.

Where a suit is dismissed on the ground the properties are wrongly described, there is no bar to the filing of a fresh suit either under S. 11 or under O. 2, R. 2, C. P. C. (*Scott Smith, J.*) BIKA v. BALANDA. 78 I. C. 579.

—O. 2, R. 2—Distinct causes of action—Plaintiff if bound to unite in one suit—Bar.

G. P. CODE (1908) O. 2, R. 2.

Where there are perfectly different causes of action, though it might be open to a plaintiff to join them in one suit he is not bound to do so and the failure to do it will not be a bar under O. 2, R. 2. (*Baker, O. J. C.*) LALLU PRASAD v. BABU LAL. 76 I. C. 218.

—O. 2, R. 2—Hindu widow—Alienation—Setting aside—Successive suit by reversioners.

A Hindu widow in possession of her husband's estate made several alienations of it in favour of the defendant. The plaintiff, a reversioner, brought a suit for recovery of some of the properties so alienated but omitted to sue for the remaining items. In a subsequent suit for possession of the items so omitted, *Held*, that the subsequent suit was barred by O. 2, R. 2, C.P. Code. (*Mukerji and Dalal, JJ.*) DARBARI LAL v. GOBIND SARAN. 22 A. L. J. 753 : L. R. 5 A. 556 : 46 A. 322 : 80 I. C. 31 : 1924 All. 902.

—O. 2, R. 2—Instalment bond—Prior suit for some instalments—If bars subsequent—Time, 1924 Nag. 61.

—O. 2, R. 2 and O. 23, R. 1—Omission to sue for a portion of the claim—Withdrawal of suits with liberty to bring a fresh suit—Subsequent suit including claim previously omitted.

The plaintiff who had omitted to sue for a portion of his claim withdrew the suit with liberty to bring a fresh suit under the provisions of O. 23, R. 1, C.P. Code. Later on he brought a suit including the portion of the claim so omitted in the prior suit. *Held*, that effect of withdrawal under O. 23, R. 1 was to leave the parties in the same position as if no such suit had been instituted and that O. 2, R. 2, did not deprive the plaintiff's right to include the omitted portion of his claim in the subsequent suit. 10 M. 160. 18 All. 53 followed. (*Young, J.*) MA PO v. A. BUX. 3 Bur. L. J. 189.

—O. 2, R. 2—Part of cause of action occurring later—Second suit based on that part is not barred. (*Hallifax, A. J. C.*) KESHEORAO v. SUKLYA MALI. 19 N. L. R. 170 : 76 I. C. 123 : 1924 Nag. 61.

—O. 2, R. 2—Payment under decree—Suit for declaration of right—Subsequent payment—Fresh suit—No bar.

Defendant obtained a decree on a mortgage and the judgment-debtor paid half the decree amount into court. The plaintiff thereupon sued the defendant for a declaration that he was entitled to a moiety of the amount paid into court and obtained a decree. Subsequently the judgment-debtor paid the remaining decree amount into court and thereupon the plaintiff brought a suit for declaration of his right to a moiety of that amount. *Held*, that the plaintiff's right to a moiety of the amount was conclusively decided by the prior suit and that the subsequent suit was not barred by O. 2, R. 2, C.P. C. inasmuch as the plaintiff could not have sued for a share of further payments which might or might not be made. (*Rullan, A. J. C.*) LALTOO v. BAJRANGI LAL. 10 O. & A. L. R. 574.

C. P. CODE (1908) 2, R. 2.

—O 2, R. 2—*Suit for partition—First suit against members of the family—Second suit against alienees—No bar.*

Although O. 2, R. 2, of the Civil Procedure Code requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, still that rule does not require that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant. Where the former suit was a suit for partition of certain moveable and immoveable property by one member against another member of the family, the plaintiff was not bound to join in that suit his distinct cause of action against the stranger purchaser. Cases are possible where the mere fact that the partition has been effected does not by itself, in the absence of an agreement to that effect, bar the right of partition of property still undivided and in respect of which the member may retain his share in the undivided estate. The whole village or a particular community may have joint property in a common pasturage or a forest, and such common enjoyment may continue even after there has been a private partition among the members of any one or more of the component families. No intention to relinquish a part of the claim can be inferred by the mere non inclusion of such a common claim in a family partition suit. (*Kinkhede, O. A. J. C.*) SONBA v BABYA. 20 N. L. R. 28 : 78 I. C. 376 : 1924 Nag. 89.

—O 2, R. 2—*Suit for possession—Subsequent suit for mesne profits.*

The law provides for the awarding of mesne profits upon the date of obtaining possession and its on to the plaintiff not only to have asked for mesne profits up to the date the decree was passed but up to the date that he obtained possession and his omission to have done so tells against him not only up to the date that the decree was passed but up to the date that he obtained possession. A subsequent suit would be barred. (*Stuart, J.*) GIRWAR SINGH v MT. RAM PIARI KUNWAR. L. R. 5 A. 223 : 78 I. C. 326 (1) : 1924 All. 909.

—O 2, R. 2—*Suit by vendee for possession—Claim for refund of purchase money—Suit for—If lies*

Where a vendee's suit for possession is dismissed, a separate suit for refund of purchase money is not barred under O 2, R. 2. (*Mukerjee and Suhrawardy, JJ.*) LUKHAN CHANDRA MONDAL v. TAKIM DHALI, 80 I. C. 357.

—O 2, R. 2—*Prior suit for possession—No claim for future mesne profits—Second suit for mesne profits—If barred*

Where in a prior suit for possession, there was no claim for future mesne profits, a subsequent suit therefor is not barred, as the cause of action is different. (*Miller, C. J. and Foster, J.*) RAMJANAM SINGH v. KHUB LAL SINGH. 80 I. C. 710.

—O 2, R. 2—*Prior suit for possession—Subsequent suit for redemption.*

1924 Lah. 143.

C. P. CODE (1908) O. 3, R. 1.

—O. 2, R. 2—*Rent—Cesses—Separate suits for maintainability.* MOHANDRANATH BOSE v ABINASH CHANDRA BOSE. 77 I. C. 364.

—O. 2, R. 4—*Mortgage—Suit for redemption—Persons claiming by title paramount—Question of title—Adjudication on.*

As a general rule in mortgage suits, all questions except those between mortgagor and mortgagee are to be excluded. But where defendants are in possession and set up a title paramount and are likely to obstruct plaintiff in getting possession, it is better to adjudicate on such questions also in order to prevent multiplicity of action. O. 2, R. 4, provides for leave being granted in such a case. (*Miller, C. J. and Mullick, J.*) KHUB LAL UPADHYA v. JHABSI KANDU.

3 Pat. 244 : 78 I. C. 885 : 5 Pat. L. T. 573 : 1924 P. 613.

—O. 2, R. 3, 4, 5—*Suit for pre-emption—Four sales of four plots of lands to different vendees on different dates—Single suit for pre-emption if maintainable.*

The vendee purchased four plots of land from different owners at different prices. The plaintiff as pre-emptor brought a single suit in respect of all the sales impleading the vendee and also the various vendors of the four sales. Held, that the suit was not defective by reason of misjoinder of defendants and causes of action. If the trial Court did not think fit under O. 2, R. 6, of the C. P. Code to order separate trials it is not proper to interfere with its discretion in the matter in appeal and order separate trials. (*Abdul Raoof, J.*) PIARA RAM v. KESHO NATH. 82 I. C. 605 : 6 Lah. L. J. 349.

—O. 2, R. 4—*Separate suits for possession and mesne profits—Maintainability of.* See C. P. CODE, S. 11, EXPL. 4. 26 Bom. L. R. 288.

—O 2, R. 6—*Appellate Court—Powers of—Trial Court not objecting to trial.* PIARA RAM v. KESHONATH. 1924 Lah. 156.

—O. 2, R. 6—*Suit for rent—Different holdings with the same tenant—Right to claim rent in one suit—Agra Tenancy Act.*

It is not competent to the plaintiff to join in one suit claims for arrears of rent in respect of occupancy and non-occupancy holdings held by the same tenant. Under the Agra Tenancy Act there should be different suits in respect of different holdings. 3 A. L. J. 603 followed. (*Mukerjee, J.*) HIRA LAL v. HOTI LAL.

22 A. L. J. 459 : L. R. 5 A. 155 (Rev) : 79 I. C. 560 : 1924 All. 720.

—O. 3, R. 1—*Pleader duly appointed—Manning of—Appointment by Official Liquidator.*

Where the official liquidators of a Company had obtained the leave of the Court to institute a suit the pleader engaged by them to file the suit on their behalf must be deemed to have been duly appointed within the meaning of O. 3, R. 1, C. P. Code. (*Martineau and Moli Sugar, JJ.*) KATHIAWAR AND AHMADABAD BANKING CORPORATION, LTD v. GURDAS RAM. 5 Lah. 414.

—O. 3, R. 1—*Power of attorney—Validity—Objection not raised in Trial Court—Effect—Waiver.* 1924 Lah. 296.

C. P. CODE (1908), O. 3, R. 2.

———O. 3, R. 2—Power of attorney—Special power—Suit filed by Mukhtear—Irrregularity—Immaterial defect—C. P. Code, S. 99.

76 I. C. 34.

———O. 3, R. 4—*Vakalat*—Mark made by consent of executant—Ability to sign—Validity of appointment of pleader.

Where a person who can sign his name touches the pen of a scribe who puts in his mark in a *vakalat* and there is no doubt of the intention to give a *vakalatnamah* the defect is only a technical one and the acts done by the pleader so appointed are valid. (*Baker, J.C.*) GULAM MOHI-
UDDIN v. SHANKAR. 1924 Nag. 159.

———O. 4, R. 1—Presentation of plaint to Judge outside Court and out of office hours—Validity of.

Where a Judge accepts a plaint presented to him outside Court and after the usual office hours, the suit must be deemed to have been instituted on the day on which the plaint was so presented. (*Schwabe, C. J. Coult's Trotter and Ramesam, JJ.*) SATTAYA PADAYACHI v. SOUNDARATHACHI.

47 Mad. 312 : (1924) M. W. N. 162 :

19 L. W. 468 : 33 M. L. T. 273 (H. C.) :

79 I. C. 1017 : 1924 Mad. 448 : 46 M. L. J. 78.

———O. 4, R. 1—Presentation of plaint out of office hours—if proper.

A plaint which was presented after it became time-barred, out of office hours, and was refused. *Held*, that it was not proper to treat it as if it had been received during office hours and the District Munsif was within his discretion to refuse it out of office hours. (*Jackson, J.*) SINNAPPA NAIDU v. SINNAPPA NAICKER. 82 I. C. 928 :

20 L. W. 655 : 35 M. L. T. 116 (H. C.)

———O. 5, R. 1 and O. 9, R. 3—No date fixed for appearance of defendant—Dismissal for default—Property.

Where no date has been fixed for the appearance of the defendant within the meaning of O. 5, R. 1 but a date is fixed for the plaintiff to attend and find out what date had been fixed for the appearance of the defendant, the Court has no power to dismiss the suit for default, merely because plaintiff did not appear on that day. The proper course would be to fix a day for the defendant to appear and if on that day plff. did not appear, to proceed under O. 9, R. 3. (*Moti Sagar, J.*) ISHAR SINGH v. SHARAF 78 I. C. 15.

———O. 5, R. 17—Service of summons—Substituted service—Necessity for personal service.

Where a process server is told that the persons whom he is seeking to serve, were not living at that time at the place where he seeks to serve them but at their own native place, it is his duty to endeavour to effect personal service upon them either by proceeding to that place or returning the summons to the Court with a proper endorsement so that fresh summons should be issued. Under O. 5, R. 17, C. P. C. the service, if possible, should be personal unless there is an agent empowered to accept service and it is only if personal service cannot be effected that there is any justification for proceeding in accordance with

C. P. CODE (1908), O. 5, R. 17.

the provisions of O. 5, R. 17. (*Greaves and Graham, JJ.*) CHOWDHURY DINA NATH PATI v. CHOWDHURY UPENDRA NANDAN DAS.

82 I. C. 703 : 40 C. L. J. 154.

———O. 5, R. 17—Service of summons—Summons received but endorsement not made—Affixature—Necessity for.

The summons in a case was served by delivering a copy of the summons together with a copy of the plaint to the defendant personally (the defendant being personally known to the peon). The defendant refused to grant a receipt therefor, but retained the summons and the copy of the plaint. When the defendant took the summons and the plaint, the peon had no other copy to affix upon the outer door or other conspicuous part of the house. He therefore did not affix it to the house. If the defendant had refused to take the summons and to sign the acknowledgment, in that case the peon would have a copy of the plaint and the summons to be affixed upon the house of the defendant. *Held*, that defendant by his conduct rendered it impossible to have the copies affixed on the house and he cannot be permitted to take advantage of his own wrong and to plead that the omission rendered the service invalid. The defendant was in this house and copies of the summons and the plaint were given to and left with him in his hands. Therefore the requirements of O. 5, R. 17 were complied with. (*Jwala Prasad and Forbes, JJ.*) NAGESHWAR BUX ALI v. FFASWAR DAYAL SINGH. 3 Pat. 236 :
2 Pat. L. R. 58 : 78 I. C. 889 :
5 Pat. L. T. 576 : 1924 P. 446.

———O. 5, R. 17—Service of process—Affixature—Temporary absence of party.

Where the process server's report was to the effect that, on reaching the village, he was informed that the tenant had gone to another district, and so he served the notice by affixation. *Held*, that the affixature did not invalidate the notice.

The object of that rule is to make certain that the person who is to be served receives notice, whereas, in the present case, he actually received it. The question whether affixation was really justified is of less importance.

In the circumstances of the present case, affixation does not invalidate the notice (*Fremantle, S. M. and Burn, J. M.*) ABDULLAH KHAN v. MAHANT KESHO RAM. L R. 50 43 :
10 & A. L. R. 348 : 11 O. L. J. 64.

———O. 5, R. 17—Personal service—When can be dispensed with—Peon affixing notice at entrance of party's house—Service if valid.

Personal service of notice should not be dispensed with unless it is unavoidable to do so or unless there is an agent empowered to accept service. Where the notice was sent for service at the place mentioned in the plaint as the plaintiff's residence but the peon on arriving there did not find the plaintiffs or any male member of the family, but found there a servant of the plaintiffs and was told that the plaintiffs were at that time living at their own *bari* at a village some two or three miles distant :

C. P. CODE (1908), O. 5, R. 17.

Held, that the affixing of the notice at the entrance of the plaintiffs' house was not good service as the peon did not use due and reasonable diligence. (*Greaves and Graham, JJ.*) DINA NATH PATI v. UPENDRA NANDAN DAS MAHAPATRA.

1924 Cal. 1004.

—O. 5, R. 17—Service by affixture—Temporary absence of defendant—Duty of court. NIHALA v. KAZAR SINGH. 1924 Lah. 233 (2).

—O. 6, R. 2—Scope of—Inconsistent facts—Pleading as to.

O. 6, R. 2 of the C. P. Code does not on the face of it exclude the pleading of inconsistent facts. All that it requires is a statement of material facts on which a party relies. A person may rely upon one set of facts if he can succeed in proving them, and he may rely upon another set of facts in the alternative. (*Wazir Hasan, J. C. and Pullan, A. J. C.*) BANSIDHAR v. LALA AJODHIYA PRASAD. 10 O. & A. L. R. 701 : 82 I. C. 333 : 27 O. C. 175 : 11 O. L. J. 619 : 1 O. W. N. 248.

—O. 6, R. 4—Undue influence—Particulars as to—New case on appeal not to be allowed to be set up.

To make out a plea of undue influence, the person alleging it must prove that another person was in a position to dominate the will and exercise influence and secondly that he actually did influence. Where there was no issue on these questions, no evidence and no findings of the trial, it will be impossible for the appellate court to adopt the suggestion of the appellant to remit the case for retrial. (*Macleod, C. J. and Shah, J.*) SHIDDUBAI v. NILAPGAUDA.

26 Bom. L. R. 622 : 1924 Bom. 457.

—O. 6, R. 4, 5—Dismissal from service—Suit for damages—Particulars if can be ordered

In a suit for damages for wrongful dismissal from service, the defendant cannot be directed to furnish particulars of the reasons for dismissal. (*Madgankar, A. J. C.*) COLLINS v. CHARLES BOOTH & CO. 80 I. C. 958.

—O. 6, R. 4—Fraud—Particulars—Duty to disclose—Procedure. 1924 A. 17.

—O. 6, R. 6—Condition precedent—Allegation and denial—Pleadings. MURLI MANOHAR v. RAJA NAND SINGH. 1924 P. 205.

—O. 6, R. 7—Admissions—Amendment for evading effect of.

An amendment of plaintiff should not be allowed where the object is to get round the effect of some admissions made by the plaintiff himself. (*Baker, J. C.*) RAGHUNATH SINGH v. GABDOO.

80 I. C. 355 (2).

—O. 6, R. 14—Plaint signed on instructions—If valid.

Where a plaintiff is signed by a third person on instructions from the real and ostensible plaintiff it must be deemed to be signed by a duly authorized person. (*Le Rossignol, J.*) ALI AHMAD v. ABDUL GHANI. 75 I. C. 880.

—O. 6, R. 14—Trustees—Co-plaintiffs—Plaint not signed or verified by one—Effect.

C. P. CODE (1908), O. 6, R. 17.

There is no rule that a person who is named as a co-plaintiff is not to be treated as such unless he signs and verifies the plaint. The signature is only a matter of procedure and the omission can be rectified at any time. (*Bilaram, A. J. C.*) FIRM OF MOTHARAM DOWLATRAM v. GOPALDAS.

80 I. C. 141.

—O. 6, R. 15—Verification of pleadings—Omission of—Defect supplied after limitation.

A plaint was signed but not verified by the plaintiff. The verification was made after the expiry of the period of limitation prescribed for the suit. *Held* that the subsequent verification could not be treated as an amendment and that the plaint was validly presented. (*Sulaiman and Kanhaiya Lal, JJ.*) SHIB DEO MISRA v. RAM PRASAD. 46 All. 637 : 22 A. L. J. 690.

—O. 6, R. 17—Amendments—Duty of court.

Courts should allow all amendments which are intended to shorten litigation and to put the case of the plaintiff more clearly if by reason of the case being misconceived in the first instance it has not been put in proper form. (*Kinkhede, A. J. C.*) SHANKAR v. MURARI. 78 I. C. 510.

—O. 6, R. 17—Late stage—Opportunity already given—Prejudice to defendant. MANOHARDAS v. RAMDAS. 75 I. C. 549.

—O. 6, R. 17—Amendment at last stage. PALU v. RASILU. 75 I. C. 740.

—O. 6, R. 17—Amendment—Allowing of—No new cause of action raised.

An amendment which only develops the original cause of action and not varies it should be allowed. When the plaintiff sought to set aside a sale on the ground his youth was taken advantage of to defraud him and he subsequently applied to amend his plaint to the effect he was a minor at the time of sale, the amendment should be allowed. (*Jackson, J.*) SOMASUNDARA BHAIKAR v. MUTHU THEVAR. 80 I. C. 278.

—O. 6, R. 17—Amendment—Appellate court.

An amendment of pleadings can be allowed even at the stage of appeal. (*Jwalu Prasad, A. C. J. and Kulwant Sahay, J.*) HARGOBIND RAI v. KESHWA PRASAD SINGH.

(1924) P. H. C. C. 297.

—O. 6, R. 17—Amendment when allowed.

Under O. 6, R. 17 an amendment can be allowed at any stage of the suit and the question is one for the discretion of the court. (*Prideaux, A. J. C.*) ANWAR KHAN v. JAKUB KHAN.

79 I. C. 911.

—O. 6, R. 17—Amendment—Powers of court—How to be exercised.

The discretion vested in courts to allow amendment must be judicially and not arbitrarily exercised. The power is wider under the new Code than under the old one and when a party who has an honest case has either through ignorance, bona fide mistake or misapprehension not placed the real facts before the Court or misconceived his cause of action and form of suit, he should be allowed to amend his plaint.

C. P. CODE (1903), O. 6, R. 17.

To disclose further details of facts which support a cause of action already sued upon is not to introduce a new relief or a new cause of action. (*Kinkhede, A. J. C.*) *SITARAM v. NANDRAM.*

1925 Nag. 9.

—O. 6, R. 17 and O. 23, R. 1—Nature of suit and plaintiffs' title changed during suit—Amendment or withdrawal not necessary.

L R. 5. A. 28 (Rev.)

—O. 6, R. 17—Plaint—Amendment in second appeal. 77 I. C. 518.

—O. 6, R. 17 and O. 7, R. 7—Specific performance—Pleading—Proof—Variance between.

1924 Cal. 461.

—O. 6, R. 17—Pleading—Amendment—Limitation.

An amendment of the plaint should not be allowed when its effect would be to deprive the defendant of a plea of limitation which has accrued to him by lapse of time. 22 C. W. N. 104; 11 M. I. A. 468 Ref. (*Chatterjee and Cuming, JJ.*) *NIRANKA CHANDRA BASU v. ATUL KRISHNA GHOSE.* 28 C. W. N. 1003; 1925 Cal. 67.

—O. 6, R. 17—Amendment—When allowed—Claim barred by limitation—Change in description of defendant.

In allowing amendments under O. 6, R. 17 courts have to see that the case tried is consistent with the case as originally laid and the equities and grounds of relief originally pleaded and alleged are not departed from. Nor should fresh claims barred by limitation be allowed to be set up. Where however in a partnership action a *bona fide* mistake crept in, in describing the defendant and the latter knew of it, the court should allow the amendment to bring out the true state of things. (*Kincaid, J. C. and Aston, A. J. C.*) *DIPCHAND DOWLAT RAM v. PARMANAND CHIMANDAS.* 1924 S. 144.

—O. 6, R. 17—Pleadings—Partition by metes and bounds—Found against—Division in status—New plea.

Where in a suit by a creditor against a Hindu father and his sons for recovery of a debt contracted by the father, the sons set up a division by metes and bounds which was found against, they could not on second appeal alter their plea into a division in status merely and escape liability on that footing. (*Venkatasubba Rao, J.*) *NIDADAVOLU ACHYUTAM v. VEERINA SURAYYA.*

79 I. C. 902; (1924) M. W. N. 485; 1924 Mad. 845.

—O. 6, R. 17—Powers of court.

A court has jurisdiction to allow an amendment when special circumstances exist even though the effect of the amendment will be to take away from the defendant a legal right which has accrued to him by lapse of time. (*Aston, A. J. C.*) *FIRM of JESSARAM BHAGWANDAS v. RATANCHAND FATEHCHAND.* 3 + 78 I. C. 846.

—O. 6, R. 17—*Ex parte* proceedings—Amendment of plaint—No fresh notice—Validity.

Where the defendant in a suit did not appear and was declared *ex parte*, an amendment of

C. P. CODE (1903), O. 7, Rr. 10 and 11.

the plaint without fresh notice to him is not invalid. (*Prideaux, A. J. C.*) *BANOBI v. JAKUB KHAN.* 80 I. C. 375.

—O. 6, R. 17—Suit against Railway Company—Erroneous description of defendant—Amendment of.

Where a suit against a Railway Company is erroneously filed as against the Agent of the Company when everybody concerned including the Company treated it as a suit against the Company, the plaint can be amended by striking out the word "agent" (*Baker, J. C.*) *BULAKIDAS v. AGENT, B. N. RY. COMPANY.* 82 I. C. 177.

—O. 6, R. 17—Suit for injunction—Relief for possession necessary—Application for amendment of plaint, by addition of prayer for possession—Discretion.

Where a plaintiff sued for perpetual injunction probably on the misunderstanding that he slight user of the land by the defendant, viz., tying cattle, feeding them and erecting a house for himself did not amount to possession but only a nuisance which could be prevented by an injunction and after the issues were framed and before the evidence was led, he applied for amendment of the plaint by the addition of a prayer for possession which the Court refused.

Held, that having regard to the provisions of O. 6, R. 17, C. P. C. the Court should have allowed the amendment upon payment of costs by the plaintiff. (*Dalal, J. C.*) *WARIS ALI v. SYED ABBAS ALI.* 1 O. W. N. 757; 10 O. and A. L. R. 1185.

—O. 7, Rr. 1 and 4—Representative Suit—Allegations in plaint.

If a plaint is filed in a representative capacity, it must contain allegations bearing out such statement Rr. 1 and 4 or O. der 7 are mandatory. (*Kinkhede, A. J. C.*) *HARBAX v. LACHMAN.*

82 I. C. 201.

—O. 7, R. 5—Several defendants—Plaint to show cause of action against each.

Every plaint must show how the various defendants are interested in the subject matter of the suit and the cause of action against each. (*Kinkhede, A. J. C.*) *BALAJI VINAYAK BUTI v. VIT-HOBA.* 1924 Nag. 191.

—O. 7, R. 6—Pleadings—Ground of exemption from limitation not set up in plaint—If can be set up and proved.

Where a plaint which is barred does not contain the ground of exemption as required by O. 7, R. 6 the plaintiff cannot afterwards rely on a ground of exemption not contained in the plaint. (*Moti Sagar and Martineau, JJ.*) *NANAK CHAND v. MAHOMED KHAN.*

1924 Lah. 702.

—O. 7, R. 7—Suit on hundi—Hundi not properly stamped—Decree on original consideration. *NATHU RAM v. DOGAR MAL.*

1924 Lal. 144.

—O. 7, Rr. 10 and 11—Plaint not properly stamped—Return of plaint to Court having jurisdiction—Proper procedure. See COURT FEES ACT, S. 7 (v) (A) (B).

46 M. L. J. 345.

C. P. CODE (1903), O. 7, R. 11.

— O. 7, R. 11—Cause of action arising after plaint filed—Suit for money.

75 I. C. 562 : 6 Lab. L. J. 31.

— O. 7, R. 11—Rejection of plaint—Power of Court not confined to cases specified in O. 7, R. 11—Inherent power. See C. P. CODE, S. 151.

11 O. L. J. 260.

— O. 7, R. 11—Rejection of plaint—Failure to produce document ordered by Court—Effect. See C. P. CODE, O. 7, R. 18.

67 I. C. 254.

— O. 7, R. 11 (a)—Power when to be exercised.

The power to reject a plaint on the ground it does not disclose a cause of action must be exercised with great care and it is only if the court thinks that if even all the plaint allegations are proved there is no cause of action that the plaint can be rejected. (*Madgarkar, A. J. C.*) COLLINS v. CHARLES BOOTH & Co.

80 I. C. 958.

— O. 7, R. 14 and 18 (2)—Filing of documents—Documents produced by plff. in answer to case set up by defts—Necessity for filing before first hearing MANBOH MISSIR v. BHAIRO MISSIR.

77 I. C. 848.

— O. 7, R. 18—Failure to produce document—Effect of.

Where a plaintiff who is directed to produce a certain document by a certain time fails to do it, he cannot put it in as evidence later without leave of court, but this does not entitle the court to reject his plaint—Neither O. 7, R. 11 nor O. 17, R. 3 apply to such a case. (*Abdul Raoof, J.*) MAHOMED BAKHSH v. MALIK MUSA.

1924 Lah. 608.

— O. 8, R. 2—Limitation—Plea of—Facts to be alleged in the written statement—Suit by principal for accounts—Demand and refusal to be specifically pleaded by defendant. See LIM ACT, ART. 89.

5 Pat. L. T. 303.

— O. 8, R. 5—Admission in pleadings—Construction of—Qualified admission—Effect of.

It is a general rule of law that an admission made by the opposite party in his pleadings of a fact necessary for the decision of a case dispenses with its proof. But an admission must be taken as a whole and not piecemeal. The principle upon which the latter rule is grounded is that if a party makes a qualified statement, that statement cannot be used as against him apart from that qualification. An unfair use is not to be made of a party's statement by trying to convert into a particular admission by him, that which he never intended to be such an admission. Where the defendant admits the affixing of his thumb impression in a blank paper, that does not amount to admission of execution of a promissory note which had been brought into existence over his thumb impression. (*Kinkhede, O. A. J. C.*) DEVIDAS v. MAMOOJI.

20 N. L. R. 7 :

78 I. C. 104 : 1924 Nag. 103.

— O. 8, R. 5—Allegation in pleadings—Plaint—Statement as to date of death—Denial—Sufficiency of.

C. P. CODE (1908), O. 8, R. 6.

Where the reversioners of a deceased Hindu bring a suit for possession of properties alleged to have been with the widow of the last male-owner and in the plaint they allege that the widow died on a particular date and the defendant in the written statement alleges that the widow did not die on that particular date and also alleges that the plaintiff's suit is barred by limitation held that it could not be said that inasmuch as the defendant did not make a counter allegation as to what exactly the date of the death of the widow was he must be deemed to have admitted that allegation in the plaint within the meaning of O. 8 R. 5 C. P. C. In the present case there was no question of evasive denial for there was only one fact alleged and that had been stated to be not admitted. Whether the defendant actually knew the date of the death of the widow or not at the time they made the pleading was not material. (*Phillips, J.*) N. C. RAJAGOPALACHARIAR v. BASHYACHARIAR.

20 L. W. 399 :

(1924) M. W. N. 788 : 82 I. C. 584 :

1924 Mad. 838 : 47 M. L. J. 520.

— O. 8, R. 5—Admission by Mukhtear of a party—Right to require proof in spite of admission.

Though prior to the framing of issues in a suit the defendant's mukhtear admits a fact alleged by the plaintiff, the admission is not conclusive in his favour and it is open to the court under O. 8, R. 5 proviso to require the facts admitted to be proved by other evidence. (*Scott Smith, A. C. J.*) VIR SINGH v. BHOLA SINGH.

6 Lah. L. J. 328 : 82 I. C. 617 : 1924 Lah. 744.

— O. 8, R. 6—Legal and Equitable set off—'Ascertained sum' Jurisdiction. See JURISDICTION PECUNIARY.

2 R. 462.

— O. 8, R. 6—Set off—Counterclaim—Distinction—Claim for unliquidated damages—Omission to plead—Amendment. NANJAN AHMED HAJI ALI v. MAHOMED PEER MAHOMED.

77 I. C. 943.

— O. 8, R. 6—Set off—Counter claim—Specific performance.

Though counter-claim is a form of suit unknown to the C. P. Code, there is nothing to prevent a judge treating the counter-claim as the plaint in a suit and hearing the two together if the counter claim is properly stamped. (*Young and Heald, JJ.*) SAYA BYA v. MAUNG KYAW SHUN.

2 Rang. 276 : 82 I. C. 721 (1) :

1924 R. 346.

— O. 8, R. 6—Set off—Suit by assignee from cosharer for profits—Decree in favour of lam-bardar—Right to set off.

A decree for arrears of rent obtained by a lam-bardar against cosharer could not be set off against a claim for profits by an assignee from the cosharer. (*Lindsay, Sulaiman and Kanhaiya Lal, JJ.*) GOVIND RAM v. KUNJ BEHARI LAL.

22 A. L. J. 217 : L. R. 5 A. 65 (Rev.) :

46 A. 398 : 1924 A. 341.

— O. 8, R. 6—Set off—Counter claim—Suit for price of goods—Defendant's claim for damages for non-delivery.

C. P. CODE (1908), O. 8, R. 6.

Plaintiff sued the defendants for the price of a ship's mast despatched by the former. The defendants contended that they never got the mast and that owing to plaintiff's negligence they had sustained heavy damages for which they reserved to themselves liberty to bring a fresh suit. Subsequently the defendants in the course of the trial, changed their mind and wanted to plead a set off and counter claim in respect of the damages. The court below refused to allow the defendants to plead set off. *Held* that though the defendants could not by reason of their former attitude plead a counter claim they should have been allowed to plead a set off. (*Coults Trotter, C. J. and Ramesam, J.*) **ABDUL KADER v. FAROJ BIN.** 20 L. W. 531.

— O. 8, R. 6—Set off—Plea of payment—Distinction between—Small Cause Court, Rangoon—Pecuniary Jurisdiction.

It is necessary to distinguish between a plea of payment and a defendant's plea of set-off. In the case of a plea of payment, the allegation in effect means that the debt or amount of the demand alleged to be due to the plaintiff (or in the case of a partial payment, the amount of the debt or demand *pro tanto*, paid off) had ceased to be due by reason of the alleged payment and that consequently, it was not a just demand validly in existence at the time of the institution of the suit or at the time of the written statement as the case may be. This plea is quite different in its nature from a plea of set-off raised by the defendant under the C. P. Code, which is in effect a request that the debt or amount found to be due to the plaintiff shall *thereafter* be treated as extinguished or satisfied in whole or *pro tanto* by being set off against the debt or ascertained sum due to the defendant. In short, a payment refers to a satisfaction or extinguishment effected prior to the raising of the defence of payment whilst a defendant's plea of set-off prays for a satisfaction or extinguishment commencing in the future after the date of the plea.

In cases of set-off the proper test to be applied in order to ascertain whether the set off is within the pecuniary jurisdiction of the Court, is to see whether the ascertained sum or the aggregate of the ascertained sums which the defendant seeks to set-off, does not exceed the pecuniary limits of the jurisdiction of court. (*Lentaigne and Carr, JJ.*) **HOE MOE v. J. M. SERDAT.**

2 Rang. 349 : 1925 R. 22.

— O. 8, R. 6—Set off—Suit for price of goods sold and delivered—Defence that there were counter dealings between the parties—Set off.

Plaintiff brought a suit for the price of goods sold and delivered. The plea of the defendant was that the suit transaction formed one out of a number of similar transactions between the parties and that if the payments were to be credited on both sides a definite balance would be found payable by the plaintiff to the defendant. *Held* that the sum claimed by the defendant was an ascertained sum and could be made the subject of a set-off within the meaning of O. 8, R. 6 C.P.C. and consequently the Court

C. P. CODE (1908), O. 9, Rr. 3 & 9.

below was wrong in refusing to go into his claim. (*Daniels and Neave, JJ.*) **HAR PRASAD v. FIRM OF RAM SARUP RADHA KISHEN.**

22 A. L. J. 844 : L. R. 5 A. 734 : 82 I. C. 340 : 1924 All. 572.

— O. 9—Applicability—Execution proceedings.

O. 9, C. P. Code is not applicable to applications arising out of execution proceedings. Where an application under O. 21, R. 90 is dismissed for default, it cannot be restored. (*Suhrawardy and Cholzner, JJ.*) **NARENDRA NATH CHATTERJI v. RAKHAL DAS TARAFDAR.**

79 I. C. 351.

— O. 9—Ex parte decree—Application to set aside—Whether affidavit Compulsory—Proper procedure.

Where the applicant, in seeking to set aside an ex parte decree of an appellate Court on the ground that he had no notice of the appeal, was questioned why he did not file an affidavit in support of his allegation. *Held*, there is nothing in order 9 C. P. Code. Making it compulsory on the applicant to file an affidavit. If the Court entertains any doubt as to the applicant's *bona fides* it should require the applicant to file an affidavit or examine him. (*Fremantle, S. M. and Burn, J. M.*) **PREM NARAIN v. AHMAD SHAH.**

L. R. 5 All. 325 (Civ.)

— O. 9, R. 2—Plaintiff—Non-appearance—Pleader asking for adjournment and reporting no instructions in case of its refusal—O. 3, R. 4 (2)—Withdrawal of vakalat—What amounts to—Leave of court for withdrawal—Grant of—Resumption—Conditions.

On the day fixed for the hearing of the suit the plaintiff's vakil who had previously filed a vakalat in the ordinary form, appeared in court asked, for an adjournment, and stated that, if that adjournment was not granted, he had no further instructions to go on with the case. He also took the plaint which he had drawn and signed and endorsed on it as follows: "I have no instruction except to apply for an adjournment."

Held, that the pleader could not be deemed to have appeared. O. 3, R. 4 Sub-r. 2 of Civil Procedure Code does not require the writing containing the withdrawal by the pleader of his vakalat to be in any specified form, and that which the plaintiff's pleader had endorsed on the back of the plaint would be perfectly good written withdrawal from his duties and obligations under the vakalat.

No formality is necessary about the leave of the court required for the withdrawal of the pleader and in the circumstances of the case the court ought to be presumed to have given its consent to the withdrawal of the plaintiff's vakil within the meaning of O. 3, R. 4 (2), Civil Procedure Code. (*Coults Trotter, C. J. Ramesam and Wallace, JJ.*) **MANICKAM ILLAI v. MAHODUM BATHUMMAL.** 20 L. W. 427 : 35 M. L. T. (H. C.) 48. 82 I. C. 102 : 1925 Mad. 21 : 47 M. L. J. 398.

— O. 9, Rr. 3 and 9—Execution proceedings—Dismissal of, for default—Setting aside dismissal.

C. P. CODE (1908), O. 9, R. 4.

Where an execution application is dismissed for default, no application lies under O. 9, R. 9 to have the application restored to file and disposed of. 17 A. 106 Ref. (*Dalal, J.C. and Wazer Hasan, A. J. C.*) *IQBAL NARAIN v. MT. JAGRANS*.

1 O. W. N. 847 : 10 O. & A. L. R. 1285.

—O. 9, R. 4—Application to sue as pauper—Dismissal for default—Fresh application. *MAUNG AUNG TUN v. MA E. KIN*. 76 I. C. 785 : 1924 Rang. 161 (1).

—O. 9, R. 8—Absence of pleader or party—Procedure.

If a plaintiff does not appear either in person or by pleader who has instructions to go on with the suit, then the suit should be dismissed under O. 9, R. 18 and the remedy of the aggrieved party is to apply for review or get the dismissal set aside. (*Macleod, C. J. and Crump, J.*) *PANDURANG VEDURAM v. MOHAN CHHATRA BHAY*.

83 I. C. 178.

—O. 9, R. 8—Appeal—Claim partly rejected. 75 I. C. 7.

—O. 9, R. 8—Dismissal for default—Prior adjournments by Court—Discretion.

Where a Deputy Collector has three times adjourned a case on account of want of time, it is all the more necessary that he should show some consideration to litigants. Where no kind of consideration was shown to the parties and the dismissal of a suit was induced by the desire merely to get rid of the case, the order of the lower court should be set aside and the case remanded for trial on the merits. (*Fremantle, S. M. and Burn, J. M.*) *AJODHYA PRASAD v. RAM PHUL KURMI*. L. R. 5 A. 222 (Rev.)

—O. 9, R. 9—Decree—Dismissal of suit—Appeal if any.

After a decree has once been made in a suit the suit cannot be dismissed unless the decree is reversed on appeal. The parties have on the making of the decree acquired rights or incurred liabilities which are fixed unless or until the decree is varied or set aside. (*Lord Phillimore*.) *LACHMI NARAIN MARWARY v. BALMAKUND*.

1924 P. C. 198 : 20 L. W. 491 :

35 M. L. T. (P. C.) 143 : L. R. 5 P. C. 171 :

26 Bom. L. R. 1129 : 22 A. L. J. 990 :

5 Pat. L. T. 623 : 40 C. L. J. 439 : 1 O. W. N. 629 :

10 O. & A. L. R. 1033 : 5 I. A. 321 :

81 I. C. 747 : 47 M. L. J. 441.

—O. 9, R. 9—Dismissal for default—Restoration—Power of Court—Several defendants.

Owing to the non-appearance of the plaintiff on the day fixed for the hearing of a suit, it was dismissed. Subsequently on plaintiff's application it was restored as against some of the defendants against whom the plaintiff wanted to prosecute the suit. Subsequently the Court of its own motion ordered the restoration of the suit as against the other defendants also. *Held*, that the order passed without any application on the part of the plaintiff and beyond the period of limitation was wholly *ultra vires*. (*Pullan, A. J. C.*) *SYED SHAM SHAD MEHDI v. MAHBUB KHAN*.

10 O. & A. L. R. 898 : 80 I. C. 75 (1)

11 O. L. J. 573:

C. P. CODE (1908), O. 9, R. 9.

—O. 9, R. 9—Execution proceedings—Applicability to—Execution sale—Petition to set aside—Dismissal for default—Application under O. 9, R. 9 to restore application—Maintainability.

O. 9, R. 9, Civil Procedure Code, does not apply to orders passed in execution proceedings. *Held*, that a petition for setting aside an execution sale which has been dismissed for default cannot be restored on an application made under O. 9, R. 9. (*Jackson, J.*) *KAJLURI SWAMI v. SRE RAJAH CHINTALAPATI SOORYANARAYANA RAZU BAHADUR GARU*.

20 L. W. 192 :

1924 M. W. N. 672 : 1925 Mad. 126 :

81 I. C. 841 : 47 M. L. J. 269.

—O. 9, R. 9—Leave to sue in *forma pauperis*—Dismissal of application for default—Fresh application if barred. *See* C. P. CODE, O. 33, R. 15. 40 C. L. J. 188.

—O. 9, R. 9—Action under. If different from O. 17, R. 2. *See* C. P. CODE, O. 17, R. 2.

78 I. C. 340.

—O. 9, R. 9 and 13—Appearance by pleader—Pleader reporting no instructions—Dismissal for default—Restoration.

On the day on which a suit was posted for hearing the plaintiff's pleader appeared and stated he had no instructions. Thereupon the Court dismissed the suit. *Held*, that the dismissal of the suit under the above circumstances, was a dismissal for default and that an order restoring the suit by the court was rightly passed. When a pleader appears and says he has no instructions he intends to inform the court that he had no instructions to conduct the case either wholly or partially ; in other words he tells the court that though he has filed an appearance he does not propose to appear for his client. It is a contradiction in terms to hold that a person who says he does not appear does in fact appear. 30 M. 274 followed. (*Venkatasubba Row, J.*) *ARUNACHALA GOUNDAN v. KATHA GOUNDAN*.

20 L. W. 795 :

82 I. C. 107 : 1924 M. W. N. 835 :

1924 Mad. 842 : 47 M. L. J. 514.

—O. 9, R. 9—Adjournment allowed on paying costs—Non-payment of costs on that day—Dismissal of suit—Propriety.

The plaintiff applied for an adjournment and he was ordered to pay Rs. 5 as costs. The amount was not paid that day and later in the day the judge dismissed the case for non-payment of costs. *Held* the dismissal was improper and plaintiff should have been given time to deposit the amount of costs. (*Suhrawardy, J.*) *DELARUDDIN HALDAR v. DEOLAR BUN MOLLA*.

78 I. C. 125.

—O. 9, R. 9—Dismissal for default—Sufficient case—Pleader sent for when case called.

When a case was called up, plaintiff's pleader was in the bar room and his clerk went to call him. By the time the pleader came the case had been dismissed for default. *Held* it was proper case for restoration. (*Wazir, Hasan, A. J. C.*) *KHWAJA KARAMAT ALI v. HARDUWAR PANDE*.

78 I. C. 123 (2) : 11 O. L. J. 243 : 1924 Oudh. 405.

C. P. CODE (1908), O. 9, R. 9.

—O. 9, R. 9—*Dismissal for default—Setting aside—Not for sufficient ground but as a matter of grace—propriety of.*

An order dismissing a suit for default should not be set aside as a matter of grace, when the court finds no sufficient cause shown for non-appearance. (Wallace, J.) MANIKAM PILLAI v. MANUDAM BATTUMOND.

20 L. W. 829 : 47 Mad. 819.

—O. 9, R. 9—*Dismissal of suit for default—Application for Restoration—Noncontesting defendants—Compromise by some of the parties—Effect of.*

Several Plaintiffs brought a suit for setting aside a decree in a partition suit and other incidental reliefs. Some of the plaintiffs compromised the case. The remaining plaintiffs applied for an adjournment of the case and the application was rejected and the suit was dismissed for the default both against the petitioners, who were the contesting defendants and other defendants who remained *ex parte*. An application for restoration of the case was refused and on an appeal against the order of refusal to which the non-contesting defendants were not made parties, the appellate court directed the suit to be restored between the plaintiffs and the contesting as well as the non-contesting defendants. On an application to revise the order of the Lower Appellate Court held that its order was wrong in so far as it purported to put the non-appearing defendants back on the record. Under O. 9, C. P. Code an application for restoration should be made so as to bring the suit back as regards parties to the exact position in which it was when the suit was dismissed. After that, it is competent no doubt for a particular plaintiff or plaintiffs to apply to be dismissed from the suit or withdraw the suit and such an application can be made. There was no justification for letting out any plaintiff until first of all the costs of the present petitioners up to the date of the dismissal of the suit had been paid to them by those plaintiffs who proposed to continue the suit. Secondly, if the suit is to proceed by those plaintiffs only against the petitioners, it must be distinctly on the terms that any objections arising out of that new state of things must be capable of being raised by the present petitioners by an additional written statement if they so desire and must be dealt with in the course of the case. (Rankin and Mukherji, JJ.) KAILAS CHANDRA RAY v. HRIDAY CHANDRA DAS.

39 C. L. J. 367 : 1924 Cal. 814.

—O. 9, R. 9—*Ex parte decree—Application to set aside—Dismissal—Subsequent suit to set aside decree on the ground of fraud—If maintainable.*

Defendants obtained an *ex parte* decree in a money suit against plaintiff. Subsequently the plaintiff applied under O. 9, R. 13, C. P. Code to set aside the decree on the ground that he had been wrongly informed by his mukhtear of the date when the hearing was to take place. The Court disbelieved the plaintiff's case and dismissed the application. Subsequently plaintiff brought a suit against the defendant on the ground of fraud namely that the defendant and the plaintiff's mukhtear had fraudulently conspired to

C. P. CODE (1908), O. 9, R. 13.

keep the true date of hearing from the plaintiff and the suit was therefore decreed *ex parte*. Held, that the matter having been the subject of decision in the previous proceeding to set aside the *ex parte* decree, could not be reopened again in the suit. (Miller, C. J. and Mullick, J.) MAHABIR PRASAD CHOUDHURY v. CHHEDI SINGH.

1924 P. H. C. 155 : 81 I. C. 1035 : 1924 P. 769.

—O. 9, R. 9—*Ex parte decree—Order setting aside—Propriety of, if can be questioned on appeal.*

In the absence of any error, defect, or irregularity affecting the decision of the case, the propriety of an order setting aside an *ex parte* decree cannot be questioned on appeal. (Lindsay and Sulaiman, JJ.) BENAIR RAO v. PUTAN SINGH.

L. R. 5 A. 335 : 79 I. C. 69 : 1924 All. 929.

—O. 9, R. 9—*Ex parte suit—Duty of Court—Burden on plaintiff to prove his case.*

The fundamental principle of law is that the plaintiff when he comes to court, must prove his case to the satisfaction of the Court. His burden is not lightened because the defendant is absent ; on the other hand the responsibility is increased in one sense, for when a matter is heard *ex parte* in the absence of one of the parties who is not represented, it is the duty of Counsel to bring to the notice of the Court adverse as well as favourable authorities. (Mookerjee and Chotzner, JJ.) RAI SATYENDRA NATH SEN BHADUR v. NARENDRA NATH GUPTA.

39 C. L. J. 279 :

81 I. C. 867 : 1924 Cal. 806.

—O. 9, R. 9—*Party appearing after a few minutes.*

77 I. C. 901 (1).

—O. 9, R. 9—*Suit of minor dismissed for default—Fresh suit with new guardian.*

The provisions of O. 9, R. 9 cannot be nullified in the case of minor plaintiffs by changing the guardian ad-litem after the prior suit was dismissed for default. Where after a mortgagee had obtained a decree for sale against a Hindu father his minor sons first sued for partition free of the mortgage which they challenged as not binding and the same was dismissed for default, a subsequent suit for an injunction restraining the mortgagee from selling the properties is barred under O. 9, R. 9, as the cause of action in both suits is the same. What is meant by cause of action considered. (Kennedy, J. C. and Madgavkar, A. J. C.) VISHINDAS FATEHCHAND v. NARUMAL DHARAMDAS.

80 I. C. 985.

—O. 9, R. 13—*Applicability—Order dismissing application under O. 21, R. 100.*

Quaere if O. 9, R. 13 applies to an order dismissing for default an application under O. 21, R. 100 C. P. Code ? (Jwala Prasad, J.) THAKUR PRASAD LAL v. SUKHLAL SINGH.

5 Pat. L. T. 567 : 79 I. C. 598 : 1924 P. 698.

—O. 9, R. 13—*Application beyond time—Onus of proving knowledge.*

An applicant who seeks to have an *ex parte* decree set aside has to prove the application is within the time allowed by law. If he alleged that he did not know of the decree he will have to explain satisfactorily the circumstances which

C. P. CODE (1908) O. 9, R. 13.

led to the default. (*Campbell, J.*) *THE FIRM OF MAGHI MAL KHARAITI RAM v. THE FIRM GOPI RAM RAM CHAND.* 75 I. C. 1020 : 1924 Lah. 603.

— O. 9, R. 13—Application to set aside *ex parte* decree—If bars suit to set aside decree—Fraud. 1924 P. 241.

— O. 9, R. 13—Application to set aside *ex parte* decree—Date of acknowledgment—Proof of—Limitation. *MODE NARAIN SINGH v. BIKRAN SINGH.* 1924 P. 36.

— O. 9, R. 9, and 13—Dismissal of suit for default—Application to set aside dismissal—Dismissal—Fresh application if maintainable.

Although an application is called an application to restore the application to set aside the *ex parte* decree, which application had itself been dismissed for default, it really is an application to set aside the *ex parte* decree, and it may be treated as such. The application may be treated as an original application although no fresh parties are interested in the case. The proceeding is initiated by an application which has to be numbered as a separate miscellaneous case. But the application has to be made within 30 days of knowledge of the *ex parte* decree or dismissal for default. (*Walsh and Ryves, JJ.*) *PITAMBAR LAL v. DODEE SINGH.* 46 A. 319 : 22 A. L. J. 191. L. R. 5 A. 226 : 78 I. C. 358 : 1924 A. 503.

— O. 9, R. 13—*Ex parte* decree against firm—Setting aside—One of the partners not served—Effect—Lim. Act, Art. 164.

An *ex parte* decree passed against a firm after it had been served in the manner contemplated by O. 30. C. P. Code cannot be set aside on the application of a partner who alleges he was not duly served. Any application to set aside the decree must be made within the period of 30 days prescribed under Art. 164, Limitation Act.

It can never be said a decree against the firm is *ex parte* against one of the partners because he has not appeared. (*Macleod, C. J. and Shah, J.*) *ADIVEPPA SHIDLINGAPPA v. PRAGJI MOHANJI.* 26 Bom. L. R. 388 : 80 I. C. 773 : 1924 Bom. 366

— O. 9, R. 13—*Ex parte* decree against one defendant—Appeal by the other impleading the *ex parte* defendant—Application for setting aside—If maintainable. *MIRZA ABDULLAH BEG v. RAMZANKHAN.* L. R. 5 A. 8 : 79 I. C. 381 : 1924 A. 173.

— O. 9, R. 13—*Ex parte* decree against several defendants—Distinct but similar defence—Decree set aside as regards one—Effect.

An *ex parte* decree was passed against several defendants the defences being similar but distinct. One of them alone applied to set it aside and he succeeded. Held, it does not enure to the benefit of the other defendants. (*Kendall, A. J. C.*) *PITAM SHAH v. BHAG NATH.* 81 I. C. 520.

— O. 9, R. 13—*Ex parte* decree when justified—Suit disposed of on day fixed for arguments on a preliminary question—Legality of. 1924 Lah. 224.

C. P. CODE (1908) O. 9, R. 13.

— O. 9, R. 13—Final decree *ex parte*—Partition suit—Decree passed without notice to defendant—Setting aside. 77 I. C. 91.

— O. 9, R. 13—Application to set aside *ex parte* decree—Dismissal for default—Application for restoration dismissed—Appeal—If lies.

Under the C. P. Code there is no appeal provided for from an order dismissing an application which is for restoring an application for setting aside an *ex parte* decree. When O. 43 makes no provision for an appeal S. 151 cannot be resorted to as conferring a right of appeal. (*Sulaiman, J.*) *CHANDRA SAHAI v. DURGA PRASAD.* 79 I. C. 323.

— O. 9, R. 13—Application to set aside *ex parte* decree—Limitation—Delay—Power to excuse—Limitation Act, S. 5.

The High Court has power under the combined effect of S. 5 of the Limitation Act and S. 122 C. P. Code to apply the provisions of S. 5 of the Limitation Act to applications to set aside *ex parte* decrees. Consequently the rule framed by the High Court applying S. 5 of the Limitation Act to such applications is *intra vires*. (*Coutts Trotter, C. J. Ramesam and Wallace, JJ.*) *KRISHNA-MACHARIAR v. SRI RANGAMMAL.*

35 M. L. T. (H. C.) 43 : 20 L. W. 382 : 80 I. C. 877 : 1924 M. W. N. 682 : 47 Mad. 824 : 1925 Mad. 14 : 47 M. L. J. 409.

— O. 9, R. 13—*Ex parte* cases—Duty of Court to require proof from plaintiff.

Even if a case is heard *ex parte*, it is the duty of the Court to consider the interest of the absent party and not to pass a decree except on proof by the plaintiff that he is entitled to that decree. (*Newbould and Rankin, JJ.*) *MONMATHA KUMAR RAY v. JASODA LAL.* 28 C. W. N. 300 : 77 I. C. 551 : 1924 Cal. 647.

— O. 9, R. 13—*Ex parte* decree against a number of defendants—Setting aside of—Revision on behalf of some only—If competent.

Where an *ex parte* decree against a large number of defendants was set aside and the suits restored at the instance of a few of the tenants and the order of restoration is challenged by way of revision all the original defendants must be impleaded. (*Suhrawardy, J.*) *PROFULLA CANDRA GHOSE v. TARA CHAND GAIN.* 78 I. C. 132.

— O. 9, R. 13—*Ex parte* decree—Application to set aside—Appeal by another—Jurisdiction to hear application—Successor-in office if can declare predecessor's order as being without jurisdiction.

A suit for partition was instituted on 20-12-1918 against several defendants, among whom the present appellant was No. 4. Two of the defendants contested the suit, and on 22-2-1919 a preliminary decree for partition was made on contest against two of the defendants and *ex parte* against the others. The present appellant did not appear at

C. P. CODE (1908), O. 9, R. 13.

all in the first Court, and he was one of those against whom the decree was made *ex-parte*. On 17-12-1919 the first defendant alone preferred an appeal against the decree to the High Court and three days later *i.e.*, 20-12-1919 the appellant presented an application to the trial Court under O. 9, R. 13, C. P. C. The application was kept pending until after the disposal of the appeal preferred by 1st defendant. The appeal in the High Court was dismissed on 5-1-1912 as having abated by reason of the omission of the appellant to implead the legal representatives of one of the deceased respondents. The record was returned to the lower Court and on 8-4-1922 a petition of compromise between the plaintiff and the appellant was presented and in accordance therewith the court ordered that the suit should be restored to its original number as against defendant No. 4 in regard to three of the items in the suit. In making this order the Court proceeded on the compromise alone without any enquiry as to the causes which prevented defendant No. 4 from appearing at the trial. In July 1922 a different Judge succeeded and on 7-7-1922 he passed an order to the effect that the order of 8-4-1922 was made without jurisdiction because there was no longer any *ex parte* decree over which the Court had any control; that the order was a nullity and utterly void so that no proceedings to set it aside were necessary, and that the fact of its being made on contest as against the plaintiff could not convert it into a valid order. *Held* that the appellant had the right to make an application under O. 9, R. 13 at the time when he did make it, although an appeal had been preferred by another defendant; that the result of the appeal could not have been to rob the Court of its jurisdiction to make an order on the application of the appellant; that the order of the High Court dismissing the appeal as having abated was not a decree in which that of the lower Court was merged; that the order of the 8th April 1922 was an order within the jurisdiction of the Judge to make whether it was legal or otherwise; that the order must stand until proper steps were taken by the parties affected thereby to have it set aside; and that the subsequent order of 7-7-1922 should be set aside and the suit remanded for trial.

Per Mukerji, J. :—Where a defendant against whom an *ex parte* decree is passed applied under O. 9, R. 13 to set it aside and at the same time prefers an appeal from it, the original Court may proceed with the application not with standing the pendency of the appeal. When the *ex parte* decree has been confirmed or otherwise disposed of on appeal, the Court which passed the *ex parte* decree has no longer any power to entertain the application to set it aside even though the application was made before the appeal was filed. The same principle will hold good, even if the appeal has been preferred by a party other than the defendant against whom the decree was passed *ex parte*, provided the decree was one and indivisible. (*Walsley and Mukerjee, JJ.*) *KALIMUDDIN AHAMMED v. ESABAKUDDIN.* 39 C. L. J. 399 : 28 C. W. N. 795 : 51 Cal. 715 : 1924 Cal. 830.

—O. 9, R. 13—*Ex parte* decree—Setting aside—Grounds for.

C. P. CODE (1908), O. 11, R. 14,

A Court has no power to set aside an *ex parte* decree except on one of the grounds contemplated by O. 9, R. 13 C. P. C. 43 M. 94 followed. (*Waller, J.*) *GULLAPALLI KOTAYYA v. GORANTLA SUBBAYYA.* 20 L. W. 490.

—O. 9, R. 13—*Mortgage decree*—*Ex parte* against some and on the merits against others—It can be set aside as regards some only.

Where a mortgage decree is passed *ex parte* against some defendants and on the merits against others, the liability being joint, the decree cannot be set aside as against some only of the defendants under O. 9, R. 13. (*Dass and Ross, JJ.*) *RAGHUBAR CHOWDHURY v. RAMASRAY PRASAD CHOWDHURY.* 78 I. C. 408 (1) : 1924 P. H. C. G. 252 : 1924 P. 771.

—O. 9, R. 13—Party appearing soon after decree passed—Setting aside decree.

Where a suit is disposed of *ex parte* on account of the absence of the party or pleader at the time of hearing but later on the pleader turns up in the course of the same day, the court should after notice to the other party, restore the suit to file after imposing such conditions on the defaulting party as might meet the justice of the case. (*Macleod, C.J. and Shah, J.*) *SORABJI RUSTOMJI v. RAMJI LAL DEVJIBHAI.* 26 Bom. L. R. 321 : 80 I. C. 237 : 1924 Bom. 392.

—O. 9, R. 13—Wrong date given by Small Cause Court Bench Clerk—*Ex-parte* decree—Application to set aside decree refused—Order set aside in revision.

Where the Small Cause Court Bench clerk gave a wrong date to the petitioner (defendant) as that on which the case was fixed for hearing and an *ex parte* decree was passed in consequence.

Held, that the procedure in the Small Cause Court under which the clerk fixed date for cases which are ripe for hearing lends itself to such a misunderstanding as was alleged by petitioner and the *ex parte* decree should have been set aside and the High Court accordingly set aside the decree and ordered a re-hearing. (*Herald, J.*) *WAZIR CHAND v. B. M. BHARADWAZA.*

3 Bur. L. J. 34 : 1924 R. 271.

—O. 11, R. 14—Inspection of adversary's documents—Order permitting—Propriety—Condition—Notice to opposite party—Necessity—Partnership—Declaration of right as partner and taking of partnership accounts—Suit for—Inspection by plaintiff of alleged partnership accounts—Order permitting before commencement of trial—Inspection by employee in defendant's firm who had been won over by plaintiff—Revision—Interlocutory orders of court below—Interference with—Conditions.

Inspection by a party of his adversary's documents is not a matter of routine, but is to be permitted or refused only after a judicial decision not only as to the right to inspection itself but with reference also to the stage of the case at which such right is to be permitted and the right must be exercised so as to result in as little harm as possible to parties who are entitled to have the protection of the court in carrying on

C. P. CODE (1908), O. 11, R. 14.

their lawful pursuits. In a suit in which the two main contentions were (1) whether plaintiff was really a partner in 1st defendant's firm and trade and (2) whether he was therefore entitled to a taking of the partnership accounts, the defendant filed various lists of documents and produced various documents with an affidavit praying that the court should not allow inspection of any document by plaintiff without specific orders and without notice to him. Before the trial of the suit had begun the Court made an order without notice to the defendant allowing the plaintiff to inspect a number of documents produced by the defendant.

Held, in revision against the order of the Court below, that plff. could not be allowed unless and until he had established that he was a partner, to inspect any document which did not bear on the question of partnership, and that as regards documents which did bear upon it the court below must hear the defendant's objection before it passed its order.

Following on the order referred to above, the court below passed a further order permitting M, who had obtained a power of attorney from plaintiff, to inspect all the defendant's documents. M was employed in the defendant's firm for at least 20 years writing up and keeping the firm's accounts; he had left defendant and he actively reverted to plaintiff's side in the dispute between plaintiff and defendant; and he actively supported plaintiff and was ill-disposed towards defendant. M. was employed by the plaintiff for the purposes of inspection because of his exclusive and intimate acquaintance with the firm's business.

Held, in revision against the said order, that unless and until the plaintiff established his plea of partnership, inspection on his behalf by M could not be permitted and that such inspection as the lower court permitted must be by some one else. There would be no objection to an inspection, by M. after plaintiff established his plea of partnership.

Interference by the court in revision with proceedings of the lower court during the pendency of a suit are to be deprecated unless strong reasons are made out.

Interference in the present case was based partly on the ground that the lower court had not properly understood the provisions of O. 11, R. 14, Civil Procedure Code, and partly on the ground that the result of the orders of the Court below might be wholly unnecessary and irreparable damage to the defendant's business interests. (*Wallace, J.*) *RAMACHARI v. KRISHNAMACHARI*. 20 L. W. 533 : 1924 M. W. N. 863 : 47 Mad. 934 : 80 I. C. 604 : 1924 Mad. 846 : 47 M. L. J. 460.

———O. 11, Br. 14 & 21—Order for production of documents—Non-compliance with—Dismissal of suit.

O. 11, R. 21 of the C. P. Code does not justify the dismissal of a suit for non-compliance with

C. P. CODE (1908), O. 12, R. 6.

an order under O. 11, R. 14, C. P. Code, for production of documents 65 I. C. 661 diss. (*Krishnas and Waller, JJ.*) *SITHAMALLI SUBBAYYAR v. RAMANATHAN CHETTIAR*. 19 L. W. 355 : 34 M. L. T. (H.C.) 23 : 77 I. C. 766 : 1924 M. W. N. 340 : 1924 Mad. 582. 46 M.L.J. 350.

———O. 11, Rr. 18 and 21—Order of inspection—When to grant.

Under O. 11, R. 18 when a party applies to inspect documents in the pleadings or in a previous affidavit of documents and makes an affidavit for that purpose the Court ought not to make an order for inspection without giving the other side an opportunity of replying to the affidavit. In such a case, dismissal of suit for non-compliance with the terms of the order is not proper. (*Walsh and Ryves, JJ.*) *FIRM OF KEDAR NATH DURGA PRASAD v. FIRM OF BISHWANATH LAKSHMI CHAND*. I. R. 5 A. 225 : 22 A.L.J. 299 : 46 A. 417 : 1924 A. 510.

———O. 11, R. 21—Order for discovery—Non-compliance—When suit to be dismissed.

O. 11, R. 21, contemplates two orders being made : first, an order for the answer to the interrogatories or for the discovery or inspection of documents within a specified time ; and secondly, upon the failure to comply with such an order a further order dismissing the suit. The latter part of the order should not ordinarily be made unless the court is satisfied that the plaintiff is endeavouring to avoid giving a fair and proper discovery. (*Sanderson, C. J. and Richardson, J.*) *JAGANNATH MOTILAL v. BALA PRASAD ARJUNDAS*. 78 I. C. 859.

———O. 11, R. 21—Striking of defence—Order when to be passed.

No order should be passed against a party without allowing him a reasonable opportunity of being heard and adducing evidence in his favour. A suit for partition was taken up for hearing on 12-4-1923 after several prior adjournments granted at the instance of one or other of the parties. On that date the defendant was absent and the plaintiff being ill applied for one month's time. The Court on that date passed an order as follows: "Put up on 14-4-1923 for disposal *ex parte*" The defendants appeared on the 14th April and proved that they should be allowed to defend the suit. The Court rejected their prayer examined the plaintiff and passed an *ex parte* preliminary decree. *Held* that the Court erred in making an order on 12th of April 1923 depriving the defendant of his right to defend the suit. The Court had no statutory authority to take such a disciplinary measure and there was no question of exercise of the inherent jurisdiction of the Court. (*Mookerjee and Chotzner, JJ.*) *RAT SATVENDRA NATH SEN BAHADUR v. NARENDRA NATH GUPTA*. 39 C.L. J. 279 : 81 I.C. 867 : 1924 Cal. 806.

———O. 12 R. 6—Judgment on admissions—When to be passed. 1924 Cal. 190.

C. P. CODE (1908), O. 13, Rr. 1 and 2.

—O. 13, Rr. 1 and 2—*Filing of documents—Late stage—Admission in evidence.*

O. 13, R. 1, C. P. Code makes it obligatory on the parties to produce all their documentary evidence at the first hearing of the suit. O. 13, R. 2 provides that no documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with O. 13, R. 1, C.P. Code shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof. But the fact that a document sought to be admitted in evidence at a late stage is a public document is a good cause for relaxing the stringency of the rule. (*Mitter, C. J. and Mullick, J.*) MT. TAIBUNNISA BEGAM v. JAGDIP PANDEY. 2 Pat. L.R. 1.

78 I. C. 489 : 1924 P. 517.

—O. 13, R. 4—*Documentary evidence—How to be exhibited in a suit—Defect in procedure.*

Under O. 13, R. 4, C.P.C. it is provided that a presiding judge shall endorse with his own hand a statement that a document proved or admitted in evidence was proved against or admitted by the person against whom it was used. Unless such procedure is followed, the documentary evidence for the Secretary of State as well as for the objector, cannot be regarded as having been legally brought on the record. (*Broadway and Fford, JJ.*) SECRETARY OF STATE v. SHRIMATI SARLA DEVI.

5 Lah. 227 : 79 I. C. 74 : 1924 Lah. 548.

—O. 14, R. 1—*Issues—Framing of—Duty of Court.*

It is the function of courts to frame the necessary issues although on an application for issues parties are heard. (*Schwabe, C. J. and Wallace, J.*) MANAMAL KORU KUTTY v. VALIAKATHODEYIL AHAMAD. 78 I. C. 1.

—O. 14, R. 1—*Issues—Framing of.*

Issues are framed not only with reference to the pleadings but also with reference to statements made at the time they are framed. (*Krishnan, J.*) DEVARAJULU NAIDU v. KONDAMMAL. 80 I. C. 929 : 20 L. W. 754.

—O. 14, R. 1—*Issues—Scope of—Power of Court.*

O. 14, C. P. Code does not limit the Court framing issues to the matters set out in the pleadings. (*Burn, J. M.*) KAMTA SIROMAN PRASAD SINGH v. BIPAT KURMI. L. R. 5 O. 121.

—O. 14, Rr. 1 and 3—*Practice—Court's duty—Raising points.*

The Courts should confine themselves to the dispute between the parties and not go out of their way to raise fanciful points which are not raised by the parties themselves. (*Walsh, J.*) LALA LACHMAN PRASAD v. MAJJU. 1923 A. 187.

—O. 16, R. 1—*Duty of court—Summoning of witnesses.*

Under O. 16, R. 1 a party has an absolute right to summon witnesses and so long as he pays the necessary expenses to insist that their attendance shall be enforced. The only case in which the

C. P. CODE (1908), O. 17, Rr. 2 and 3.

court has power to refuse to issue summons is, where the application is not made *bona fide* or where in the exercise of its inherent powers to prevent the abuse of its own process it is necessary to refuse to issue the summons. The fact that whether the party originally undertook to bring the witnesses or applied late for issue of summons does not affect the duty of the Court. (*Abdul Raouf and Moti Sagar, JJ.*) PRITAM SINGH v. SOBHA SINGH. 75 I. C. 866 : 1924 Lah. 647.

—O. 16, R. 1—*Summons to witnesses—Rights of parties.*

A party is entitled as of right to summonses to witnesses. But if an application is made at such a late stage that the witnesses cannot be present, the court may refuse to adjourn the case for their attendance, but has no power to refuse to issue summons. (*Moti Sagar, J.*) SARDARI LAL v. MOHAR SINGH. 79 I. C. 143.

—O. 17—*Provisions of—Liberal construction.*

The provisions of O. 17, C. P. Code should be liberally construed, particularly as there is latitude given to the trial court to make any such order as it thinks fit, in lieu of an order of dismissal. (*Kinkhede, A. J. C.*) AYODHYA PRASAD v. THE SECRETARY OF STATE. 79 I. C. 123 : 1924 Nag. 298.

—O. 17, Rr. 1 and 2—*Defendant absent but pleader present—No action by pleader—Nature of decree passed.* MOTILAL RATANCHAND v. NANDRAM DALPATRAM. 82 I. C. 124 : 1924 Bom. 139.

—O. 17, R. 2—*Action under—If different from O. 9.*

There is no valid distinction between action under O. 9 and O. 17, R. 2. The latter provision refers back to O. 9 and gives their court permission to decide the case in one of the ways prescribed. (*Daniels, J. C.*) RAMASHAR DAT SINGH v. MAHARAJA JAGIT SINGH. 78 I. C. 340.

—O. 17, Rr. 2 and 3—*Applicability of—Absence of plaintiff on adjourned day—Dismissal of suit—Effect of.*

Where a plaintiff realising the weakness of his case absented himself on the day fixed for hearing and let the suit be dismissed for default, the decision is one under O. 9, R. 3, C. P. C. even though the Court purported to act under O. 17, R. 3 and the decision does not bar a fresh suit. (*Dalal J.C. and Neave A.J.C.*) SYED MD. HASAN v. SYED ALI HYDER. 10 O. & A. L. R. 1239 : 1 O. W. N. 803.

—O. 17, Rr. 2 and 3—*Day of hearing—Summonses not served—Adjournment.*

Where the record shows that the summonses reached the destination before the date of hearing but the witnesses were not found, the non-appearance of the witnesses could not be said to be due to the delay in the application for summoning them and the party must not be punished with the dismissal of his suit for default. (*Wazir Hasan, J.C.*) DHANI RAM v. GAYA SINGH. 10 O. & A. L. R. 864.

C. P. CODE (1908), O. 17, R. 2.

———O. 17, R. 2—*Dismissal for default—Application for restoration—Duty of Court.*

When the plaintiff is absent on a date to which the suit is adjourned, and the suit is dismissed for default an application for restoration must be decided by the court on the merits of the allegations in the affidavit. The fact that plaintiff consented to pay Rs 300 demanded by deft. for setting aside the order of dismissal, does not entitle the court to surrender its jurisdiction. (*Wazir Hasan, A. J. C.*) *MANNI LAL v. SHEO SARAN.*

10 O. & A. L. R. 136 : 27 O. C. 103 :
11 O. L. J. 412 : 78 I. C. 157 : 1924 Oudh 389.

———O. 17, R. 2—*Hearing—If includes interlocutory applications.*

Quære whether the term "hearing" in O. 17, R. 2 extends to occasions when interlocutory applications are being dealt with? (*Lord Phillimore.*) *LACHMI NARAIN MARWARY v. BALMUKUND MARWARY.*

35 M. L. T. (P. C.) 143 : 20 L. W. 491 :
L. R. 5 P. C. 171 : 26 Bom. L. R. 1129 :
22 A. L. J. 990 : 5 Pat. L. T. 623 : 81 I. C. 747 :
40 C. L. J. 439 : 1 O. W. N. 629 :
10 O. & A. L. R. 1033 : 1924 P. C. 198 :
L. R. 51 I. A. 321 : 47 M. L. J. 441.

———O. 17, Rr. 2 and 3—*Non-attendance of party on adjourned hearing—Application of the rule—Disposal on merits not contemplated.*

When one of the parties fails to appear on the date to which the case is adjourned, the case falls under O. 17 rule 2 and must be disposed of under one of the modes directed under O. 9. O. 17, R. 3 does not apply to such a case and it cannot be considered to have been disposed of on the merits. (*Neave, A. J. C.*) *PUTTU LAL v. MUSSAMMAT CHHUTKO.*

10 O. W. N. 636 :
10 O. & A. L. R. 1040.

———O. 17, Rr. 2 and 3—*Suit—Absence of party on date of hearing—Disposal on merits—Legality of—Application for rehearing of the case.*

Where on the date of hearing of a suit a party was not present in Court, the Court is bound to proceed under O. 17, R. 2, C. P. Code and it cannot proceed under O. 17, R. 3, C. P. Code. It can only adjourn the suit or dispose of the suit under O. 17, R. 2, C. P. Code. A court must be presumed to have passed such an order as it ought to pass, whatever section it may have quoted in its order. Where on the date fixed for hearing of the case a party absents himself the Court cannot by an adjudication on the merits prevent him from applying to set aside the *ex parte* order. Where a person entitled to apply for a rehearing of the case puts in an application for the purpose and the Court rejects an application for that purpose, the High Court is entitled to set it aside in revision. The action of the lower court amounts to a refusal to exercise a jurisdiction vested in it by law. (*Mukerji and Dalal, J.*) *RAM ADHIN v. RAM BHARDOE.*

L. R. 5 A. 740 :
22 A. L. J. 1041.

———O. 17, R. 2—*Order dismissing suit after decree is without jurisdiction.*

In a partition suit the Court made an order dismissing a party from the array of defendants. On an appeal from this order, the suit was compromised and the suit was remitted to lower

C. P. CODE (1908), O. 17, R. 3.

Court for further action. On a day fixed by lower Court for this purpose the plaintiff did not appear and thereupon the Court dismissed the suit apparently under O. 17, R. 2.

Held, that O. 17, R. 2 did not apply that there could be no dismissal after decree and that the order was made without jurisdiction and was rightly set aside by the High Court. (*Lord Phillimore.*) *LACHMI NARAYAN MARWARY v. BALMAKUND MARWARY.*

35 M. L. T. (P. C.) 143 :
20 L. W. 491 : L. R. 5 P. C. 171 :
26 Bom. L. R. 1129 : 22 A. L. J. 990 :
5 Pat. L. T. 623 : 40 C. L. J. 439 : 1 O. W. N. 629 :
10 O. & A. L. R. 1033 : L. R. 51 I. A. 321 :
1924 P. C. 198 : 81 I. C. 747 : 47 M. L. J. 441.

———O. 17, Rr. 2 & 3—*Suit adjourned for appointing guardian—Dismissal for default—Propriety of.*

An adjournment of a suit for appointing a guardian *ad litem* is not an adjournment for the hearing of the suit, and hence on the adjourned date if the plaintiff is absent, the Court has no jurisdiction to dismiss the suit for default. (*Dass and Ross, JJ.*) *BALMAKUND RAM MARWARY v. MADHO PRASHAD.*

5 Pat. L. T. 424 :
78 I. C. 224 (2) : 1924 P. H. C. C. 215 :
1924 P. 714.

———O. 17, R. 3—*Action under—When taken—Remedy.*

Action should be taken under O. 17, R. 3 when an adjournment has been granted at the instance of a party and the Court has materials on the record to proceed with the suit. The decision is one given on the merits and the remedy of the aggrieved party is to appeal. (*Daniels, J. C.*) *RAMESH DAT SINGH v. MAHARAJA JAGJIT SINGH.*

78 I. C. 340.

———O. 17, R. 3—*Adjournment granted to plaintiff—Default on adjourned date—Disposal of matter on record—If regular.*

Where after the evidence in a case was complete, the case was adjourned for argument to a particular date at the request of the plaintiff and on that date he was absent and the Judge decided the case on the materials on record, the procedure is quite regular. He was not bound to proceed under O. 17, R. 2.

Per Abdul Raoof, J. : If there was any irregularity, it was covered by S. 99, C. P. Code. (*Broadway and Abdul Raoof, JJ.*) *JHANDA SINGH v. SADIQ MAHOMED.*

5 Lah. 218 : 78 I. C. 453 :
1924 Lah. 545.

———O. 17, R. 3—*Applicability of—Process fee paid within adjourned day—Omission to serve witnesses—Procedure.*

1924 Lah. 272.

———O. 17, R. 3—*Applicability—Non-production of document ordered by Court—Plaint if can be rejected. See C. P. CODE, O. 7, R. 18.*

76 I. C. 254.

———O. 17, R. 3—*Order directing plaintiff to furnish copy of document in a non-Court language—Failure to comply—Effect—Power to dismiss suit.*

There is no statutory provisions compelling the plaintiff to furnish the deft. with copies of documents in any particular language and where a

C. P. CODE (1908), O. 17, R. 3.

Court orders such a thing the order is wholly without jurisdiction. A dismissal of the suit for non-compliance with the direction is bad and cannot be justified under O. 17, R. 3. (*Mullick and Bucknill, JJ.*) DEBI LAL v. JAI PRAKASH NARAIN SINGH. 75 I. C. 1.

———O. 17, R. 3—*Presence of party—If amounts to appearance—Scope of rule.*

The mere presence of a party in Court is sufficient to constitute appearance within the meaning of O. 9, C. P. Code. 23 Bom. 414, Foll. O. 17, R. 3 requires a decision on the merits. 23 All. 462, Foll. (*Baker, J. C.*) ONKAR v. KAMAL CHAND. 1924 Nag. 26.

———O. 18, R. 2—*Written arguments—Judgment.* 77 I. C. 398 : 1924 Lah. 107.

———O. 18, R. 5—*Deposition of witness—Not read over to him—Admissibility of deposition in subsequent trial for perjury—Evidence Act, Ss. 80 and 91.*

Under O. 18, R. 5, C. P. Code, it is necessary that the deposition of a witness in an appealable case, in order to bind him to the statement recorded therein, should be read over to him. This provision is mandatory and not directory. The omission to do so renders the deposition inadmissible in evidence against him on his subsequent trial for perjury. S. 91 of the Evidence Act excludes oral evidence of its contents. 6 C. 762 ; 12 C. W. N. 845 ; 36 C. 955 ; 42 C. 240, Foll. 45 C. 825 not foll. (*Suhrwardy and Cuming, JJ.*) EMPEROR v. NABAB ALI SARKAR. 51 C. 236 : 25 Cr. L. J. 1027 ; 81 I. C. 803 : 1924 Cal. 705.

———O. 20, R. 2—*Rule if mandatory—Judgment written by predecessor—Ceasing to be a Judge—Effect.*

O. 20, R. 2 is not mandatory and a Judge may, if he sees reason to do so, refuse to pronounce a judgment written by his predecessor. The pronouncement of a judgment is the last act of the trial of a suit and is a material part of the trial. It is not an act which can be performed by any other person than a Judge of the Court in which the suit was tried.

Where, however, the predecessor in office had ceased to exercise judicial functions, his order is a nullity. (*MacColl, J. C.*) MAUNG BA v. MAUNG YE. 1924 B. 358.

———O. 20, R. 3 and O. 21, R. 2—*Judgment—Decree—Application for certificate of satisfaction.*

A decree though drawn up subsequent to the day on which judgment was delivered, must bear the date of the judgment and a certificate of satisfaction of the decree between the date of the judgment and the date when the decree was actually drawn up is valid. (*Pearson and Graham, JJ.*) GIRIBALA DAS v. BISWAMBHAR HOLDAR. 40 C. L. J. 87 : 82 I. C. 746 : 1924 Cal. 1064.

———O. 20, R. 3—*Recalling.*

Court cannot recall order duly made in exercise of inherent jurisdiction save on review or under S. 152. (*Das and Ross, JJ.*) RAMCHARAN SINGH v. JANGBAHADUR SINGH. 5 Pat. L. T. 631 : 79 I. C. 900 : 1924 P. 696.

C. P. CODE (1908), O. 20, R. 14.

———O. 20, R. 4—*Judgment of Small Cause Courts—Reasons for—Practice.* MAUNG SA v. MA U MA. 76 I. C. 600.

———O. 20, R. 10—*Maintenance—Suit for value of grain—Form of decree.*

Where a maintenance holder brings a suit to recover the value of the grain which under a *Karar* the defendant was bound to pay but which he failed to pay, O. 20, R. 10 does not apply and the Court is not bound to decree in the first instance payment in grain and in the alternative its money value. (*Prideaux, A. J. C.*) BEONAJEE v. MT. SARASWATI. 1924 Nag. 176.

———O. 20, R. 12—*Mesne profits—Ascertainment of—Nature of proceedings—Interest on profits.*

An application for ascertainment of mesne profits is not under the new C. P. Code an application in execution but is a part of the suit and in continuation thereof. The right to apply for mesne profits will arise either when the delivery of possession is actually given or three years expire from the date of the preliminary decree. An application to ascertain mesne profits would be governed by Art. 181 of the Lim. Act. (*Jwala Prasad, A. C. J. and Kulwant Sahay, J.*) HARAKHPAN MISSIRIF v. JAGDEO MISSIRE. 1924 P. H. C. 265 : 5 Pat. L. T. 626 : 1924 P. 781.

———O. 20, R. 12—*Mesne profits (future) awarded by preliminary decree for possession—Application for ascertainment of—Maintainability—Res judicata—Prior execution petitions praying for same relief—Dismissal of, but not on merits—Effect.*

A preliminary decree for possession of immoveable property awarded mesne profits subsequent to suit. On an application filed by plaintiff under O. 20, R. 12, C. P. Code for ascertainment of those profits, held that the same was not barred by *res judicata* by reason of the fact that the plaintiff had previously filed execution petitions for ascertainment of those profits under the erroneous impression that they were to be ascertained in execution and that that those petitions were dismissed either because of plaintiff's laches or because he did not press that relief.

After the passing of a preliminary decree the dismissal of an application not on the merits, but owing to say, non-appearance of the plaintiff or laches on his part, cannot result in the dismissal of the suit itself. (*Phillips and Venkatasubba Rao, JJ.*) MANTINA RAMACHANDRA RAJU v. SRI RAJA MANTRIPRAGODA BHUJANGA RAO. 19 L. W. 69 : (1924) M. W. N. 115 : 79 I. C. 635 : 33 M. L. T. 261 (H. C.) : 46 M. L. J. 46 : 1924 Mad. 473.

———O. 20, R. 14—*Pre-emption decree—Costs not directed to be deposited—Effect.* 26 O. C. 345 : 1924 Oudh 104.

———O. 20, R. 14—*Pre-emption decree—Pre-emptor when acquires the rights of the vendee.*

A pre-emptor's right to or in the property accrues only when he has complied with the

C. P. CODE (1908), O. 20, R. 15.

conditions laid down in the decree and paid the purchase money into Court, and it is then only that the property vests in him. A successful pre-emptor is vested with the rights of the vendee not from the date, of the sale but from the date on which he enforces his rights, *i.e.*, from the date on which he satisfies the conditions of the decree. Where at the date of the sale, the defendant's right of pre-emption in respect of the land purchased was equal to that of the plaintiff, the suit must fail. (*Martineau and Moti Sagar, JJ*) NADIR ALI SHAH v. WALI. 5 Lah. 486.

— O. 20, R. 15—*Suit for taking the accounts of a dissolved partnership—Decree in favour of defendant.*

A decree can be passed in favour of a defendant in a suit for the taking of partnership accounts under O. 20, R. 15, C. P. Code, if it turns out that on taking accounts there is a balance due to the defendant instead of to the plaintiff. (*Dauids and Neave, JJ*) RAM CHARAN v. BULAQI. 22 A. L. J. 783 : L. R. 5 A. 563 : 1924 All. 854 (2).

— O. 21, R. 1—*Payment into Court—Notice to other party.*

Payment of money into Court under a decree must be notified to the decree holder in writing and served on him in the way prescribed for service of summons. (*Kinkhede, A.J.C.*) BALIRAM v. GHASIRAM. 81 I. C. 1001.

— O. 21, R. 1 (b)—*Payment to attaching creditor of decree-holder—Effect.*

Payment to an attaching creditor of a decree-holder is not payment to a decree-holder under O. 21, R. 1 (b) as the former is not a decree-holder within S. 2 (3), C. P. Code. (*Mukerji, J.*) RAM BADAN SINGH v. CHAUDHRI RAM PARGASH SINGH. 80 I. C. 947 : L. R. 5 A. 629

— O. 21, R. 2—*Adjustment not certified—Effect.* 1924 Mad. 189.

— O. 21, R. 2—*Uncertified adjustment—Power of Court to take cognizance.* 10 O. & A. L. R. 119 : 77 I. C. 337 : 1924 Oudh 208.

— O. 21, R. 2—*Adjustment uncertified—Suit for declaration lies.*

O. 21, R. 2 only states that in execution court cannot recognise an adjustment which is not certified but it can be recognised by a Court trying the matter as a regular suit and a declaration that the decree has been satisfied can be given. (*Moti Sagar, J.*) BISHEN SINGH v. MAHINDER SINGH. 1926 Lah. 54

— O. 21, R. 2—*Application for certification—Limitation for—Execution of decree barred.*

Although no time is provided within which an application for certification of payments towards a decree must be made, such an application cannot be made after the period of limitation for execution has expired and the decree has become time-barred. A time-barred decree cannot be revived by a subsequent application under O. 21, R. 9, C. P. Code, for certification of intermediate payments which would bring the case within

C. P. CODE (1908), O. 21, R. 2.

limitation. (*Daniels, J.C.*) MT. JAMWANTI v. MT. MOHAN DEI. 10 O. & A. L. R. 72 : 11 O. L. J. 379 : 79 I. C. 799 : 1924 Oudh 892.

— O. 21, R. 2—*Application to record adjustment—If to be written or signed.*

An application to record adjustment need not be written nor signed by the decree-holders. (*Baker, J.C. and Hallifax, A.J.C.*) MT. PERABAI v. CHAWANI PRASHAD. 1924 Nag. 185.

— O. 21, R. 2—*Certificate of payment—Statement of payment in execution petition—Sufficiency of—Limitation.*

A statement in an execution application of money having been paid by the judgment-debtor is not such a certificate of payment as is contemplated by O. 21, R. 2, C. P. Code, and has not the effect of saving limitation for execution. O. 21, R. 2, C. P. Code, clearly contemplates a formal proceeding consisting of two steps, first an application by the decree-holder informing the Court of the payment, and secondly, a formal order of the Court recording the payment. This proceeding must be separate from and prior to the execution proceeding in which it is desired that the payment should be recognised. Though no period of limitation has been prescribed for an application by the decree-holder to certify, the intention of the law appears to be that the payment should be certified within a reasonable time of its being made. It is primarily the decree-holder's duty to certify. If he fails to do so, O. 21, R. 2 (2) allows the judgment-debtor to inform the Court of the payment within 90 days. (*Daniels and Neave, JJ.*) BRIJ NATH v. PANNA RAI. 22 A. L. J. 581 : L. R. 5 A. 348 : 46 A. 635 : 83 I. C. 737 : 1924 A. 706.

— O. 21, R. 2—*Decree-holder certifying payment—Whether a step in execution—Previous application after three years from date of decree is no bar to a subsequent application after certification.*

Where the decree-holder applied for execution in 1919 and no subsequent steps were taken till 21st October, 1922 and the decree became time barred, and in December 1922, the petitioner applied for certifying payments made before 3 years, and it was contended that an application to certify payment is not a step in execution and it does not lie after a decree is time barred. *Held*, relying on authority 20 Cal. L. J. 131, and 46 C. 22, that an application made by decree-holder to certify payments made within 3 years from the dates of such payments. (Limitation Act, S. 181) will afford the decree holder a fresh starting point for limitation within the meaning of Art. 182 (5), Lim. Act. (*Godfrey, J.*) MAUNG LAW SAN v. MAUNG PO THEIN. 2 Rang. 393 : 1925 Rang. 26.

— O. 21, R. 2 and O. 34, R. 3—*Mortgage decree—Adjustment—Fresh decree need not be drawn up.*

O. 21, R. 2, C. P. Code, applies to mortgage decrees also. 11 N. L. R. 16, Ref. But the C. P. Code nowhere contemplates that each time an

C. P. CODE (1908), O. 21, R. 2.

adjustment is arrived at between the parties a fresh decree must be drawn up or the original decree modified. In almost every case where any payment in satisfaction of a decree is made, the original decree no longer represents the rights of the parties. 17 N. L. R. 66 Ref. (*Baker, J.C.*) *DULICHAND v. GOSWALAL*. 30 N. L. R. 122.

—O. 21, R. 2—Payment out of Court—Form of certification.

An application for execution certifying payments already made amounts to certifying under O. 21, R. 2, which a Court is bound to take notice of. There is no particular form under O. 21, R. 2, in which a decree-holder must certify payment nor is there any rule as to the time within which or the manner in which it should be done. (*Moti Sagar, J.*) *FATTU v. NANAK CHAND*. 1924 Lah. 676.

—O. 21, R. 2 and O. 32, R. 6—Payment to one of several decree-holders—Decree if satisfied—Payment certified but not recorded—Recognition of, by executing Court—Decree in favour of manager and minor members of a joint Hindu family—Payment to manager—Leave of Court not obtained—Effect of.

Payment to one of several joint decree-holders will not be a satisfaction of the decree, even in part, unless the payee is an agent of the others entitled in law to receive the whole amount on their behalf or the distinct share of each of the joint decree-holders was determined and known. 31 M. L. J. 93 relied on. Where a decree has been passed jointly in favour of the manager of a joint Hindu family and certain minor co-parceners represented by the manager as next friend, a payment to the manager, although made and certified, cannot be recognized by the Court executing the decree unless leave of the Court had been obtained for such payment under O. 32, R. 6. Civil Procedure Code 36 M. 295 applied.

Under O. 21, R. 2, Civil Procedure Code, a payment to be recognised by the Court executing the decree does not require to be both certified and recorded. It is enough if it is certified or recorded. (*Wallace, J.*) *PITCHAKKUTTIYA PILLAI v. DORAISWAMI MOOPANAR*. 82 I.C. 588 (2); (1924) M.W.N. 815; 47 M.L.J. 498.

—O. 21, R. 2—Promise by judgment-debtor to discharge debt of decree-holder—Failure to pay—If satisfaction can be recorded.

A judgment-debtor promised to discharge some debts of the decree-holder and thereupon the latter gave a receipt that the decree had been cancelled. The former defaulted in discharging debts, but applied to have satisfaction entered up under O. 21, R. 2. *Held*, the Court would be justified in refusing to record satisfaction. (*Jackson, J.*) *GANGADARA MUDALIAR v. EKAMBARA MUDALIAR*. 20 L. W. 849.

—O. 21, R. 2 (3)—Adjustment out of Court—Not certified—Fraud—Effect of.

O. 21, R. 2 (3) is intended to exclude recognition of any payment or adjustment of a decree out of court if there has been an omission to certify the payment. The rule only raises a presumption to start with that what is not certified has not been paid. But it is still open to the judgment-debtor to assert and prove that the claim

C. P. CODE (1908), O. 21, R. 15.

under the decree has been discharged. The court is not deprived of its jurisdiction to try the plea of payment under S. 47. (*Wazir Hasan, J.C.*) *SURAJ NARAIN MISRA v. ULAND SINGH*. 10 O. & A. L. R. 375; 78 I. C. 776; 10 W. N. 218.

—O. 21, R. 2 (3)—If mandatory—Adjustment not certified—Fraud—If can be gone into in execution—Estoppel.

An uncertified adjustment though it may have been due to the fraud of decree-holder cannot be recognised by an execution Court, the provision of O. 21, Rr. (2) (3) being mandatory. The general principle of estoppel cannot override its provisions. (*Kennedy, J. C. and Raymond, A. J. C.*) *MOTOOMAL v. TEOMAL*. 79 I. C. 89.

—O. 21, Rr. 10, 11 and S. 39—Decree transferred for execution—Execution application necessary.

After a decree is transferred to another Court for execution, the decree holder must apply regularly under O. 21, Rr. 10 and 11 in order to set the law of execution in motion. (*Kinkhede, A. J. C.*) *SULTAN ALI v. BALAJI*. 1924 Nag. 413.

—O. 21, R. 11 (1) & (2) and O. 19 R. 2 (1)—Execution petition—Verification by person other than decree-holder—Legality of.

An execution petition signed and verified by a person other than the decree-holder but who is acquainted well with the facts of the case is valid. It is not necessary that the verification should be made in open court or after obtaining the permission of the court thereupon. (*Newbould and Ghose, JJ.*) *KHARARIA MIJAZILLA ZEMINDARI SYNDICATE, LTD. v. OMED SHEIKH*. 28 C. W. N. 687; 80 I. C. 313, (1); 1924 Cal. 811.

—O. 21, R. 11 (2)—Adjustment—Omission to mention in execution application—Effect of.

The deliberate omission to mention in an execution application an adjustment which is subsisting though it could be avoided in law, is a circumstance which vitiates the application. (*Baker, J.C. and Hallifax, A. J. C.*) *MT. PERABAI v. BHAGWANI PRASHAD*. 1924 Nag. 185.

—O. 21, R. 11 (2)—Decree for money—Payment by instalments—Discretion of Court.

It is clearly the intention of the law that debtors should be compelled to pay their just debts, but it is not reasonable to compel them to do so by means which will deprive them of their means of livelihood if there is available an alternative method of enforcing payment which will be reasonably fair to the creditor. Where the debtor owed the respondent about Rs. 500, the Court directed payment by monthly instalments of Rs. 100. (*Heald, J.*) *THOMAS A. CHAPPLE v. MAMSA BROTHERS*. 3 Bur. L. J. 97; 82 I. C. 827 (2); 1926 Rang. 33.

—O. 21, R. 15—Joint decree—Execution by one decree-holder—Reservation of rights of others—Purchase by decree-holder—Effect.

One of several mortgage decree-holders executed his portion of the decree reserving the rights of the others and purchased the property

C. P. CODE (1908), O. 21, R. 15.

himself. *Held*, it enured to the benefit of all of them. (*Sulaiman, J.*) *KHUB CHAND v. TODAR MAL.* 1924 A. 813.

—O. 21, R. 15—Execution—Decree burnt—How to be proved. *See* DECREE, 77 I. C. 258.

—O. 21, R. 16—Applicability—Award filed in Court. 1924 Cal. 117.

—O. 21, R. 16—Assignment of decree—Transferee by operation of law—Assignment of lands together with arrears of back rents—Subsequent decree for back rents—Right of assignee to execute.

An assignment of a decree not by operation of law, to be valid must be in writing and a transferee under an oral assignment has no *locus standi* to execute the decree. Transferees by operation of law ordinarily would be legal representatives of the deceased decree-holder or the official assignee in the case of insolvent debtor or the purchaser of a decree at a court sale or a minor succeeding to the estate which was in the hands of an executor and other instances where there is a vesting of interest by operation of the statute. A person to whom a party agrees to transfer a decree that may be passed in a suit is not a transferee within O. 21, R. 16, C. P. Code. A transfer of the property during the pendency of the suit does not entitle the purchaser to apply for the execution of the decree, unless he has taken steps to have his name substituted in the suit in the place of his vendor and O. 21, R. 16, does not apply to such a case. An assignment of properties with all its back or future rents does not enable the assignee to execute a decree for rent subsequently obtained by the landlord when the decree itself has not been assigned. (*Mukerjee and Walmsley, JJ.*) *MATHURAPUR ZEMINDARY CO., LTD. v. BHASARAM MANDAL.* 28 G. W. N. 626; 39 G. L. J. 373; 51 Cal. 703; 80 I. C. 881; 1924 Cal. 661.

—O. 21, R. 16—Assignment of decree—Application for recognition—Judgment-debtor—Failure to object—Effect.

The failure of a judgment-debtor to object when an application is put in for the recognition of an assignment of the decree bars him from raising such objection at a later stage. (*Mukherjee and Dalal, JJ.*) *DWARKA DAS v. MUHAMMAD ASHFAGULLAH.* 22 A. L. J. 928; 80 I. C. 722; L. R. 5 A. 744.

—O. 21, R. 16—Benamidar—Right to execute—Decree for money against several persons—Meaning of. *NANHELAL v. MANGILAL.* 1924 Nag. 41.

—O. 21, R. 16—If mandatory—Notice—What amounts to—Application during pendency of execution—Effect of.

Where an order for substitution was passed in the presence of the transferors and the debtors, no notice is necessary. O. 21, R. 16 requires notice of the application for execution and not of the assignment to be given to the transferor and the judgment-debtor and therefore where assignee applies during the pendency of an execution case to continue it, he does not apply for fresh execution and no notice is required.

The provisions of R. 16 are mandatory and non-compliance renders proceedings in execution

C. P. CODE (1908), O. 21, R. 20.

void. (*Adami and Bucknill, JJ.*) *MT. BHAGWANTA KOER v. ZAMIR AHMED KHAN.* 5 Pat. L. T. 451; 78 I. C. 766; 3 Pat. 596; 1924 P. 576.

—O. 21, R. 16—Provisions of, mandatory—Notice to transferors—Necessity for.

The provisions of O. 21, R. 16 C. P. Code are mandatory and notices under the rule should be issued to the transferors and judgment-debtors. Non-compliance with O. 21, R. 16, C. P. Code renders all the proceedings in execution void. (*Adami and Bucknill, JJ.*) *BHAGWANTA KOER v. ZAMIR AHMED KHAN.* 1924 P. H. C. C. 221; 2 Pat. L. R. 249.

—O. 21, R. 16—Purchaser of property covered by decree—Assignment not recognized by Court—Locus standi to intervene in execution proceedings

A decree-holder assigned some of the properties covered by the decree to a stranger and then applied to execute his decree without impleading his assignee. Against the order in execution the assignee appealed. *Held*, he had no *locus standi* to appeal, as he had not got his assignment recognised by Court under O. 21, R. 16, C. P. Code. (*Macleod, C. J. and Shah, J.*) *VITHAL LAXMAN NAIK v. MAHADEV RAGHUNATH.* 26 Bom. L. R. 333; 1924 Bom. 426.

—O. 21, R. 16 and 2—Transfer of decree—Proof of uncertified payment.

When an application is made to the Court under O. 21, R. 16 C. P. Code, it must be made to the Court which passed the decree and not to the Court executing the decree, so that proof can be given of any uncertified payments. The judgment-debtor is entitled in resisting the application to plead that the debt was satisfied. (*Macleod, C. J. and Shah, J.*) *GANPAYA NARNAPPA v. KRISHNAPPA ANNAYA.* 26 Bom. L. R. 491; 80 I. C. 423; 1924 Bom. 394.

—O. 21, R. 16—Transfer by operation of law—Assignment if necessary. 2 Pat. L. R. 27; 1924 Oudh 343.

—O. 21, R. 16—Second proviso—Applicability of, to mortgage decrees.

The second proviso to O. 21, R. 16, Civil Procedure Code, has no application to mortgage decrees for sale, 43 M. L. J. 761 distinguished. 14 C. L. J. 639, 642; 27 C. L. J. 110 relied on. (*Wallace and Jackson, JJ.*) *RAJARATHNA NAIDU v. RAMACHANDRA NAIDU.* 20 L. W. 465;

35 M. L. T. (H. U.) 81; 1924 M. W. N. 747; 82 I. C. 948; 47 Mad. 948; 47 M. L. J. 434; 1924 Mad. 901 (1).

—O. 21, R. 19—Applicability—Pre-emption decree—Costs if can be set off. *NILAKANTH v. MAHABIR SINGH.* 26 O. C. 345; 1924 Oudh 104.

—O. 21, R. 20—Mortgagee of property—Execution of money decree—Substantial injury.

Where a property subject to a mortgage is sold for a money decree and the mortgagee applies under O. 21, R. 90, to have the sale set aside, he cannot be said to have incurred any substantial injury as his rights are not in any way affected, and he cannot maintain the application. In such cases there need not be direct evidence connecting the material irregularity with substantial injury; it is enough if the court is satisfied the latter is the

C. P. CODE (1908) O. 21, Rr. 22 and 23.

result of the irregularity. (*Foster, J.*) EKNATH PANDEY v. SINGESWAR NATH CHOUDHURY,
5 Pat. L. T. 250 : 76 I. C. 168 :
1924 P. 785.

——— O. 21, Rr. 22 and 23—Execution of decree—Attachment without notice. 1924 Oudh 120 (1).

——— O. 21, R. 22—Notice—When necessary—Object of. 1924 P. 111

——— O. 21, Rs. 22 and 90—*Limitation Act, Articles 166 and 181—Execution sale without notice under O. 21, R. 22, where such notice is necessary—Sale, void and not merely voidable—Application to set aside a void execution sale, governed by Article 181 of the Limitation Act and by Article 166—Failure to give notice under O. 21, R. 22, whether an irregularity in publishing or conducting the sale within the meaning of O. 21, R. 90.*

In cases where notice under O. 21, R. 22, of the Code of Civil Procedure has not been issued and omission is not due to the fact that sub-rule (2) has been applied, but to the fact that notice was not asked for, sales held in execution are void and not merely voidable as against the persons to whom notice should have been, but was not issued, 45 M. 875 and 45 M. L. J. 413 overruled. 42 C. 72 : 44 C. 954 followed, 25 B. 337 and 14 C. 18 distinguished.

Where a sale in execution is void as against a party, an application to set it aside, under S. 47 of the Civil Procedure Code or otherwise is governed by Art. 181 of the Limitation Act and not by Art. 166. 43 M. 313 approved.

Per Chief Justice and Wallace, J.—The failure to give notice of an application for leave to attach and sell under O. 21, R. 22 of the Civil Procedure Code is not an irregularity in publishing or conducting the sale within the meaning of O. 21, R. 90 of the Code (*Schwabe, C. J., Ramesam and Wallace, JJ.*) RAJAGOPALA IYER v. RAMANUJA CHARIAR.
47 Mad. 288 : 46 M. L. J. 104 :
19 L. W. 179 (F. B.) : (1924) M. W. N. 182 :
80 I. C. 92 : 34 M. L. T. (H. C.) 37 :
1924 Mad. 431

——— O. 21, R. 28—*Applicability of—Takavi, advances—Proceedings for realisation of—Sale of rent alleged to be due to tenant from sub-tenant—Objection by sub-tenant that rent had already been paid—Dismissal for default—Suit for realisation by purchaser—Maintainability of.*

In certain proceedings for realisation of a takavi loan advanced to a tenant, certain rent alleged to be due to the tenant from his sub-tenant was attached by court. The sub-tenant objected to the attachment on the ground that the rent had already been paid and there was nothing due to the tenant, but his objection was dismissed for default. The arrear of rent was then sold by auction and purchased by the plaintiff. In a suit by the plaintiff against the sub-tenant for recovery of the rent, the sub-tenant again pleaded that he had already paid up the rents and nothing was due. Held that there was no warranty of title in the sale held by the government for arrears of takavi, that the dismissal of the sub-tenant's objection did not operate as *res judicata*

C. P. CODE (1908), O. 21, R. 46.

in the subsequent suit for recovery of the rent and that the objection of the sub-tenant was not an objection to the attachment under O. 21, R. 53 of the C. P. Code and his present defence was not shut out by reason of his omission to bring a declaratory suit within the year prescribed by O. 21, R. 63 C. P. C. (*Mukerji, J.*) SOBHA RAM v. RAM PRASAD.
L. R. 5 A. 263 (Rev.) :
1924 All. 910.

——— O. 21, R. 29, s. 151—Stay of execution on ground of fraud. 1924 P. 88,

——— O. 21, R. 30—Decree for money—Attachment when necessary. 1924 P. 258 (1).

——— O. 21, R. 33—Decree for restitution of conjugal rights—Detention of females in jail. 75 I. C. 24.

——— O. 21, R. 33—Decree for restitution of conjugal rights—Failure to comply with—Effect. MT. AMER BIBI v. NUR MAHOMED.
1924 Lah. 244.

——— O. 21, R. 33—*Direction that wife should not be imprisoned—If can be interfered with.*

Where a court in passing a decree for restitution of conjugal rights expressly directs the wife is not to be imprisoned if she does not comply with the decree, an appellate court should not ordinarily interfere with the direction. (*Daniels, J.*) DHARINEE HAJJAM v. MT. PIARI.
1924 All. 836.

——— O. 21, Rr. 43, 53 and 78—Money—If moveable property. 1924 Rang. 21.

——— O. 21, R. 46—*Attachment of debt—Order on garnishee to pay—Refusal—Distraint—Right to levy.*

The judgment-debtor was interested along with several others in a fixed deposit of Rs. 6,000 held by a Bank. The interest of the judgment-debtor was attached under O. 21, R. 46, C. P. C. and the Bank was ordered to pay into Court the amount due under the decree, viz., Rs. 1,142 It was represented on behalf of the Bank that the money could not be paid until the fixed deposit receipt was produced; and further that the share of the judgment-debtor had not been ascertained. The Munsif however, overruled those objections and directed the Bank to pay the money due and on the Bank's failing to comply, the Court issued a goods warrant for distress of that Bank's moveable property. There had been no determination of the respective shares of the persons interested in the fixed deposit with the Bank. Held, that the Court should, in the first instance, have satisfied itself as to the actual amount of the share of the judgment-debtor. The next step would be to appoint a Receiver to recover the debt either by production of the fixed deposit receipt or by suit against the Bank if the deposit receipt were not forthcoming. There is no authority in law for the action of the Munsif in directing the Bank to pay the decretal amount into Court in the circumstances as set forth. There is similarly no legal warrant for the order of distraint. (*Barton, R. M.*) THE IMPERIAL BANK OF INDIA v. CHINNASAMI NAIDU.
2 Mys. L. J. 9 (B. and C.).

C. P. CODE (1908), O. 21, R. 46.

—O. 21, R. 46—Breach of contract—Right to sue for damages—If a debt.

The right to sue for damages for breach of contract is not a debt within O. 21, R. 46, as there is no sum certain due, (*Raymond, A. J. C.*) *GORDHANDAS KALIDAS v. FIRM OF GOKAL KHATAOO.* 78 I. C. 409.

—O. 21, R. 46 (1) (3)—Garnishee's option—Jurisdiction of executing court to order deposit or to attach and sell—Proper procedure.

Under O. 21, R. 46 (3) of the C. P. Code a debtor prohibited under cl. (1) of sub-rule (1) may pay the amount of his debt into court and such payment shall discharge him as effectually as payment to the party entitled to receive the same. The wording a debtor "may" pay is quite clear and unambiguous and leaves no manner of doubt as to the meaning of the Legislature. It does not clothe the executing Court with any power to compel the garnishee to deposit the debt into Court if he denies it and informs the Court to that effect. An executing court is not bound to satisfy itself as to the existence of the debt. It can still cause it to be sold or appoint a receiver with garnishee to recover the debt from him. 13 W. R. 40; 11 B. 448; 28 A. 262 Ref. (*Kin Khede, O. A. J. C.*) *PANNALAL v. MT. BHAGIRATHIBAI.*

20 N. L. R. 11 : 78 I. C. 601 : 1924 Nag. 98.

—O. 21, R. 46—Garnishee—Attaching decree holder—Rights of.

Attaching decree-holders cannot by means of the attachment stand in a better position as regards the garnishee than the judgment-debtors did ; in other words the decree-holder could only obtain what the judgment-debtor could honestly give him, (*Ghose, J.*) *AMARENDRA NATH SAHA v. S. BANERJEE & Co.* 40 C. L. J. 228 : 1924 Cal. 1068.

—O. 21, Rr. 46 and 89—Simple mortgage—Attachment of—Moveable property—Execution sale—Setting aside.

A simple mortgage deed is "moveable property" not only for purposes of attachment in execution and but also for the purposes of sale O. 21, R. 89 of the C. P. C. (relating to setting aside of sale of immoveable property) has no application to sale of mortgage. (*Walsh, A. C. J. and Boys, J.*) *LAL UMRAO SINGH v. LAL SINGH.*

22 A. L. J. 840 : 80 I. C. 890 : 1924 All. 796.

—O. 21, R. 52—Order under—Nature of.

An order under O. 21, R. 52 as to the way in which money is to be paid between various claimants is not an administrative order but a judicial one, binding on all the parties (*Suhrawardy and Graham, JJ.*) *JITENDRA NATH SAMANTA v. ASUTOSH DEY.* 82 I. C. 240.

—O. 21, R. 53—Adjustment out of Court.

Adjustment between the judgment-debtors in decree sought to be attached and person attaching such decree is not prohibited but only that between judgment-debtors and decree-holders in the decree sought to be attached. (*Das and Ross JJ.*) *RAMCHARAN SINGH v. JANGBAHADUR SINGH.* 5 Pat. L. T. 621 : 79 I. C. 900 : 1924 P. 698.

C. P. CODE (1908), O. 21, R. 57.

—O. 21, R. 54—Prohibitory order—Service of—Proof—Loss of records.

In execution of a decree certain property was attached on 25-4-1916 by means of a prohibitory order under O. 21, R. 54, C. P. Code. Subsequently on 20-6-1916 the property was privately sold. Thereafter the attached property was sold in court auction and purchased. It was found that the prohibitory order was duly served on the judgment debtors but that portion of the record of court which would show whether the service was affected in the prescribed manner had been destroyed. Held that the court should presume that official acts were regularly performed and in view of the fact that a material portion of the record was not in existence, the burden of proving due service of notice ought not to be thrown on the Court auction purchaser. (*Daniels and Neave, JJ.*) *MAHOMED ABDUL GAFOOR KHAN v. AKRAM HASAN.*

22 A. L. J. 703 : L. R. 5 A. 525 : 1924 All. 747.

—O. 21, Rr. 54 and 58—Usufructuary mortgagee—Attachment of property by money decree-holder—Procedure.

If a money decree-holder attaches property of his debtor in the hands of a usufructuary mortgagee, the attachment has to be raised if an application under O. 21, R. 58 is filed ; but if he intended to attach only the equity of redemption, the attachment is valid to that extent. (*Suhrawardy and Page, JJ.*) *MAHARAJ BAHADUR SINGH v. NOSHARAN BIBI.* 80 I. C. 428.

—O. 21, R. 57—Applicability of—Attachment before judgment.

O. 21, R. 57, C. P. Code applies only to cases attachment in execution of a decree and has no application to an attachment before judgment. 33 C. 639, 643 dist ; 42 M. 1 dissented. (*Sulaiman and Kanhaiyalal, JJ.*) *BOHRA AKHEY RAM v. BASANT LAL.* 22 A. L. J. 823.

—O. 21, R. 57—Attachment—Execution—Struck off—Effect on attachment. 76 I. C. 895.

—O. 21, R. 57—Dismissal of application—Effect on attachment before judgment.

O. 21, R. 57, C. P. Code, does not apply to attachment before judgment but its operation is confined to attachments in execution of a decree. O. 38 R. 9 of the C. P. Code provides as to how and when the attachment before judgment is to cease. (*Sulaiman and Kanhaiya Lal, JJ.*) *BHOREY AKHEY RAM v. BASANT LAL.*

L. R. 5 A. 605 : 80 I. C. 106 : 1924 A. 860.

—O. 21, R. 57 and O. 38, Rr. 8 & 11—Attachment before judgment—Decree subsequently passed in the suit—Execution of the decree—Dismissal of execution petition owing to default of decreeholder—Attachment ceases.

Held (by the majority of the Full Bench, *Coults Trotter, Ramesam and Waller, JJ.*, *Schwabe C. J.* and *Wallace, J.* dissenting) : Where a party obtained an attachment before judgment and subsequently a decree was passed in his suit, if his execution petition is dismissed for want of due diligence in presenting the necessary papers to the Court the attachment of the property ceases.

C. P. CODE, (1908) O. 21, R. 57.

The provisions of O. 21, R. 57 apply to attachment before judgment which become converted into attachment in execution when application is made to execute the decree passed in the suit.

An attachment before judgment becomes an attachment in execution when an application for executing the decree is made and admitted. 42 M. 1 : overruled. 44 M. 902 : 41 M. L. J. 256 followed.

Held by Schwabe, C. J. and Wallace, J. : The provisions of O. 21, R. 57 do not apply to cases of attachments before judgment.

Per Wallace, J. An attachment before judgment under O. 38 of the Civil Procedure Code only comes to an end by a formal order withdrawing it. (*Schwabe, C. J. Coutts Trotter, Ramesam, Wallace and Waller, JJ.*) MEYYAPPA CHETTIAR v. CHIDAMBARAM CHETTIAR. 46 M. L. J. 415 :

34 M. L. T. (H. C.) 118 : (1924) M. W. N. 392 : 79 I. C. 144 : 47 Mad. 483 : 1924 Mad. 494. (F. B.).

—O. 21, R. 57—*Default—What is—Execution proceedings struck off—Request by decree holder—Attachment if continues.*

The word "default" in O. 21, R. 57 is not restricted to default of appearance but applies also to a failure to do what the decree holder is bound to do. Where he failed to carry on the execution proceedings and had them struck off, the attachment ceases. (*Scott Smith and Zafar Ali, JJ.*) LAKHPAT RAI v. MAYYA MAL. 1924 Lah. 645

—O. 21, R. 58—*Application by party against whom suit is dismissed—Appeal if lies.*

Where a defendant against whom a suit is dismissed puts in an objection petition under O. 21, R. 58 and that is dismissed he is entitled to appeal against the order, as the petition is one under S. 47 though actually put in under O. 21, R. 58. (*Moti Sagar, J.*) MT. GAURAN v. CHANDU LAL. 1924 Lah. 589.

—O. 21, R. 58—*Claim case—Jurisdiction to try suit after sale is held.* MT. PUHUPDEI KUAR v. RAMCHARITAR BARTI. 1924 P. 76

—O. 21, Rr. 58 and 63—*Claim petition—Dismissal for default—Power of court to restore.*

Where a claim preferred under O. 21, R. 58, C. P. Code is dismissed on account of the non-appearance of the claimant, the court has power to restore it to the file. O. 21, R. 63, C. P. Code does not take away the right of the party to have the order of dismissal for default set aside. (*Venkatasubba Rao, J.*) RAMAPPA CHETTIAR v. EKAMBARA PADAYACHI. 47 M. L. J. 13 :

34 M. L. T. (H. C.) 309 : 19 L. W. 685 : (1924) M. W. N. 479 : 47 Mad. 651 : 79 I. C. 818 (1) : 1924 Mad. 715.

—O. 21, R. 58—*Mortgage—Prior and subsequent—Prior mortgagee taking also a subsequent mortgage—Suit by puisne mortgagee—Sale—Claim by prior mortgagee.*

A person mortgaged his properties first to X then to Y and then again to X. X obtained a final decree for sale on his earlier mortgage impleading Y and pending the same Y obtained a final decree for sale in a suit in which X has been

C. P. CODE (1908), O. 21, R. 63.

impleaded in his capacity of subsequent incumbrancer. When Y applied for execution X objected setting up his prior mortgage rights. *Held* the objection was not one under S. 47 but under O. 21, R. 58 as by a stranger and it could not be taken in respect of a decree for sale on a mortgage. (*Hallifax, A. J. C.*) GANGARAM v. KANHAILAL. 80 I. C. 626.

—O. 21, Rr. 58 and 62—*Mortgagee in possession—Claim—Objection to attachment—Dismissal—Suit to establish mortgage right.*

O. 21, R. 58, C. P. Code corresponding to S. 278 of the old code refers to claim or objections regarding attached property on the ground that the property is not liable to attachment. Where a mortgagee in possession intervened by way of claim to an attachment of the property in execution and asked that his mortgage should be proclaimed at the time of sale but did not apply for withdrawal of the attachment. *Held* that the dismissal of his objection did not render it obligatory on the mortgagee to sue for declaration within one year and that he could sue to enforce his mortgage or resist any attempt to dispossess him on the strength of his mortgage. (*Daniels, J. C.*) BISHESHWAR v. CHANDRIKA PRASAD. 11 O. L. J. 240 : 1924 Oudh 384.

—O. 21, Rr. 58 and 63—*Claim or objection—Dismissal without investigation—Subsequent suit to establish title—Limitation—Leave to withdraw claim or objection with liberty—Effect of grant of.*

The period of limitation for a suit to set aside an order under O. 21, R. 63, C. P. Code is one year, even if that order was passed without any investigation or consideration of the merits of the claim or objection. Where the claim or objection was withdrawn with liberty to institute fresh proceedings, there is no adverse order under O. 21, R. 63, C. P. Code to necessitate a suit within one year 41 M. 985 (F. B.) : 45 C. 785 foll. 14 M. L. R. 66 dist. (*Baker, J. C. and Halifax, A. J. C.*) CHITNAVIS v. NATH SAO. 20 N. L. R. 106 : 7 N. L. J. 170 : 79 I. C. 1002 : 1925 Nag. 2.

—O. 21, Rr. 60 and 63—*Attachment—Revival of—Decree in claim suit.* 76 I. C. 617.

—O. 21, R. 62—*Failure to notify charge—Effect.* MIRZA EWAZ ALI BEG v. MT. BARI. 10 O. & A. L. R. 23.

—O. 21, R. 62—*Mortgagee in possession—If can claim to remove attachment.*

A mortgagee in possession of property can apply under O. 21, R. 58 to have an attachment removed under O. 21, R. 60, as rule 62 contemplates only the case of a mortgagee not in possession. (*Daniels, J. C.*) RAGHUNANDAN v. AJODHIA PRASAD. 10 O. & A. L. R. 185 :

11 O. L. J. 239 : 81 I. C. 648 (2) : 1924 Oudh 404 (1).

—O. 21, R. 63—*Claim Suit—Benami Transaction—Burden of Proof.*

Ordinarily it will be for a party who sets up that a particular transaction is not real but benami to make out his case. But where there was a

C. P. CODE (1908), O. 21, R. 63.

claim petition which had been decided and a regular suit is brought to set aside the order thereon it is for the plaintiffs in that suit—the defeated claimant, to establish his ownership. (*Venkatasubba Rao, J.*) MODADUGU PERAYYA v. PEROLI VENKAYAMMA. 47 M. L. J. 14 : 19 L. W. 627 : 34 M. L. T. 201 : 79 I. C. 899 : 1924 Mad. 770 (H. C.).

———O. 21, R. 63—Attachment—Objections to—Dismissal of claim without investigation. 1924 Rang. 42.

———O. 21, R. 63—Attachment—Removal of—Ex parte order—Effect. MA THEIN TIN v. MA HTOO. 75 I. C. 322.

———O. 21, R. 63—Claim petition withdrawn—Order of dismissal—Propriety of—If an order agitated claimant.

Where a claim petition is withdrawn the proper order is to record "withdrawn" on it and not to dismiss it. Such an order need not be challenged by means of a suit within one year. (*Coutts Trotter and Ramesam, JJ.*) GADE LAKSHMINARASAMMA v. NARUGOTLA PYDANNA. 80 I. C. 233.

———O. 21, R. 63—Claim petition—Dismissed as too late for enquiry—Notification of claim directed—If an adverse order—Plea if can be agitated in collateral suit.

When a claim petition is dismissed as filed too late for enquiry, and the claim is directed to be notified, it is an adverse order to the claimant and should be challenged by suit. Where no such suit is filed within one year, the claimant cannot re-agitate the question of title in a suit filed by the parties, though within one year. (*Madhavan Nair, J.*) RAMALINGAPPA v. ALLUM NARAYANAPPA. 82 I. C. 737.

———O. 21, R. 63—Object and scope of suit.

The suit under O. 21, R. 63 contesting the order on a claim petition has been variously described as a plaint for the review of a summary decision, a continuation of the claim proceeding and a form of appeal in the guise of an original suit. (*Kinkhede, A. J. C.*) KHAIRULLA v. SETH DHANRUPMAL. 80 I. C. 905.

———O. 21, R. 63—Parties to suit—judgment debtor.

A judgment debtor must be impleaded in a suit under O. 21, R. 63. (*Kinkhede, A. J. C.*) KHAIRULLA v. SETH DHANRUPMAL. 80 I. C. 905.

———O. 21, R. 63—Suit under—Claim proceedings—Costs of—Power of court.

A court deciding a suit under O. 21, R. 63 of the C. P. Code, has no power to order payment to the successful party the costs of the proceedings under O. 21, R. 53, C. P. Code. (*Devadoss, J.*) NAMBI VEETIL RAMAN NAYAR v. ATHIVARATH VALAPPIL PARAND RAMAN MENON. 20 L. W. 557 : 1924 M. W. N. 157 : 35 M. L. T. 106 (H. C.).

———O. 21, R. 63—Suit under—Proof of title.

Appellant sued to establish her title to certain property in respect of which her claim had been

C. P. CODE (1908), O. 21, R. 66.

disallowed. *Held* on the evidence in the case that the appellant had proved her title to the house as real owner and that the attachment of the property as that of her paramour was invalid. (*Kinkhede, A. J. C.*) MT. SUNDAR v. BABU LAL. 7 N. L. J. 9.

———O. 21, R. 63—Suit for declaration of title—Burden of proof.

Where a party who is defeated in claim proceedings sues for a declaration of title under O. 21, R. 63, the onus is on him to prove the validity of the transaction on which his title is based. (*Prideaux, A. J. C.*) MT. SARASWATIBAL v. YADORAO. 1924 Nag. 240.

———O. 21, R. 63 and 103—Unsuccessful objector must sue within a year—Otherwise he is estopped even as defendant.

Where the summary order contemplated by O. 21, rules 63 and 103 is not over-ruled in a regular suit brought within a year it becomes conclusive and binding on all persons who were parties to it, or their successors-in-title and they are thereafter precluded from asserting their rights even as defendants. 22 Bom. 640 Foll. (*Raymond and Madgavkar, A. J. C.*) AZIZULLAH KHAN v. GHULAM HUSSEIN. 80 I. C. 994 : 1924 S. 97 : 17 S. L. R. 63.

———O. 21, R. 66 and 90—Execution sale—Setting aside—Statement of value of the property in sale proclamation—Valuation given by both parties inserted in sale proclamation.

Cases can be conceived when the court might rightly consider that the value of the property as stated by both parties should be mentioned though it is generally desirable that the Court should attempt to arrive at a fairly accurate value of the property to be mentioned in the sale proclamation in order to enable bidders to judge of the nature and value of the property.

A Court is justified in stating both values instead of attempting itself to value the property when the property was one that it was most difficult to value accurately and to hold an enquiry would have further delayed proceedings which the Judgment-debtors were obviously attempting to obstruct by every means in their power. When there is no evidence that any one was misled or deterred from bidding by the insertion of a low valuation in the sale proclamation the applicants could not have sustained substantial injury by reason of the alleged irregularity. (*Newbould and Ghose, JJ.*) BEJOY SINGH DUDHURIA v. ASHUTOSH GOSSAMI. 28 C. W. N. 552 : 1924 Cal. 589.

———O. 21, R. 66—Incorrect valuation in sale proclamation—Remedy of aggrieved party.

Where a sale proclamation contains an incorrect valuation, the aggrieved party can apply to have the sale set aside, if substantial injury results as a consequence of the incorrect entry but an appeal does not lie against the order inserting the value. (*Oldfield and Devadoss, JJ.*) AVUDAINAYAGAPPA PILLAI v. SUNDARANANDAN PILLAY. 76 I. C. 173 : 19 L. W. 585 : 1924 Mad. 767.

———O. 21, R. 66—Notice for setting sale proclamation—Failure to appeal—Effect—Estoppel. 1924 F. 111.

C. P. CODE (1908), O. 21, R. 66.

—O. 21, R. 66—*Notice—Service of—Failure to appear at settling of sale proclamation—Undervaluation—If can object to.*

Where a judgment debtor though notified as to the date of settling the sale proclamation fails to turn up and the court fixes the value at the figure mentioned by the other party he cannot subsequently complain of the valuation being fixed too low.

Where notice could not be personally served affixure to the house door followed by notice by registered post is sufficient. (*Walmsley and Mukerji, JJ.*) DEBI PRASAD BHAKAT v. NAGENDRA KUMAR NAG. 78 I. C. 727.

—O. 21, R. 66—*Order under—Appeal if and when lies.*

If the determination of a question under O. 21, R. 66 is also an order passed under S. 47, e. g., there had been a judicial adjudication as to the boundaries binding on parties in a subsequent proceeding and finally determining the rights of the parties, an appeal lies against the order. (*Pearson and Graham, JJ.*) DEVENDRA NATH BASU v. KAILASH CHANDRA KALU. 80 I. C. 861.

—O. 21, R. 66—*Property sold subject to mortgage—Entry in sale proclamation—Basis of—Effect.*

Entries in the sale proclamation of the existence of encumbrances may be based on an action of court under O. 21, R. 62 or on the basis of a report from the Registration office. Either way the auction purchaser is bound and he is affected by the notice conveyed thereby (*Wazir Hasan, J. C.*) SANT BUX v. NADIR MIRZA. 81 I. C. 1013 : 10 O. & A. L. R. 1046.

—O. 21, R. 66—*Sale of house—Plan if necessary for sale proclamation.*

Proceedings under Order 21, Rule 66 of the Civil Procedure Code are ministerial proceedings. The Court has to determine what were the properties to be sold and what were the encumbrances on the same. Any decision come to in those proceedings cannot operate as *res judicata* on the very point raised in a regular suit later on (*Mukherjee, J.*) TOTA RAM v. GOURI SHANKAR. 78 I. C. 582 : L. R. 5 A. 218 : 1924 A. 480.

—O. 21, R. 66—*Setting sale proclamation—If a purely ministerial act.* 1924 Mad. 234 :

75 I. C. 901 : 46 M. L. J. 71.

—O. 21, R. 66—*Sale of house—Plan if necessary for sale proclamation.*

In the sale proclamation of a house, a plan of the same is not one of the materials required by law to be incorporated therein (*Kendall, A. J. C.*) THAKUR NARINDAR BIKRAMJI SINGH v. SETH SUKHEHAN LAL. 80 I. C. 667 (1) :

10 O. & A. L. R. 934.

—O. 21, R. 71—*Execution sale—Parties to contract of—Court conducting sale—Position—Deposit of 25 per cent. required by—Failure to make—Re-sale on account of deficit at—Bidder's liability for—Bidder acting as agent, but not communicating fact to Court or—Nuzir—His liability in case of Contract Act, S. 230 Cls. (1) and (2)—Applicability—Mode of enforcing bidder's liability for deficit—Interest on deficit amount—Liability for Appeal—Dismissal.*

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C. P. CODE (1908), O. 21, R. 72.

Where in Court auction a property is sold, the auction-purchaser is one party to the contract, but the other party to the contract is not the judgment debtor or the decree holder, but the Court itself. In selling property in Court auction the Court acts under the statutory powers conferred on it by the Code and not as the agent of any party, and the contract that is made when the bid is accepted and confirmed by the Court is one between the Court on one side, and the auction-purchaser whose bid is accepted on the other.

A person, therefore, who bids at a Court-auction without informing the Court or its officer conducting the sale that he does so only as the agent of a principal, makes himself personally liable for the deficit caused by him in not completing the sale by depositing 25 per cent. of the purchase-money. The fact that the judgment-debtor knew that the person bidding was only bidding as an agent of a principal is quite immaterial. In such a case O. 21, R. 71 of the Code gives the Court power, at the instance of the judgment-debtor, to collect in a summary manner by way of execution the deficit that has been caused from the person bidding.

Under O. 21, R. 71, the bidder who makes default is not liable for interest on the deficit amount from the date of the order directing him to pay the amount. He is, however, liable for interest after that date. (*Krishnan and Waller, JJ.*) GANGABATTULA KANTHAMMA v. MANCHIRAJU REDDIPANTULU. 19 L. W. 197 :

(1924) M. W. N. 122 : 34 M. L. T. 359 (H. C.) : 78 I. C. 296 : 1924 Mad. 476 : 46 M. L. J. 134.

—O. 21, R. 72—*Execution of decree—Leave to bid to decree-holder—Fixing of heavy upset price—Effect of.*

A decree holder applied for execution of his decree by sale of ginning factory belonging to judgment-debtor. On the day of sale the bids did not go up beyond Rs. 5,000. The property had been valued by a panch at Rs. 40,000. Shortly after this first bid the judgment debtor made an application to the court stating that the property was worth Rs. 60,000. Subsequently the decree-holder made an application for leave to bid offering to buy up the property for Rs. 20,000. The Court ordered that if the decree-holder was prepared to pay Rs. 40,000, his offer would be accepted. The decree-holder did not raise his bid to that amount and ultimately the court disposed of the execution application on the ground there were no bidders. Held, that the court should have granted the decree-holder leave to bid and made a further attempt for sale of the property. The order disposing of the execution application was set aside and the application was ordered to be restored to the file of the lower court. (*Chak, A. C. J. and Rawcett, J.*) MOTILAL PARSHARAM v. FULCHAND BALARAM. 26 Bom. L. R. 770 : 1924 Bom 515.

—O. 21, R. 72—*Order allowing set off—If amounts to receipt of assets within S. 73.*

An order allowing a set off under O. 21, R. 72 does not amount to a receipt of assets within the meaning of S. 73 C. P. C. (*Wazir Hasan, J. C.*) MOHAN LAL v. AMAR NATH. 80 I. C. 40 :

1 O. W. N. 729 : 10 O. & A. L. R. 1168.

C. P. CODE (1908), O. 21, R. 72.

———O. 21, R. 72 and 84—Applicability—Execution sale—Delay in deposit. *MAUNG CHIT HLAING v. N. A. R. M. CHETTY FIRM*
1924 Rang. 81.

———O. 21, R. 84 Sale when complete—Acceptance of bid—Effect of deposit. 76 I. C. 113.

———O. 21, R. 85—Joint purchase—Sale certificate issued to one alone—Suit for declaration of title by the other.

Two persons applied jointly to purchase property at an execution sale in certain proportions and paid in the 25 per cent. deposit in that proportion. Later on one of them failed to pay his share of the balance, whereupon the other paid in the whole balance and a sale certificate was issued to him alone. *Held*, the other could sue for his share in the properties purchased. (*Greaves and Chakravarti, JJ.*) *BHABATARAN CHATTOPADHYA v. DURGESHNANDINI DEBI.*
81 I. C. 1029 (2) : 51 Cal. 992.

———O. 21, R. 89—Applicability of—Partition suit—Award of Arbitrators directing sale of properties and payment out of proceeds—Sale if can be set aside on deposit. *NIRODE NATH BANNERJEE v. AMULYA DHONE.* 77 I. C. 774.

———O. 21, R. 89—Scope of—Application to set aside sale of attached property.

A simple hypothecation bond is "moveable property, not only for the purposes of attachment but also for purposes of sale and O. 21, R. 89 has no application and there is a clear indication of the legislature that for the purposes of the Code, it should be treated as moveable property. 26 Bom. 305 foll. (*Walsh, A. C. J. and Boys, J.*) *UMRAO SINGH v. LAL SINGH.* 5 L. R. All. 674.

———O. 21, R. 89—Application under—Deposit by pleader's clerk—Legality of.

Where an application under O. 21, R. 89, C. P. Code is made by the duly authorised pleader of a party, the fact that the required deposit is made by the pleader's clerk instead of by the pleader himself, does not vitiate the application. (*Spencer and Kumaraswami Sastri, JJ.*) *THIMMARAZU VENKATA KUTUMBA RAO v. VENKATAPPA.* (1924) M. W. N. 137 : 19 L. W. 298 : 77 I. C. 765 : 1924 Mad. 483 : 46 M. L. J. 119.

———O. 21, R. 89—Construction—Whole amount to be deposited.

O. 21, R. 89, C. P. Code must be strictly construed and unless the whole amount specified in sub-rule 1 is deposited within 30 days from the date of sale, the sale cannot be set aside. (*Baker, J. C.*) *NARAYAN v. RAMKRISHNAJI.*
78 I. C. 705 (1).

———O. 21, R. 89—Failure to comply with terms exactly—If a mere irregularity.

If a judgment debtor wants to set aside an auction sale under O. 21, R. 89 he must at his peril comply with the terms of the rule, and a failure to comply with the terms is not a mere irregularity. Thus the 5 per cent. due to the purchaser must be deposited in full and he cannot rely even on a mistaken information supplied by the Court. (*Baker, J. C.*) *SETH BALLABHDAS v. SOBHA SINGH.* 1924 Nag. 216 (2).

C. P. CODE (1908), O. 21, R. 90.

———O. 21, R. 89—Right to apply—Non-transferable occupancy holding—Purchaser—Deposit of decree amount.

If a holding is a non-transferable one a purchaser under a money-decree cannot avail himself of S. 170 (3) of the B. T. Act, and the purchaser has no locus standi to pay in the money under O. 21, R. 89, C. P. Code. (*Bucknill, J.*) *BISHUN DAYAL SINGH v. JAGDISH NARAYAN SINGH.*
2 Pat. L. R. 12 : 80 I. C. 823 : 1924 Pat. 513.

———O. 21, R. 89—Right to apply—Trespasser—"Person holding an interest in property by virtue of a title acquired before such sale"—Meaning of.

Held Per Venkatasubba Rao, J. (Oldfield, J. dissenting) that a trespasser, who enters on possession of property sold in a court sale, before the sale takes place, "holds an interest in that property by virtue of a title acquired before the sale" and is entitled to apply under O. 21, R. 89, C. P. Code to set aside the sale on making the required deposit. (*Oldfield and Venkatasubba Rao, JJ.*) *POTTI NAYAKER v. SUPPAMMAL.*
20 L. W. 31 : 79 I. C. 874 : 1924 Mad. 723.

———O. 21, R. 89—Right to apply—Persons having—Interest if should be disclosed—Failure to disclose—Effect.

The right to apply to have a sale set aside under O. 21, R. 89 on making a deposit is exercisable by a person who has acquired an interest in the property before the date of sale. R. 89 does not say that no such application shall be entertained unless it discloses the nature of the interest which entitles the applicant to make the application. If such interest is not disclosed, the court can only direct the applicant to supply the particulars, and should not reject the petition. (*Kinkhede, A.J.C.*) *VITTAL SINGH v. AGARCHAND.*
79 I. C. 903.

———O. 21, R. 90—Absence of proclamation—Question gone into, at prior stage—Effect. *PAMIDIMARRI GNAMMA v. KETTIREDDI KRISHNA REDDI.* 1924 Mad. 217.

———O. 21, R. 90—Alteration in new code. 75 I. C. 103.

———O. 21, R. 90—Appeal—Failure to issue notice—Second Appeal if lies. 1924 P. 111.

———O. 21, R. 90—Auction purchaser—If can apply under. 5 Pat. L. T. 41 : 1924 P. 319 (1).

———O. 21, R. 90—Collusive decree obtained and inserted in the sale proclamation as encumbrance—Inadequacy of price—Setting aside sale—Suit or application.

A judgment debtor in order to cheat a creditor who was executing his decree by sale of lands allowed an *ex parte* judgment to be passed against him and in the sale proclamation in the first execution petition showed the latter decree amount as a possible encumbrance on the lands. As a result bidders were scared and the lands knocked down for a low price in favour of a relation of the judgment debtor. Later on the *ex parte* decree was set aside and the suit allowed to be dismissed. *Held* the decree holder's remedy was not to apply

C. P. CODE (1908), O. 21, R. 90.

under O. 21, R. 90 to set aside the sale, but to file a suit on the ground of fraud and collusion. (*Phillips and Venkatasubba Rao JJ.*) VENKATA RAMA AIYAR v. PARAMASIVA AIYAR.

78 I. C. 108.

—O. 21, R. 90—Decree for rent—Sale of tenure—Liability of purchaser for rent prior to purchase—Statement in sale proclamation of liability—Effect.

A landlord cannot sue an auction-purchaser of a tenure for arrears of rent due prior to the date of his purchase. Hence a statement in a sale proclamation of a tenure that the purchaser will be liable to pay such arrears amounts to a material irregularity and if it results in substantial loss the sale can be set aside. (*Mullick and Bucknill, JJ.*) MAHOMED JAWAD HUSAIN v. MAHRAJ KUMAR GOPAL SARAN NARAIN.

80 I. C. 223.

—O. 21, R. 90—Dismissal for default—Appeal—If lies.

In the case of an application under O. 21, R. 90 which is dismissed for default an appeal is competent. (*Pearson and Graham, JJ.*) DEBENDRA NARAIN SINGH v. NARENDRA NARAIN SINGH.

80 I. C. 678.

—O. 21, Rr. 90, 92—Dismissal of application to set aside sale for default—Effect—Remedy of party.

Where an application under O. 21, R. 90 is dismissed for default, it amounts to a confirmation of the sale under O. 21, R. 92. An appeal lies against the latter and hence the order is not revisable. (*Suhrawardy and Chotzner, JJ.*) NARENDRA NATH CHATTERJI v. RAKHAL DAS TARAFDAR.

79 I. C. 351.

—O. 21, R. 90—Execution sale—Objection to—Objection which could have been raised at an earlier stage—Defects in publishing or conducting a sale—Application to set aside sale.

1924 Mad. 217.

—O. 21, Rr. 90, 92—Execution sale—Irregularities not challenged—Suit by purchaser for possession—Irregularity if can be pleaded.

Where properties were sold in execution and the judgment debtor did not apply under O. 21, R. 90, to have it set aside on the ground of irregularities he cannot after confirmation of the sale plead such irregularities by way of defence to a suit by the purchaser for possession. (*Walmsley and Suhrawardy, JJ.*) JAGNESWAR SIKDAR v. KAILASH CHANDRA MANDAL 28 C. W. N. 821 : 78 I. C. 126;

1925 Cal. 81.

—O. 21, R. 90—Execution sale—Setting aside—Right to apply—Attaching creditor.

It is open to an attaching creditor to apply under O. 21, R. 90, C. P. Code, to set aside an execution sale of the property attached by him, at the instance of another creditor who is executing his decree. Meaning of the expression "persons whose interests are affected by the sale" explained. (*Suhrawardy and Page, JJ.*) DHIRENDRA NATH ROY v. KAMINI KUMAR PAL. 51 C. 495 :

28 C. W. N. 899 : 1924 Cal. 766.

C. P. CODE (1908), O. 21, R. 90.

—O. 21, R. 90—Failure to issue notice for preparing sale proclamation—Effect. 75 I. C. 103.

—O. 21, R. 90—Mortgage decree—Sale—Order of properties—Equities.

Where neither the mortgage bond nor the decree thereon gives a direction as to the order in which the mortgaged properties are to be sold in execution, the mortgagee can choose the order in which they are to be sold. But where there are a number of judgment debtors with rights of contribution they can apply to the executing court to look into the equities *inter se* and direct a sale in consonance therewith. Failure to do so is a material irregularity and if it results in loss the sale can be set aside. (*Jwala Prasad and Foster, JJ.*) RAGHUNATH SAHAI v. DAROGA SAHU.

78 I. C. 609.

—O. 21, R. 90—Order under—Second appeal.

There is no right of second appeal in the case of orders on applications under O. 21, R. 90. (*Das and Ross, JJ.*) BAIDYANATH SARKAR v. PRABHABATI DASL. 78 I. C. 315 : 5 Pat. L. T. 443 : 1924 Pat. 803.

—O. 21, R. 90—Portion of property attached sold—If vitiates sale.

Where the property sold is only a portion of what was attached and proclaimed for sale, there is no irregularity vitiating the sale. (*Das and Ross, JJ.*) BAIDYANATH SARKAR v. PROBHA BATI DASL. 5 Pat. L. T. 443 : 78 I. C. 315 : 1924 Pat. 803.

—O. 21, R. 90—Publication of sale proclamation less than 30 days before sale—If vitiates sale.

The fact that the sale proclamation was published less than 30 days before the sale does not vitiate the sale unless as the result of the irregularity substantial injury had resulted. (*Hallifax, A. J. C.*) RAMJI PATEL v. KARKAJI. 1924 Nag. 293.

—O. 21, R. 90—Real purchaser not known—Effect of adding him after limitation. *Mr. BHAGGO v. MATA PRASAD.* 76 I. C. 507.

—O. 21, R. 90—Setting aside sale—Duty of court.

A court is not competent to set aside an execution sale without inquiring into the objections made. The irregularities set up must be proved and the court must also be satisfied that the person applying to have the sale set aside has sustained substantial injury by reason of such irregularity or fraud. (*Martineau, J.*) ANUP CHAND v. MT. KAWAL CHAND.

1924 Lah. 592.

—O. 21, R. 90—Order setting aside an execution sale on the ground of suspicion and sale for low price—Legality of.

In an application under O. 21 R. 90 of the Code, by the judgment debtor on the ground of fraud, the sub-Judge set aside the Court sale on the ground of suspicion in the conduct of sale, and on account of the low price it fetched. *Held*, that the order cannot comply with requirements of O. 21, R. 90, C.P.C., as there was no material

C. P. CODE (1908), O. 21, R. 90.

Irregularity or fraud in conducting or publishing the sale, and that the irregularity did not cause substantial injury to the parties seeking to set aside the sale. Mere suspicious circumstances, and sale for a low price, are no grounds for interference. The onus of proof should lie on the petitioners who are seeking to set aside the sale (*Wallace and Madavan Nair, JJ.*) GANAPATHIA PILLAI v. MALAYAPERUMAL CHETTIAR.

20 L. W. 738.

O. 21, R. 90—Substantial injury necessary.

In order to succeed in an application to set aside an auction sale, the court has to find not only material irregularity but also substantial injury resulting therefrom (*Sulaiman and Mukerjee, JJ.*) SUPERIOR BANK, LTD v. BUDH SINGH.

22 A. L. J. 413 : 10 O. & A. L. R. 633 : 1924 All. 696.

O. 21, R. 91—Absence of saleable interest—Remedy of purchaser—Suit if lies.

The remedy of an auction purchaser who finds that the judgment debtor had no saleable interest in the property sold is as provided under O. 21, R. 91, C. P. Code, and a suit for refund of the purchase money or in a case where he has withdrawn the purchase money for a declaration that he is not liable to repay the same, does not lie. Case law referred. (*Broadway, J.*) HATIM MITOZA v. BHAGWANA.

78 I. C. 517.

O. 21, R. 91—Auction purchaser—If can sue for purchase money on the basis of absence of saleable interest.

If after an auction sale, the purchaser finds the judgment debtor had no saleable interest his only remedy is to apply under O. 21, R. 91 to set aside the sale and then apply for repayment of the purchase money. A suit for that purpose is not maintainable. Case law discussed and the provisions in the various Codes of Civil Procedure considered. (*Jwala Prasad and Kulwant Sahay, JJ.*) NAGANDRA NATH GHOSH v. SAMBHU NATH PANDEY.

3 Pat. 947 : 1925 P. 106

O. 21, R. 91—Saleable interest—Point of time.

The saleable interest contemplated by O. 21, R. 91 is the interest at the time of the sale. (*Kennedy, J. C. and Raymond, A.J.C.*) SIND BANK, LTD. v. AMERSI DYAL.

78 I. C. 279.

O. 21, R. 92—Appeal against appellate order—If lies.

75 I. C. 103.

O. 21, R. 92 & O. 22, R. 4—Execution Sale—Setting aside—Death of decree holder—Notice to legal representative essential.

During the pendency of an application by a judgment debtor to set aside an execution sale the decree holder (auction-purchaser) died and his legal representatives were not properly substituted in his place. No notice was served upon them, and the sale was set aside.

Held that no notice having been given to the legal representatives of the deceased decree-holder (auction-purchaser) the order setting aside the sale was liable to be set aside. Under O. 21, R. 92, Clause (2) it is provided that no order shall

C. P. CODE (1908), O. 21, R. 94.

be made setting aside a sale unless notice of application have been given to all persons affected thereby. (*Kulwant Sahay, J.*) KUMAR RAMANAND v. BAJIT SINGH JHA.

5 Pat. L. T. 233 : 75 I. C. 865 ; 1924 Pat. 507.

O. 21, R. 92—Notice—If need be formal—Knowledge, if sufficient.

Orders should not be passed setting aside execution sale without notice to the persons affected thereby; the object will equally be achieved if the party has otherwise notice of the application. (*Sukrawardy and Duval, JJ.*) CHARU CHANDRA GHOSH v. RAI BEHARI LAL MITRA BAHADUR.

80 I. C. 931.

O. 21, R. 92—Suit to set aside sale—Suit by minor defendant on attaining majority—Parties.

The auction purchaser is a necessary party to a suit to set aside a sale brought by a minor defendant after his attaining majority. (*MacLeod, C. J. and Crump, J.*) BAPUJI KRISHNA v. ANARDHAN GOVIND.

1924 Bom 130.

O. 21, R. 92 (3)—Bar of suit—Sale by Collector—Plaintiff party to decree—Application to set aside sale by subsequent purchaser—Dismissal without enquiry—Fraud.

A collector to whom execution of a mortgage-decree had been transferred sold the property which was the subject of the mortgage. Before the execution sale by the collector, plaintiff and his brother had purchased privately the mortgaged property from the mortgagor. An application made by the plaintiff's brother under the provisions corresponding to O. 21, R. 89, C. P. Code to the collector was dismissed by him. An application to the Civil Court under S. 47, C. P. C. to set aside the sale on the ground of fraud was rejected for want of jurisdiction. Thereupon the plaintiff brought a suit alleging that the execution sale had been brought about by the fraud of the decree-holder, the auction purchaser and certain other persons who had sued for pre-emption in respect of the sale to the plaintiff and that his rights were not affected by the execution sale. Held that the suit was not barred by O. 21, R. 92 (3) and that the suit should be tried on the merits. (*Mukerji and Dalal, JJ.*) BHAGWAN DAN MARWARI v. SURAJ PRASAD SINGH.

22 A. L. J. 1060.

O. 21, R. 94—Sale certificate—Error of description—Rectification

Where all that is essentially requisite is the rectification of the boundaries in the schedule to the sale certificate it is not material that the Court should go back, behind the decree to the mortgage instrument itself. Where the clerical error becomes apparent on the result of the local enquiry held on the basis of the boundaries in the sale certificate, the investigation of the proceedings in the suit itself, antecedent to the decree, only furnishes a historical explanation, as it were, how the error arose. Where there is an error in the sale certificate the Court has ample authority as a Court of justice, equity and good conscience to rectify it

C. P. CODE (1908), O. 21, R. 97.

and mould the relief accordingly as between the original parties or their representatives in interest. (*Mookerjee and Cuming, JJ.*) NANDI LAL AGRANI v. JOGENDRA CHANDRA DUTTA.

28 C. W. N. 403 : 39 C. L. J. 222 : 82 I. C. 297 : 1924 Cal. 841.

—O. 21, R. 97—*Application for possession by auction purchaser—"Resistance" or "obstruction"—Appellant absent at time of delivery of possession—Subsequent suit by appellant for possession—Article 11 A, Limitation Act, inapplicable.*

The Court purported to give possession to an auction purchaser under O. 21, R. 97 of certain land which was in possession of the appellant as purchaser from the mortgagor. The appellant was absent at the time of delivery of possession. He brought a suit for recovery of possession which was dismissed as being barred under Art. 11 A of the Limitation Act.

Held, that the Art. 11 A did not apply to the case. The "resistance" or "obstruction" contemplated in O. 21, R. 97 is some overt act of "resistance" or "obstruction" to the giving of possession by some person who is present at the time. (*Robinson, C. J. and Heald, J.*) T. C. BOSE v. O. R. CHOWDHURY.

3 Bur. L. J. 71 : 82 I. C. 865 : 1924 Rang. 261.

—O. 21, R. 97, 99 and 103—*Scope of—Obstruction or resistance—Claim by sons of judgment-debtor in their own right—Order upholding their claim—Effect of.*

An application under O. 21, R. 97, C. P. Code cannot be made until the decree-holder or the auction purchaser has been resisted or obstructed in obtaining possession of the property. It is only then that he files an application complaining of such resistance or obstruction. Of course no resistance or obstruction can be said to have taken place before any attempt to obtain possession has been made. An application under O. 21, R. 95 asking for possession against a person alleged to be holding the property on behalf of the judgment-debtor is not necessarily an application complaining that resistance or obstruction has been offered by such a person. The provisions of O. 21, R. 97 come into operation only when either the delivery of possession has been ordered by the Court or, at any rate, an attempt to obtain possession has been made by the decree-holder out of Court. (*Suaiman and Kanhaiya Lal, JJ.*) BOHRA SOBHA RAM v. TURS RAM.

22 A. L. J. 626 : L. R. 5 A. 488 : 46 A. 693 : 1924 All. 495.

—O. 21, R. 100—*Application under—Ordered to be filed—If proper.*

An application under O. 21, R. 100 should be registered and disposed of according to law. An order requiring it to be filed is not a proper disposal. Even if the court meant to dismiss it by using the word "file" a court has inherent jurisdiction to restore it. (*Jwala Prasad, J.*) THAKUR PRASAD LAL v. SUKHLAL SINGH.

79 I. C. 598 : 5 Pat. L. T. 567 : 1924 P. 698.

C. P. CODE (1908), O. 22.

—O. 21, R. 100—*Application under—Dismissed for default—Whether O. 9, R. 13 applies for restoration to file—Proceedings under O. 21, R. 100 whether execution proceedings.*

Where an application complaining of dispossession was filed under O. 21, R. 100, which was dismissed for default of non-appearance on the part of the petitioner and was subsequently restored under O. 9, R. 13, C. P. C. by the Commissioner. *Held*, on appeal, reversing the orders of the commissioner, (1) that proceedings under O. 21, R. 100 are proceedings in execution of a decree and (2) that R. 13 of O. 9, does not apply to such proceedings. (*Haricharan v. Manmath Nath*) 41 C. 1 followed. (*Free Mantle, S. M. and Burn, J. M.*) PEAREY LAL v. BRIJ MOHAN DAS.

L. R. 5 All. 291 (Rev.)

—O. 21, R. 100—*Joint possession—Insufficient to maintain application under—Question of benami—If relevant.*

A person who is in joint possession along with another can be said to be in possession on his own account and can maintain an application under O. 21, R. 100. To determine the question whether the applicant was in possession in his own right the court is not entitled to go into a question of *benami*. (*Das, J.*) RAM KISHUN SINGH v. DAMODAR PRASAD.

5 Pat. L. T. 107 : 75 I. C. 856 : 1924 P. 506.

—O. 21, R. 101—*Pendency of suit regarding title—Effect—Suit contesting order, if dispensed with—Lis pendens—Applicability of rule.*

Where an order is passed under O. 21, R. 101, against a person and a suit is not filed in one year contesting the validity of the order, it becomes final. The fact that there was a pending suit regarding the title to the property in which he had set up his title does not absolve him from the obligation under S. 103.

The doctrine of *lis pendens* does not apply to an application for declaration of title, as in such a case there is no transfer of any right. (*Krishnan and Coleridge, JJ.*) KUMARAN UNNIACHAN v. KUNHIRISHNAN NAIR.

19 L. W. 394 : (1924) M. W. N. 359 (1) : 75 I. C. 814 : 1924 M. d. 602 (1)

—O. 22—*Applicability—Dead person impleaded—Legal representative—Power to bring on record—Heir already on record—Amendment.*

Where an appeal is preferred against a person who is dead, O. 22, C. P. Code does not apply and there is no question of bringing on record his legal representative. But where the latter is on record in another capacity, it is only a question of amendment to describe him also as legal representative of the deceased. (*Fawcett, J. C. and Kennedy, A. J. C.*) THE MANAGER, ENCUMBERED ESTATES IN SIND v. THARUMAL.

78 I. C. 569.

—O. 22—*Applicability—Revision petition.*

O. 22, C. P. Code, and the whole theory of abatement contained therein, is inapplicable to revision applications as in such cases the order is made by the court of his own motion to redress grievances which come to its notice. (*Kennedy, J. C. and Raymond, A. J. C.*) BAKSHO v. PIARO.

80 I. C. 456.

C. P. CODE (1908), O. 22, R. 1.

—O. 22, R. 1—*Guardianship—Death of appellant pending appeal against order appointing a guardian—Right of legal representative to continue the appeal—Appointment of guardian by reference to arbitration—Legality of.*

Against an order of Court appointing a particular person as guardian of a minor, the minor's paternal uncle who opposed the appointment in the lower Court, preferred an appeal. On the death of the appellant pending the appeal, his son sought to continue the appeal. Objection was taken that the right to sue did not survive and the appeal abated. *Held* that the appeal did not abate and could be prosecuted by the son of the deceased appellant.

23 B. 719 distinguished.

In proceedings for the appointment of a guardian for a minor the Court appointed as guardian a person selected by certain arbitrators chosen by the parties without arriving at any independent conclusion as to his fitness for the appointment. *Held* that the order was unsustainable. The matter was not of private interest between the parties and could not be settled by a reference to arbitration. 30 A. 137 followed. (*Krishnan and Waller, J.J.*) SAMI CHETTI v. ADAIKKALAM CHETTI.

47 Mad. 459 :

34 M. L. T. (H. C.) 15: (1924) M. W. N. 222 :
1924 Mad. 484 : 46 M. L. J. 179.

—O. 22, R. 1—*Legal representative—Application to be brought on record—No cause of action for original plaintiff—Effect of.*

An application under O. 22, R. 1, C. P. Code to be brought on record as the legal representative of the deceased plaintiff could not be rejected on the ground that the original plaintiff had no cause of action which would survive to the applicant. The "right to sue" as specified in O. 22, R. 1, C. P. Code means merely the right to obtain relief by means of legal procedure. 26 B. 507 Ref. (*Chandrasekhara Aiyer, C. J. and Ramaswami Aiyangar, J.*) GUNDAPPA v. MANJAPPA.

2 Mys. L. J. 1.

—O. 22, Rr. 2 and 3—*Legal representative—Right of, to continue suit or appeal—Abatement.*

1924 Lah. 45.

—O. 22, R. 2—*Purdanashin lady—Delay in bringing on record legal representative.* NATH SAHI v. IMAM REZA.

1924 P. 319 (2)

—O. 22, R. 2—*Appeal—Several respondents—Death of some—Declaratory suit—No abatement.*

Where in an appeal relating to a declaration of appellant's right to an exclusive fishery, some of the respondents died and their legal representatives were not brought on record, the appeal does not abate. (*Rankin and Ghose, J.J.*) MIDNAPORE ZEMINDARY CO. LTD. v. TRILOKYA NATH HALDAR.

51 C. 110 :

81 I. C. 501 : 40 C. - J. 238 : 1924 Cal 562.

—O. 22 R. 2—*Suit against several defendants—Liability of the each ascertained—Death of some of the defendants—Abatement.*

1924 Rang. 127.

—O. 22, R. 2—*Suit by Burmese husband and wife for redemption—Dismissal of suit—Appeal—Death of husband—Right of wife to continue the appeal.*

C. P. CODE (1908), O. 22, R. 3.

A suit for redemption instituted jointly by a Burmese husband and wife was dismissed and against the decree they filed an appeal. Pending the appeal the husband died and the wife sought to continue the appeal without bringing on record the legal representative of the deceased. *Held*, that it was competent to the wife to continue the appeal. (*Young and Baguley, J.J.*) MAUNG BYAUNG v. MG. SHWE BAW.

3 Bur. L. J. 171 : 2 Ran. 486 :
1924 Rang. 376.

—O. 22, Rr. 3 and 9—*Abatement of suit—Order setting aside—Bringing on record of legal representatives.*

75 I. C. 283.

—O. 22, R. 3—*Appeal from interlocutory order in suit—Death of plaintiff—Bringing on record legal representative—If enures for suit.*

Where pending an appeal from an interlocutory order in a suit, the plaintiff died but his legal representatives were brought on record in time, it enures for the suit also and the legal representatives can be deemed to have been impleaded in the main suit. (*Adami and Bucknill, J.J.*) GOBIND SAHU v. ZAFAR KARIM.

78 I. C. 436.

—O. 22, Rr. 3 and 9—*Appeal—Abatement—Setting aside—Ignorance of death.*

The Code makes it obligatory on an appellant to keep himself informed of any devolution of interest that may take place by reason of the death of any of the respondents and it is not sufficient merely to say that the applicant had no knowledge of the death of the respondent till many months after such death. The abatement of an appeal gives a very important right to the person or his heirs against whom the appeal abates and it is not without sufficient reason that the court should set aside an abatement. Mere assertion that the applicant had no knowledge of the death of the respondent is not entitled to any weight unless some reasons are assigned why the applicant did not keep himself informed of the death of the respondent. (*Das and Macpherson, J.J.*) PHULWATI KUMARI v. MAHESHWARI PRASAD SINGH.

5 Pat. L. T. 349 : 75 I. C. 909 :
1924 Pat. 607.

—O. 22, R. 3—*Death of one of several plaintiffs—Grandson of deceased impleaded as legal representative without objection—Objection on appeal.*

One of the plaintiffs in an ejectment suit died. An application was made to bring the deceased's grandson on the record; though the Court passed no order on the application the grandson was treated as a party to the suit without any objection being made by the opposite party. *Held* that the procedure was irregular but the objection not being one of substance it could not be held in Second Appeal that the Appeal in the lower Court abated. (*Fremantle, S. M.*) RAJ SINGH v. SITA RAM KALWAR.

L. R. 5 A. 80 (Rev).

—O. 22, Rr. 3 & 9—*Death of plaintiff—Application of minor son to come on record within 6 months—Act XXVI of 1920—Duty of court.*

Where on the death of the plaintiff, his minor son applied to come on record at the end of six

C. P. CODE (1908), O. 22, R. 3.

months but meanwhile Act XXVI of 1920 had come into force cutting down the period to 3 months, the application should be treated as one to set aside the abatement and in the interests of the minor the abatement set aside. (*Macleod, C. J. and Shah, J.*) VIJAYASINGH DATTAJI RAO v. SHIVAJIRAO NARAYANRAO.

26 Bom. L. R. 378 :
80 I. C. 761 (1) : 1924 Bom. 416.

— O. 22, Rr. 3 and 10—*Legal representative—Religious Endowment—Suit by trustee not properly appointed—Death of plaintiff—Right of successor to continue.*

A suit brought on behalf of a mutt by a trustee not properly appointed can be continued by a properly appointed successor on whom the representation of the institution has devolved. O. 22, R. 10, and not O. 22, R. 5 applies to such a case.

An application for being brought on record as the legal representative of a deceased party though made under a wrong rule, may be ordered under the proper rule, if any, applicable to the case. (*Waller, J.*) RATNAM PILLAI v. ANNAMALAI DESIKAR.

19 L. W. 367 : 34 M. L. T. (H. C.) 31 :
(1924) M. W. N. 361 : 1924 Mad. 615 :
46 M. L. J. 341.

— O. 22, R. 3—*Scheme suit—Appeal by relators—Death of one—No abatement. See C. P. CODE S. 92.*

47 M. L. J. 745.

— O. 22, R. 3 and O. 34, R. 2—*Mortgage suit—Death of plaintiff after preliminary decree—Abatement—Application for final decree—Limitation.*

Where after the passing of the preliminary decree in a mortgage suit the plaintiff dies and his legal representative is not brought on record within the time prescribed by law, the suit abates, and the legal representative cannot obtain a final decree without setting aside the abatement. 39 M. 488 ; 28 M. L. J. 491. Ref. 42 M. L. J. 301 followed. (*Spencer and Odgers, JJ.*) NATESA PILLAI v. KANNAMMAL ANNI.

19 L. W. 173 : 78 I. C. 64 : (1924) M. W. N. 216 :
1924 Mad. 786 : 46 M. L. J. 181.

— O. 22, R. 4—*Abatement—Suit for partition and possession—Legal representative—Meaning of—Omission to bring on record some legal representatives—Effect.*

Where during the pendency of an appeal arising out of a suit for partition and possession, one of the respondents died and some only of the legal representatives of the deceased were brought on record, the whole appeal abates as in the absence of some heirs an effective decree for possession and partition cannot be passed.

The words legal representative in O. 22, R. 4 when read in the light of the definition in S. 2 (ii) means all the persons on whom the estate devolves. (*Kennedy and Aston, A. J. C.*) SIDIK MAHOMED SHAH v. SARAN.

1925 S. 2.

— O. 22, Rr. 4, 5 and 9—*Abatement—Substitution of parties.*

1924 Pat. 126.

C. P. CODE (1908), O. 22, R. 4.

— O. 22, R. 4—*Appeal—Abatement—Death of one of the respondents—Effect—Test.*

In considering whether an appeal abates wholly by the legal representatives of one of the respondents not being brought on record in time, a useful test is "could the suit *ab initio* have been instituted and prosecuted with the deceased left out ?". (*Prideaux, A. J. C.*) RATANLAL v. JAIDEO
1924 Nag. 123.

— O. 22, Rr. 4 and 9—*Application under—Construction.*

Where an application to bring on record the legal representative of a deceased respondent is filed under O. 22, R. 4 after the period of limitation prescribed therefor, it must be treated as one under O. 22, R. 9 to set aside the abatement and then bring on record the legal representative (*Jwala Prasad, A. J. C. and Kulwant Sahay, J.*) HARI SARAN SINGH v. SYED MOHAMMAD ERADAT HUSSAIN.
2 Pat. L. R. 279.

— O. 22, R. 4—*Death of defendant—Legal representative—Right to costs.*

75 I. C. 848.

— O. 22, R. 4—*Death of respondent before filing appeal—Legal representative—Abatement.*

A suit by three vendees for possession being dismissed, one of them appealed and the suit was decreed in favour of all the vendees. Against this, a second appeal was preferred and it was then discovered one of the vendees had died when the matter was pending in the lower Court and that his legal representatives had not been brought on record. Held the decree in his favour was wrong, and it was not necessary to bring on record his legal representatives in second appeal—No question of abatement arises. (*Abdul Raouf and Moti Sagar, JJ.*) AMIR KHAN v. HOWNA RAM.
1925 Lah. 37.

— O. 22, R. 4—*Death of one respondent—Abatement—Effects—Tests of.*

In order to judge whether the abatement of an appeal so far as one respondent is concerned amounts to an abatement of the whole appeal, one test is to see whether the interests of the other respondents can be distinguished and separated. If it could, there is no abatement of the appeal as regards all. If not, the appeal abates as against all. (*Neave, J.*) BIKRAMAJIT RAI v. MAHANT DARSHAN DAS.
82 I. C. 26 :
L. R. 5 A. 747 : 22 A. L. J. 1032.

— O. 22, R. 4—*Joint decree—Death of one of the decree-holders—Legal representative not brought on record—Effect of.*

1924 Cal. 346 (1).

— O. 22, R. 4—*Redemption suit—Appeal—Death of mortgagor—Failure to bring on record legal representative—Effect.* NANAK CHAND v. RAM CHAND.
77 I. C. 176.

— O. 22, R. 4—*Substitution necessary by application—Abatement.*

When the appellant sought to substitute the legal representatives of the deceased respondent after the expiry of the time allowed by law, and contended.

(1) That the existence of one of the legal representatives already on the record, relieves the

C. P. CODE (1908), O. 22, R. 4.

appellant from making an application under O. 22, R. 4 (2) that in a mitakshara joint family all members need not be brought on record.

Held (1) O. 22 requires legal representatives of parties to be brought on record in the case of the death of any one of them, irrespective of whether the deceased was joint or separate from the other members.

(2) The fact that one of the Legal Representatives is already on the record does not relieve the plff. from making an application under O. 22, R. 4 and that the appeal did abate before the application for substitution was made.

(3) O. 22, R. 4 does not require that all the Legal Representatives should be on the record, and if one of them is properly brought on the record, there will be no abatement. 10 Bom. 220; 18 I.C. 313; 39 I.C. 165, dist. (*Jwala Prasad and Kuwant Sahay, JJ.*) LULO SONAR v. THAGRU SAHU. 3 Pat 853.

—O. 22, R. 4, 9—*Tenants-in-common—Respondents—Abatement by death of one—Whole appeal if abates.*

Plaintiffs who were tenants-in-common sued to recover possession of certain property and pending the suit one of them died and his widow was added as his legal representative. The suit was decreed and while an appeal was pending at the instance of the defendants, the widow who had been impleaded as a respondent died. For merely a year and a half the appellant did not bring on record the legal representative of the deceased widow. The Court below dismissed the whole appeal as having abated. *Held*, that though the appeal abated as against the widow and her legal representatives, it did not abate as against the other tenant-in-common. (*Shah, A. J. C. and Fawcett, J.*) SHANKARBHAI MANORBHAI v. MOTILAL RAMDAS. 26 Bom. L. R. 1217.

—O. 22, R. 6—*Applicability—Defendant dying after hearing but representative brought on record before decree.*

Where after the hearing of suit a defendant died and his representative was brought on record before the decree was passed.

Held, that R. 6 has no application as the decree as passed was not against a dead man but against a living person. O. 22, R. 6, prevents abatement when death takes place between conclusion of the hearing and the pronouncement of the judgment and the decree is passed against a dead man; this provision of law covers cases where the Court is unaware of the death of a party and proceeds on the supposition that the parties are alive. The rule deals with a decree against a dead man and not with one against living persons. It indicates how a decree against a dead man is to be construed and can have no reference to a decree, passed against living person. (*Mukerji and Dalal, JJ.*) MT. CHAMBI v. TARA CHAND. 1924 All. 892.

—O. 22, R. 9—*Abatement—Setting aside—Sufficient Cause—Ignorance of death.*

A mere plea of ignorance of the fact that the opposite party had died is not a sufficient cause for setting aside an order of abatement. (*Neave, A.J.C.*) SANT BAKSH v. SYED NABHAN SAHEB. 81 I. C. 585; 10 O. & A. L. R. 308.

C. P. CODE (1908), O. 22, R. 9.

—O. 22, R. 9—*Abatement—Setting aside—Sufficient cause—Ignorance of death.*

Where it appeared that the deceased respondent had no stationary residence and that the appellants were living in a far off native state and urge ignorance of the death of the respondent, delay in seeking to set aside the abatement could be excused. (*Scott Smith and Fforde, JJ.*) JOWALA RAM v. HARI KISHEN SINGH. 5 L. 70. 80 I. C. 890; 1924 Lab. 429.

—O. 22, R. 9 and 4—*Abatement Setting aside—Sufficient Cause—Technical objections—Weight due to—Substantial justice.*

In a suit on a mortgage the defendant was dead at the time of passing the preliminary decree. The Court was ignorant of the judgment debtor's death at the time. The plaintiffs without seeking to bring the legal representatives on record in time applied for a final decree under O. 34, R. 5, C. P. Code, mentioning the fact of the judgment debtor's death and entering his widow as the defendant in that petition. That application was not granted. The plaintiff did not take steps till a considerable time later when he applied to set aside the abatement and to pass a final decree. The court below held that the former application may be treated as one for setting aside abatement. There was no appeal from the former application but the above order was passed in the subsequent application only.

Held, the lower Court was not seized of the former application and it had no jurisdiction to set aside the abatement purporting to act on such an application. Further that application not having contained any prayer to set aside the abatement it was really not an application under O. 22, R. 9.

The second application was filed too late and having regard to the circumstances and the conduct of the plaintiff the indulgence of the court would not be extended to him. No doubt in the interest of justice if it is necessary to brush aside technicalities the Court will not be too scrupulous in enforcing them but if the merits of the case are against the petitioner, the Court will not go out of the way to clear the plaintiff's path of technical obstacles. (*Odgers and Wallace, JJ.*) SESHAMMA v. YEERANKI PEDA VENKATA RAO. 34 M. L. T. 196 (H.C.); 19 L. W. 608. 1924 M. W. N. 633; 80 I.C. 379. 1924 Mad. 713; 47 M. L. J. 235.

—O. 22, R. 9—*Applicability—Abatement—Order refusing to set aside—When appealable.*

O. 22, R. 9 (2) is confined to cases in which abatement takes place by reason of an application not having been made within time to implead the legal representatives of the deceased party and it has no application to cases in which the suit has abated on account of some other cause, e.g., when the Court holds that the right to sue does not survive or that the death of one of several plaintiffs causes an abatement *in toto*. In the latter class of cases, the orders of the Court are decrees and as such are appealable. (*Moti Sagar, J.*) THE GENERAL TRADING COMPANY, KAHUTA v. NIHAL SINGH. 78 I. C. 22.

C. P. CODE (1908), O. 22, R. 9.

—O. 22, R. 9—Death of defendant—If one of several heirs can come on record and represent deceased.

If a defendant dies, it is sufficient if the plaintiff puts one of his heirs on record as his legal representative, who will then represent the estate for the purpose of the suit. The other heirs can come in if they wish to be represented. 26 Mad. 230 (old). (*Mahomed, C. J. and Shah, J.*) *JEHRABAI SADULLAKHAN v. BISMILLABAI SAD UDDIAN*.

80 I. C. 758 : 26 Bom. L. R. 375 : 1924 Bom. 420.

—O. 22, R. 9—Death of respondent pending appeal—Abatement—Application to set aside—Delay—Sufficient cause—Setting aside—Abatement of the whole appeal.

The fact that the parties lived in different districts and that their residences were about 200 miles apart one from the other, is not a sufficient reason in itself for failing to make an application to bring on record the legal representatives of a deceased respondent for a period of even 3 years in one case and nearly 9 months in another. The delay amounted to grave negligence on the part of the appellants who for so long a period failed to make any enquiries whatever as to the whereabouts of the most important respondents in the appeal. Where the decree appealed against is a joint decree, the appeal having abated against some of the respondents, must be dismissed against the rest. (*Broadway and Ffiorde, JJ.*) *MUNSHI RAM v. RADAKKISHEN*. 6 Lah. L. J. 192. 80 I. C. 694 (1) : 1924 Lah. 461.

—O. 22, R. 9 (2)—Legal representative—Addition of after expiry of period of limitation without objection by opposite party—Abatement—Setting aside.

An application for bringing on record the heirs of a deceased petitioner in proceedings to set aside a sale was allowed after the period of limitation without any objection. On appeal from the final order in the case, on the objection of the opposite side the appellate Court set aside the order for substitution and dismissed the case *Held* in revision that on a proper application under O. 22, R. 9 (2), C. P. C., and on showing sufficient cause, the abatement could have been set aside. The first Court having ordered substitution without objection having been taken by the opposite party at any stage of the proceedings, the petitioners were deprived of an opportunity to make an application under O. 22, R. 9 (2), C. P. C. and they were misled by the course of the proceedings that were adopted. The order for substitution made in the case should therefore be treated as being one setting aside the abatement. (*Walmsley and Mukerjee, JJ.*) *JOGUNNESSA BIBI v. SATISH CHANDRA BHATTACHARJEE*. 28 C. W. N. 559 : 39 C. L. J. 434 : 51 Cal. 690 : 1924 Cal. 633.

—O. 22, R. 9—Order to bring on record legal representative—Prior abatement—No objection of parties—Effect.

Where after a suit had abated, the legal representatives were brought on record without objection, the application can in law be looked upon as one under O. 22, R. 9 and the order validated. (*Walmsley and Mukerji, JJ.*) *SATISH CHANDRA BHATTACHARJEE v. SRI JOGUNNESSA BIBI*. 78 I. C. 958.

C. P. CODE (1908), O. 23.

—O. 22, R. 10—Assignee—Application to be impleaded in appeal—Objection by appellant and assignor—Duty of Court.

A certain person alleging that he was the assignee of property which was the subject of an appeal applied under O. 22, R. 10 to be impleaded as a respondent. Both the appellant and the assignor denied the assignment. *Held* it was the duty of the court to inquire into the genuineness of the assignment and dispose of the application according to the result of the inquiry. (*Wazir Hasan, J. C.*) *RAM LAL v. BHOOP*. 80 I. C. 631.

—O. 22, R. 9—Death of certain respondents—Effect. *NANDOO SINGH v. BALJIT SINGH*. 1924 Lah. 93.

—O. 22, R. 10—Mortgage Suit—Preliminary decree—Addition of parties. See C. P. CODE, O. 1, R. 10. 46 M. L. J. 368.

—O. 22, R. 10—Religious Endowment—Suit by person not properly appointed trustee—Death of plaintiff—Continuation of suit by proper trustee. See C. P. CODE, O. 22, R. 3 & 10. 46 M. L. J. 341.

—O. 22, R. 10 and O. 23, R. 1—Compromise of suit—Compromise filed in Court—Decree not passed—Application by purchaser to be added as a party. 1924 Cal. 188.

—O. 22, R. 12—Joint decree—Death of one decree holder—Legal Representative not brought on record—Effect. 1924 A. 95.

—O. 23—Applicability—Ejectment filed, without obtaining permission to withdraw a previous suit of the same nature—Maintainability.

Where a suit for ejectment was brought in a succeeding year, when a former suit with regard to the same subject matter, had been withdrawn, without obtaining permission to file a fresh suit. *Held* the suit was barred by O. 23 C. P. C. (*Fremantle, S. M.*) *KALI MISIR v. JAMUNA MISIR*. L. R. 5 A. 282 (Rev.) (2).

—O. 23—Ejectment Suit—Compromise conferring occupancy rights—Whether order that "parties compromised case filed with costs" amounts to withdrawal.

In a suit for ejectment the parties filed a compromise, which purported to confer on the defendants occupancy rights and to fix rent, and the court passed orders that "parties compromised. Case filed with costs;" no written statement was filed and no evidence was taken and the defendants were treated as non-occupancy tenants.

Held: that the order of the Court amounted to a dismissal of the Suit—

(1) and not to a withdrawal under the provision of order 23, C. P. C.

(2) that as no separate Agreement was made regarding the conferment of occupancy rights the defendants had not acquired such rights. (*Burn, J. M.*) *SURJA v. GHASI RAM*.

L. R. 5 All. 309 (Rev.)

—O. 23—Scheme suit—Court if can pass compromise decree.

There is nothing in law to prevent a court passing a compromise decree in a suit under

C. P. CODE (1908), O. 23, R. 1.

S. 92 C. P. Code. (*Newbould and Ghosh, JJ.*) *ABU MHOMED BARAKAT v. ABDUR RAHIM*. 80 I. C. 44.

—O. 23, R. 1—Appellate Court—If can allow withdrawal with permission to file fresh suit. 1924 A. 260.

—O. 23, R. 1—Ejectment suit—Withdrawal of—Fresh suit not barred.

In ejectment suits, as in suits for partition, there is a cause of action recurring every year and the withdrawal of a suit in one year without leave to sue afresh is no bar to a suit in the subsequent year. (*Fremantle, S. M.*) *UMRAI v. RAJA DURGA NARAIN SINGH*. L. R. 5 A. 156 (Rev.).

—O. 23, R. 1—Ejectment suit—Withdrawal of—Wrong survey numbers given—Fresh suit not barred.

Where a prior suit for ejectment giving wrong survey numbers of the land was withdrawn without liberty to sue afresh, a subsequent suit for ejectment of the defendant from the correct survey number and area is not barred. (*Fremantle, S. M.*) *BANDHO v. MT. CHAURASI*.

L. R. 5 O. 105.

—O. 23, R. 1—Formal defect—Bar of O. 2, R. 2 C. P. Code—Leave to withdraw both suits with liberty to sue afresh—Mistake of law or fact.

In respect of goods sold and delivered before a certain date plaintiff had instituted two suits for their price. Later on apprehending that the second suit would be barred by O. 2, R. 2, C. P. Code plaintiff before the framing of issues, applied for leave to withdraw them with liberty to bring a fresh suit in respect of the price of the whole quantity of goods.

Held that the plaintiff should be granted leave to withdraw with liberty to sue for the consolidated claim, inasmuch as his mistake was a *bona fide* one.

Lintaigne, J.—The expression "formal defects" must be given a very wide and liberal meaning and presumably as connoting defects of various kinds which are not defects affecting the merits of the case on substantial questions (including equities and estoppels) reasonably arising between the parties. It is impossible to lay down any exhaustive definition of what are sufficient grounds within the meaning of O. 23, R. 1, C. P. C.

Amendments of pleadings should equally be allowed in suitable cases in order to overcome the effects of *bona fide* mistakes whether of law or of fact, and it does not matter whether the assertions or omissions caused by such mistakes were deliberately made or not. If the Court is satisfied that there is a reasonable apprehension that the suit must fail if the permission to withdraw is not granted, the plaintiff is entitled to be given leave to withdraw.

Decisions to the effect that an appellate court had not legally granted the permission to withdraw on a particular ground would not amount to an authority to the effect that such ground would not have been a proper ground for the granting of such relief if applied for at an early stage of the suit in the trial court. (*Lintaigne, J.*) *K. E. A. K. A. SAHIB & Co., v. K. M. ADAMSA*.

81 I. C. 465; 2 Rang. 66; 1924 R. 249.

—O. 23, R. 1—Formal defect—Failure to give evidence—If enough.

C. P. CODE (1908), O. 23, R. 1.

In a suit to recover property the fact plaintiff has not let in evidence to identify the suit property to be his is not a formal defect to justify the Court to allow the suit to be withdrawn with liberty to file a fresh suit. (*Daniels, J. C.*) *DAULA v. DWARKA PAL*. 78 I. C. 121.

—O. 23, R. 1—Leave to withdraw suit with liberty to bring a fresh suit—Grounds for—Failure to exercise judicial discretion—Revision.

Where the court below has failed to exercise a judicial discretion an order under O. 23, R. 1 C. P. Code can be made the subject of revision. Where a court after the whole of the evidence for the plaintiff had been adduced allows him to withdraw the suit on account of certain legal defects which would be cured by amendment, the order granting leave to withdraw is not just fled by the provision of O. 23, R. 1 and must be set aside. (*Daniels, J. C.*) *RAJINDRA PURI v. BENI MADHO*. 10 O. and A. L. R. 823; 11 O. L. J. 351; 79 I. C. 1031; 1 O. W. N. 883.

—O. 23, R. 1—Liberty to file fresh suit—Need not be expressly given.

A court can impliedly give a plaintiff permission under O. 23, R. 1 to institute fresh suit after withdrawing a pending one. There is nothing in that rule demanding that the permission should be given expressly. (*Hallifax, A. J. C.*) *SAVITRI v. MADHORAO*.

1924 Nag. 285.

—O. 23, R. 1 Cl. 2—Leave to withdraw suit with liberty to bring a fresh suit—Leave granted on condition of payment of costs—Institution of fresh suit without payment of costs—Effect of.

Where the Court granted the plaintiff leave to withdraw a suit with liberty to institute a fresh suit on payment of costs of the first suit and the plaintiff filed a second suit without paying the costs as directed held, that the plaintiff having failed to comply with the condition laid upon him as to the payment of costs before he could bring a fresh suit the first suit cannot be held to be pending until costs were paid therein. 33 M. 258. 2 C. L. J. 480 followed 31 Cal. 965; 19 C. L. J. 529, 3 Patna L. J. 63 dissented from. (*Phillips, J.*) *GOLLAPUDI SHESHAYYA v. NADENDLA SUBBAYYA*. 35 M. L. T. 62; 20 L. W. 642; (1924 M. W. N. 887; 82 I. C. 499; 1924 Mad. 877. 47 M. L. J. 646.

—O. 23, R. 1—Likelihood of failing on the case set up—Withdrawal.

O. 23, R. 1 is not meant to apply to a case where plaintiff fearing that he would fail on the case set up by him desires to withdraw it in order to bring a fresh suit on entirely different allegations for in such a case the suit would fail not by reason of some formal defect but on the merits. (*Baker, J. C.*) *MT. RANGABAI v. MADHORAO*.

81 I. C. 276.

—O. 23, R. 1—Withdrawal of suit—Order of Court granting leave—Form of.

10 O. and A. L. R. 74.

—O. 23, R. 1—Suit for partition—Withdrawal of suit with liberty to sue afresh—Payment of costs—Condition not complied with effect..

C. P. CODE (1903), O. 23, R. 1.

A suit for partition brought by a member of a joint Hindu family was allowed to be withdrawn with liberty to sue again on payment of cost to the defendants. After the withdrawal of the suit the plaintiff continued in a state of jointness with the other members of the family. Eventually he again sued for partition but without payment of the costs directed to be paid under the order granting leave to withdraw the former suit. *Held* that the second suit was not in respect of the same subject-matter as the first suit and that the second suit was maintainable even though the costs directed to be paid had not in fact been paid by the plaintiff. (*Phillips, J.*) KRISHNASWAMI NAIDU v. PERUMAL alias NARANAYYA.

20 L. W. 540 : 1924 M. W. N. 742 : 1925 Mad. 112.

—O. 23, R. 1—*Withdrawal of suit with liberty to sue again—Grounds for—Revision—Interference by High Court.*

An order under O. 23, R. 1, C. P. Code granting a plaintiff liberty to withdraw a suit with permission to institute a fresh suit must be founded on one or other of the grounds mentioned in the rule. The expression "other sufficient ground" in O. 23, R. 1, clause (2) would not cover any ground dissimilar to the formal defect specified in the section. A suit which must fail by reason of the cause of action on which it is founded not being substantiated by evidence cannot be said to fail by reason of some formal defect. Where the Lower Court made an order giving leave to the plaintiff to withdraw his suit in the absence of any of the grounds specified in O. 23, R. 1, C. P. Code, its order is one made in disregard of the rules of procedure under which the jurisdiction to pass the order could be exercised and such an order must be taken to have been passed with material irregularity, if not illegally so as to justify interference by the High Court under Section 115, C. P. Code. (*Wazir Hasan, J. C.*) MAHOMED EJAZ RASUL KHAN v. MUBARAK HUSAIN.

10 O. & A. L. R. 685 : 79 I. C. 1033 : 11 O. L. J. 613

—O. 23, R. 1—*Withdrawal of suit—Order by appellate court without giving reasons—Liable to be set aside in revision.* See C. P. Code, S. 115 AND O. 23, R. 1. 39 C. L. J. 371.

—O. 23, R. 1 (1) O. 6, R. 17 and S. 115—*Specific Relief Act (1877), S. 42—Suit for declaration of title—Omission to sue for possession—Application for amendment of pleadings rejection of—Application for withdrawal of a suit with permission to bring a fresh suit, grant of—Order permitting withdrawal, whether open to revision—Words 'Other sufficient grounds' in O. 23, R. 1 (2) (b) C. P. C., meaning of.*

Held, that it is most improper to reject an application for amendment of a plaint merely on the ground of delay as the loss if any, occasioned by such delay to the opposite party can be compensated by an order for costs in his favour.

Held further, that where an order under O. 23, R. 1, C. P. Code granting a plaintiff permission to withdraw his suit with liberty to institute a fresh suit is not founded on one or other of the grounds

C. P. CODE (1908), O. 23, R. 3.

mentioned in the rule *c. g.*, omission in a declaratory suit to ask for the relief of possession, the Court making such an order exercises its jurisdiction with material irregularity and the order is open to revision under S. 115, C. P. Code 40 M. 793 P. C. and 24 C. W. N. 723 relied on.

Held also, that O. 23, R. 1 (2) (b), C. P. Code merely adds grounds *Ejusdem generis* with some formal defect.

The words "other sufficient grounds" used therein would not cover any ground wholly dissimilar to some formal defect and admit of the same interpretation as "other sufficient reason" in O. 47, R. 1 (1) (c) in connection with an application for review of judgment, which means "sufficient of a kind analogous to the two already specified". 3 Lah. 127 ; 13 M. I. A. 160 ; 21 O. C. 66 and 1 O. W. N. 383 referred to. (*Wazir Hasan, J. C.*) RAJA MUHAMMAD EJAZ RASUL KHAN v. MUBARAK HUSAIN. 1 O. W. N. 388.

—O. 23, R. 1 (4)—*One of several plaintiffs—If can withdraw suit—Consent.*

One of several plaintiffs cannot withdraw from the suit without the consent of the others. (*Fremantle, S. M. and Burn, J. M.*) MAHOMED ILYAS v. FAQUIRA. 10 O. & A. L. R. 210 : L. R. 5 A. 78 (Rev.)

—O. 23, R. 3—*Adjustment—Agreement of parties—Compliance with terms—Effect.*

Where in a redemption suit, one of the issues was about the legitimacy of a person and the parties agreed that if food cooked by that person were eaten the suit should be decreed and that was done, it would conclude the matter only so far as regards that issue. The other issues must be decided on the merits in the usual way in the case. (*Daniels, J.*) BHAWANI PRASAD MISIR v. RAM SUNDER. L. R. 5 A. 268 :

79 I. C. 353 : 1924 All. 911 : 22 A. L. J. 301.

—O. 23, R. 3—*Adjustment depending on future contingency—If can be resiled from.*

Where a question of legitimacy was in issue, the parties proposed that if food prepared by one of the parties was eaten by the other, the suit might be decreed. The food was actually prepared and eaten, but before that, one of the parties withdrew from the agreement—But the Court still decreed the suit. *Held* the agreement was not an adjustment and it was open to the parties to resile from it. If the adjustment depends on a future contingency, it does not fall under O. 23, R. 3. The agreement and its performance however would be evidence on the issue of legitimacy. (*Wazir Hasan, A. J. C.*) GAURI SHANKER v. BANSI DUBE.

10 O. & A. L. R. 140 : 78 I. C. 540 :

11 O. L. J. 306 : 27 O. C. 157 : 1 O. W. N. 44 : 1924 Oudh 367 (2).

—O. 23, R. 3—*Adjustment of suit—Nominee of parties—Admissions by—Effect of.* See EVIDENCE ACT, Ss. 20, 31 and 439.

—O. 23, R. 3—*Appeal withdrawn—Compromise not made decree of court—Remedy of parties if conditions broken.*

Where an appeal is withdrawn as settled out of court, but the compromise itself is not made a decree, the parties cannot get the help of court.

C. P. CODE (1908), O. 23, R. 3.

if it afterwards turns out that one of them does not stand by the terms of the compromise. (*Baker, C. J.*) *MT MULIA v. PARTAB.*

1924 Nag. 325.

———O. 23, R. 3—Applicability to arbitration cases—Adjustment of disputes. See C. P. CODE, SCH. II, CL. 20. 76 I. C. 502.

———O. 23, R. 3—Appellate Court—Compromise of claim—Duty of court to pass decree in accordance with.

When pending an appeal the parties have compromised their dispute under a lawful agreement, it is the duty of the appellate court to record the agreement and pass a decree in accordance therewith. (*Campbell, and Zafar Ali, JJ.*) *UTTAM SINGH v. MUNSHI.*

80 I. C. 527 :
6 Lah. L. J. 261.

———O. 23, R. 3—Compromise or adjustment of suit—What constitutes—Lawful agreement.

Before a Court records a compromise it must be satisfied that the suit has been adjusted wholly or in part by any lawful agreement or compromise. Where the parties to a compromise were not only the parties to the suit but also other persons not parties to the suit, one of whom was an infant, and the compromise purported to govern the rights and liabilities of persons not impleaded in the suit and the compromise contained many clauses which were interdependent the performance of one of which being dependant on the performance of the other—the court could not pass a decree in accordance with the compromise under O. 23, R. 3. But the action of the Court in refusing to pass a decree in accordance with the compromise would not prejudice the rights of the parties to enforce the agreement in other proceedings. (*Sanderson, C. J. and Richardson, J.*) *DOOLYCHAND SRIMALI v. MOHANLAL SRIMALI.*

51 Cal. 432 : 1924 Cal. 722.

———O. 23, R. 3—Compromise decree—Illegal or inoperative condition—Enforceability of—Executing Court.

It is settled law that the inclusion of an invalid or illegal provision in a decree does not vitiate it. Where the parties have inserted in their decree a condition which cannot be carried out, the executing Court is right in refusing to enforce that portion of the decree (*Pridcaux, A. J. C.*) *PARASHARAM v. SITA RAM.* 20 N. L. R. 1: 78 I. C. 357 : 1924 Nag. 84

———O. 23, R. 3—Compromise including matters outside the scope of the suit—Compromise decree if capable of execution.

A compromise entered into by parties to the suit contained matters outside the scope of the suit and the plaintiffs had therein withdrawn the reliefs asked for by them in the suit. When the compromise was filed in the Court the Court ordered, "It is ordered that the suit be dismissed in accordance with the terms of Solenama..... and the parties do abide by the terms of the Solenama."

Held, that the words "the parties do abide by the terms of the Solenama" must not be regarded as intended to effect the enforceability of all the

C. P. CODE (1908), O. 26, R. 4.

terms of the Solenama in execution. 25 C. W. N. 68 Ref. (*Rankin and Ghose, JJ.*) *SATIS KANTA ROY v. JYOTIRUPA DEVI.*

1924 Cal. 49.

———O. 23, R. 3 and O. 43, R. 1 (m)—Compromise of suit—Power of Court to split up compromise and pass a decree—Decree or compromise—Appeal.

Under O. 43, R. 1 (m) C. P. Code, an appeal is competent from an order under O. 23, R. 3, C.P.C., recording or refusing to record an agreement, compromise or satisfaction. The mere fact that an order recording a compromise or refusing to record a compromise has been followed by a decree does not deprive a party of his statutory right to prefer an appeal against such an order. A court should accept or reject a compromise as a whole and it has no power to accept a part of it only and pass a decree thereon. (*Moti Sager, J.*) *THE SHOP OF MEGH RAJ TEJ BHAN v. SHOP OF TULSI RAM DEVI DITTA MAL.* 6 Lah. L. J. 187 : 1924 Cal. 466.

———O. 23, R. 3—Lawful—what is—Compromise affecting Piusne mortgagee—Validity. (*Mookerjee and Cholzner, JJ.*) *MAL CHAND BOID v. OSMAER ALI MANDAL.*

1924 Cal. 159.

———O. 23, R. 3—Order under—Appeal—Effect of decree—Duty of Court.

If a compromise relating to the subject matter of the suit is filed in court, the court is bound to pass a decree in accordance therewith under O. 23, R. 3, if it is satisfied of the fact of compromise. It cannot accept it in part only and reject the rest.

An appeal lies under O. 43, R. 1 (m) from an order recording or refusing to record a compromise. This right is not taken away merely because subsequently a decree has been passed in the suit. (*Moti Sager, J.*) *THE FIRM OF MEGH RAJ TEJ BHAN v. FIRM OF TULSI RAM DEVI DITTA.*

80 I. C. 696.

———O. 25, R. 1—Pauper appeal—Security for Costs—Grounds. *MA SAW v. MAUNG SHWE GON.*

75 I. C. 309 (1).

———O. 26, R. 4—Commission—Party—Examination on commission—Application for—Order disallowing—Revision against—Inference in—Application by plaintiff—Application by defendant—Difference between.

The plaintiff and the defendant in a suit instituted in the Court of the District Munsif of Devakottah were both residents of Rangoon, and the defendant was served with summons at Rangoon. The plaintiff was allowed to examine himself on Commission at Rangoon. An application by the defendant to examine himself on commission at Rangoon was, however, disallowed by the Munsif on the ground that his demeanour could not be watched by the Court. *Held*, that the Munsif acted with material irregularity in disallowing the application and that his order was liable to be set aside in revision.

Difference between an application by a plaintiff to examine himself on commission and one by a

C. P. CODE (1908), O. 26, R. 4.

defendant to examine himself on commission. (*Krishnan, J.*) VISVANATHA CHETTY v. SOMASUNDARAM CHETTY. (1924) M. W. N. 191 : 34 M. L. T. (H. C.) 314 : 78 I. C. 407 : 46 M. L. J. 131 : 1924 Mad. 541.

— O. 26, R. 4—*Examination of witnesses on Commission—Duty of Court—Discretion.*

Where an application is made for the examination of witnesses on commission and is opposed, it resolves into a question as to whether a court can be said to have acted with jurisdiction in taking away from a litigant the rights which he undoubtedly has under the law of having witnesses brought before the court and examined before the court in accordance with the normal procedure ; in other words whether the circumstances disclosed in the case gave the court jurisdiction to depart from the usual course prescribed by law. If the plaintiff insists on the attendance of his witnesses in court and the witnesses apply for their examination on commission, the court undoubtedly will have to take into consideration the grounds upon which the commission is applied for, but at the same time it cannot lose sight of the prejudice that might be caused to the plaintiff by reason of such commission being issued. If sickness or infirmity is alleged, the character and gravity of that sickness or infirmity have got to be assessed and the risk consequent upon a refusal to issue a commission will have to be taken into consideration. At the same time the importance of having the witnesses present before the court the advantages that would follow from their examination and cross-examination in the presence of the court and the emergency which might arise of having them confronted or identified should not be altogether lost sight of. If all these matters are duly considered and an order is passed, then and only then can it be said that the order has been passed in the exercise of a judicial discretion. (*Mukerjee, J.*) PANCHKARI MITRA v. PANCHANAN SAHA. 39 C. L. J. 598. 1924 Cal. 971.

— O. 26, R. 5—*Revisional power under S. 115—Principle governing grant of application to examine plaintiff on commission.*

When the plaintiff and his witnesses residing outside the jurisdiction of a Court, applied for permission to be examined on Commission, and it was opposed on the ground, that the Plaintiff having chosen (1) the forum himself cannot apply to be examined on Commission and (2) that the permission to examine witnesses should be refused under O. 26, R. 4 Held that under O. 26, R. 5 the Court had jurisdiction to allow the examination on Commission but the exercise of it would amount to a denial of justice to the defendant. *Emanuel v. Soltykoff*. 8 T. L. R. 331 (1892) followed.

The case of a Plaintiff stands on a different footing and it is an extraordinary thing to pass an order for the examination of a plaintiff on commission and that the trial Judge acted with the material irregularity. (*Dass and Ross, JJ.*) NAWAB SAYID MD. AKBAR ALI KHAN v. HERBERT FRANCIS. 3 Pat. 863.

C. P. CODE (1908), O. 32, R. 1.

— O. 26, R. 9—*Local inspection—If can be the sole basis of a decree—Note of local inspection—If essential.*

The power of a court to have local inspection does not entitle it to decide the suit purely on the basis of that. It must decide the case on the evidence adduced by the parties.

There is nothing in the C. P. Code to make it obligatory on a court to leave a note of a local inspection on the record. (*Suhrawardy and Graham, JJ.*) RAJ CHANDRA BANIK v. ISWAR CHANDRA BANIK. 80 I. C. 392.

— O. 26, R. 9—*Local investigation—Commissioner for—Report of Commissioner—Weight due to.*

Interference by a court with a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated 13 M. L. A. 607 ; 15 W. R. 423 ; 60 I. C. 434 Rel. It is not safe for a court to act as an expert and to overrule the elaborate report of a commissioner for local investigation whose report is unquestioned whose careful and laborious execution of his task was proved by his report and who had not blindly adopted the assertions of either party. (*Mookerjee and Chatterjee, JJ.*) RANI AMRITA SUNDARI DEBI v. MUNSHI SERAJUDDIN AHMED CHOWDHURY. 80 I. C. 755 : 28 C. W. N. 318 : 1924 Cal. 620.

— O. 26, R. 9—*Sub-letting—Issue as to—Appointment of Commissioner—Legality of.*

In an ejectment suit the Assistant Collector appointed a Commissioner to determine whether the land had been sub-let by the tenant. There was nothing to show that he had delegated his own powers to the Commissioner. Held, that the appointment of the commissioner was legal under O. 26, R. 9 of the Civil Procedure Code and there was no irregularity. (*Burn, J. M.*) ZIA-UL-HAQ v. MD. KARIM-UD-DIN. L. R. 5 A. 62 (Rev).

— O. 26, R. 11—*Contracts if authorised—Question if can be referred to Commissioner—Findings of—Value.*

A question whether a certain contract is authorized or not cannot be referred to a commissioner for taking accounts under O. 26, R. 11, C. P. Code. The report of a Commissioner is only to be treated as evidence in the case and is not a decision which has to be accented. (*Raymond and Bilaram, A. J. C.*) FIRM OF SETH VISHINDAS NIHAL CHAND v. NAZARALI SAMJI. 1924 Sind 9.

— O. 30—*Suit against—Firm—Defendant also described as owner of Firm.* MOTILAL JASRAJ v. CHANDUMAL HINDUMAL.

1924 Bom. 155.

— O. 30, Rr. 1, 3—*Suit against firm—service of summons—Non-service on one of the partners—Effect.* See C. P. CODE, O. 9, R. 13, 26 Bom. L. R. 389.

— O. 32, R. 1—*Suit against husband to recover property—Husband as natural guardian cannot resist the suit.*

C. P. CODE (1908), O. 32, Rr. 2 & 4.

A minor wife is entitled to bring a suit through her next friend according to Civil Procedure Code to recover her own property. The only person who would be entitled to resist such a proceeding would be the person appointed as the guardian of minor's property under the Guardian and Wards Act. The husband has no title to resist the suit (*MacLeod, C. J. and Crump, J.*) MALLAWA v. SHIVRUDAYA. 1924 Bom. 114.

—O. 32, Rr. 2 and 4—Minor—If can be guardian of other minors.

A minor cannot be guardian ad litem or next friend of other minors and proceedings based on such representation are null and void. (*Wazir Hasan, J. C.*) GUR CHARAN v. FASHUDDIN. 80 I. C. 602.

—O. 32, R. 3—Decree against unrepresented minor defendant if nullity—Effect prejudice not alleged.

A minor who was unrepresented in the suit by any guardian cannot be held to be bound by the decree passed against him although he neither alleges nor proves that the decree passed against him is unjust or to his prejudice and though he regarded himself as major throughout the whole proceeding. (*Mukerji and Dalal, JJ.*) MT CHAMBI v. TARA CHAND. 1924 All. 892.

—O. 32, Rr. 3, 4—Minor—Guardian ad litem—Appointment of—Absence of notice—Irregularity.

Notice was issued to some minor defendants and to their father that there was an application to appoint the latter guardian ad litem. He refused to accept the appointment whereupon the court appointed a pleader without further notice to the minors. Held, there was a proper representation of the defendants and in the absence of prejudice, an *ex parte* decree cannot be set aside. (*Das and Ross, JJ.*) PRITAM RAM v. DHARU RAM. 1924 P. H. C. C. 216 : 78 I. C. 613 : 1924 Pat. 772.

—O. 32, Rr. 3 and 16—Ruling Chief—Age of majority—Personal law—Dayabaga—Chief aged 16—No guardian necessary.

In the case of a defendant who is a Ruling Chief aged 16 not living or domiciled in British India, the Indian Majority Act. does not govern. Where his personal law is the Dayabaga School of Hindu Law, he is a major and as such no guardian ad litem is necessary. He can act through his manager appointed under S. 85, C.P. C. (*Suhrawardy and Graham, JJ.*) RAMESH CHANDRA DAS v. MAHARAJA BIRENARA KISHEN. 80 I. C. 100.

—O. 32, R. 3 (5)—Minor defendant—Guardian ad litem—Appointment of the head clerk of the Court—Omission of notice to persons having custody of the minors—Irregularity.

No irregularity by way of an omission to send a notice as required by O. 32, R 3 (5) of the C. P. Code will operate to render void the presumed representation of the minor in a suit by a guardian ad litem appointed for him, unless such an omission has in fact prejudiced his defence. Such prejudice is not a matter of assumption or presumption but of proof.

C. P. CODE (1908), O. 32, R. 4 (3).

Consequently a decree passed in a prior suit against a minor represented by the Head clerk of the Court as guardian ad litem cannot be set aside in a fresh suit on the ground of want of notice of the appointment of the guardian ad litem under O. 32, R. 3 (5), C. P. Code to the person having the custody of the minor unless it is shown that the minor had a good defence to the suit which by the negligence of the Court guardian, whose appointment followed on the breach of the rule, had not been put forward. 14 C. 204, 37 A. 17 : 44 M. L. J. 299 relied on. (*Wallace, J.*) KIDAMBI TIRUMALACHARYU v. AMMISSETTI VENKIAH. 46 M. L. J. 363 : 1924 M. W. N. 362 : 34 M. L. T. (H. C.) 202 : 19 L. W. 678 : 80 I. C. 541 : 1924 Mad. 763.

—O. 32, R. 4—Appointment of guardian ad litem—Consent.

A court is not competent to appoint a person as the guardian ad litem of an infant without his express consent. (*Mookerjee and Rankin, JJ.*) JAGADISH CHANDRA DE v. HARIHAR DE. 78 I. C. 219 : 40 C. L. J. 39 : 1924 Cal. 1042.

—O. 32, R. 4—Death of respondent—Minor heirs not properly represented—Decree against other heirs—If maintainable.

Where on the death of a respondent in appeal his heirs including some minors were impleaded but no steps were taken to have them represented properly and a decree is passed only against the major heirs, the whole procedure is irregular and the appeal should be dismissed. (*Suhrawardy and Chotzner, JJ.*) NEYAJADDIN v. AKAMAT ALI. 79 I. C. 365.

—O. 32, R. 4—Minor—Certificated guardian—Mortgage by guardian without sanction of court—Suit to enforce mortgage—Certificated guardian appointed guardian ad litem of the minor in the suit—No proper representation of the minor—Decree not binding on minor—Liable to be set aside in separate suit by minor. See GUARDIAN AND WARDS ACT, S. 30. 22 A. L. J. 493.

—O. 32, R. 4—Minor—Guardian ad litem—Appointment for suit—If enures for execution proceedings.

A guardian ad litem appointed in the suit does not continue as such without a fresh appointment during the execution proceedings. In order to constitute *litis pendens* there must be a continuance of *litis contestates* and if therefore the suit is ended by a decree there is no longer any *lis pendens*. The case of mortgage suits may be an exception. (*Newbould and Ghose, JJ.*) KHAIJEE SALAUDDIN v. AFZAL BEGAM. 39 C. L. J. 590 : 28 C. W. N. 963 : 1925 Cal. 23.

—O. 32, R. 4 (3)—Appointment of guardian for a suit—Consent of proposed guardian—Whether must be expressed—Want of consent by proposed guardian, whether renders the decree in the suit a nullity.

Held by the Full Bench the Chief justice *Ramesam* and *Wallace JJ.* that the consent of a proposed guardian ad litem under O. 32, R. 4 (3) of the Civil Procedure Code need not necessarily

C. P. CODE (1908), O. 32, R. 4 (3).

be expressed. Consent is a question of fact; it is a question to be decided upon evidence whether there was consent by the person proposed that he would act as guardian.

Held by Phillips J. (Venkatasubba Rao, J. dissenting): The absence of consent on the part of a proposed guardian *ad litem* does not render the decree a nullity, but is merely an irregularity which would vitiate the decree only if it has affected the merits of the case.

Per Venkatasubba Rao, J.: A decree passed against a minor where there is no consent on the part of the guardian *ad litem* to act as such is a nullity and it is unnecessary to set it aside in a separate proceedings. (*Coults Trotter, C. J. Ramsam and Wallare, JJ.*) *VASIREDDI SRIRAMALU v. LAKSHMINARAYANA.* 35 M. L. T. (H.C.) 12 ;

20 L. W. 248 ; 47 Mad. 783 ; 1925 Mad. 30 ; 47 M. L. J. 278.

———O. 32, R. 4 (3)—Guardian appointed consent of proposed guardian, necessity of—Presumption.

Under O. 32, R. 4 (3) no person can be appointed guardian for a suit without his consent. Consent can be presumed where the guardian is given an opportunity to object to his appointment, and does not do so. *Chatter Singh v. Rej Singh* 43 A. 104 ; 2 Pat 296 foll. (*Daniels and Neave, JJ.*) *RAJA BABU v. BAI-MUKUND.*

L. R. 5 All. 692.

———O. 32, R. 4 (3)—Consent if may be implied.

The consent may be implied and is not necessarily to be expressed in any document on record. Where notice was not issued because the guardian happened to be present in Court when his appointment was made and in another case notice did really issue though the guardian did not give any express consent but none of the two guardians refused to accept the appointment but remained silent and they were appointed as guardians and where they themselves were parties to the suit as defendants and were members of the same family and their interest in the suit was identical with that of the minors.

Held, that there was no defect in the appointment of the guardians. 59, I. C. 691 Foll. (*Motisagar, J.*) *JAWAHAR SINGH v. SEWA SINGH*

5 Lah. L. J. 487 ; 1924 Lah. 97.

———O. 32, R. 4 (4)—Appointment of a Court guardian—Father unwilling to act—Existence of other guardians, not known to the plaintiff. Decree, whether bad for non-representation of the minor.

Where a clerk of the Court is appointed as a Court guardian of a minor defendant after his father's expression of unwillingness to act as guardian, on an affidavit to the effect that there were no other principal guardians for the minor defendant, a decree obtained against the minor is not bad on the ground of his non-representation, if it is not shown that the plaintiff procured the appointment of the Court guardian being aware of the existence of other proper guardians on a false affidavit by reason of collusion between the Court Clerk and the plaintiff. (*O'igers and Hughes, JJ.*)

C. P. CODE (1908), O. 32, R. 7.

SRI RAJAH DANTULURI DEVI PRASADA SATYANARAYANA VEERABHADRA VENKATA LAKSHMI KANTARAJA GARU v. PEDA VENKATA JAGANNATHA RAJU GARU. 46 M. L. J. 12 ; (1924) M. W. N. 125 ; 33 M. L. J. (H. C.) 243 ; 77 I. C. 464 ; 1924 Mad. 281.

———O. 32, R. 5—Guardian-ad-litem—Appointment of—Locus standi to appeal.

When a guardian-ad-litem has once been appointed, the same enures for the whole of the *lis* unless and until revoked by court. He alone has the *locus standi* to file an appeal. (*Baker, J. C.*) *ABDUL HUSSAIN v. MEGHRAJ.*

1924 Nag. 133.

———O. 32, R. 6—Decree in favour of manager and minor members of a joint Hindu family—payment to manager—leave of Court not obtained effect of. See C. P. CODE, O. 21, R 2 & O. 32, R. 6. 47 M. L. J. 498.

———O. 32, R. 7—Applicability—Execution proceedings—Compromise—Sanction, absence of—Collector—Powers of.

O. 32, R 7 applies to proceedings in execution and where pending execution before a Collector, the guardian of a minor decree-holder compromises without the sanction of the court, the same is voidable at the option of the minor, even if the guardian happens to be his father or the manager of his family. (*Baker, J. C. and Hallifax, A. J. C.*) *MT. PERABAI v. BHAWANI PRASAD.*

1924 Nag. 185

———O. 32, R 7—Compromise of suit—Minor members—Joint Hindu family—Consent of next friend—Absence of

Where all the plaintiffs in a suit form members of a joint Hindu family and some of them are minors, the absence of the consent of the next friend of the minor plaintiffs vitiates the compromise in toto. (*Dalal and Simpson, JJ.*) *LOOTAR RAM v. LAL RANJIT SINGH.*

11 O. L. J. 881.

———O. 32, R. 7—Compromise—Minor—Leave of Court not obtained—Compromise voidable by minor—Suit to set aside—Limitation.

A compromise decree entered into on behalf of a minor even without the leave of the court first obtained is not void and a nullity but is voidable only. It is binding on all the parties except the minor and the only person who can call it in question is the minor himself. If the minor does not elect to avoid the decree, it will be binding all round. Even as against the minor the decree will be treated as binding until it has been got rid of. The decree can only be set aside by a regular suit or by an application for review. The period of limitation for a suit of that kind is art. 120 and the plaintiff, minor, would be entitled to the benefit of Ss 6 and 8 of the Limitation Act. (*Lindsay and Kanhaiya Lal, JJ.*) *PHULWANTI KUNWAR v. JANESHAH DAS* 22 A. L. J. 521 ; 46 All. 575 ; L. R. 5 A. 785 ; 1924 All. 625.

———O. 32, R. 7—Minor—Reference to arbitration—Sanction of court if necessary.

C. P. CODE (1908), O. 32, R. 7.

Per Suhrawardy, J. Where one of the parties to a suit is a minor, an agreement to refer disputes to arbitration is not such an agreement as under O. 32 R. 7 requires the sanction of the court.

Per Page, J. When at the request of parties the court passed an order referring the disputes to arbitration, the proceedings are regular whether there was an application under O. 32, R. 7 or not. (*Suhrawardy and Page, JJ.*) *DEBIR-UD-DIN v. AMINA BIBI.* 78 I. C. 335.

— O. 32, R. 7—*Negotiation for compromise—If require sanction of court—Propriety of sanction—If can be questioned in later suit or split up.*

O. 32, R. 7 does not require that the sanction of the court should be obtained even before negotiations for a compromise are started. It only says if a compromise is arrived at, it must be sanctioned by court in order to be binding on the minor. When a court has sanctioned a compromise it is not open in a subsequent suit to challenge the propriety of the same or to have it split up, retaining one part and rejecting another. (*Kotwal and Prideaux, A.J.C.*) *YADORAO v. MIRABAI.* 1924 Nag. 180

— O. 32, R. 7—Minor—Compromise—Deputy of Court—Wishes of guardian or next friend—Weight due to. 75 I. C. 682

— O. 32, R. 7—Compromise decree—Joint Hindu family—Minors—Consent of Court.

A compromise decree for enhancement of rent obtained against the members of a joint Hindu family, some of whom were minors represented by a court guardian other than the manager is not binding on the minors unless the sanction of court is obtained. (*Neave, J.*) *SANTU v. ARHAI NANDAN PRASAD.* L. K. 5 A 292 :

81 I. C. 297 : 1925 A. 32 (Rev.)

— O. 33, R. 1—Application on behalf of minor—Reasons of next friend immaterial.

When a minor brings a suit *in forma pauperis* through a next friend, the inquiry into pauperism is confined to the minor and is not affected by the status of his next friend. 3 Mad 3 folld. (*Macleod, C.J. and Shah, J.*) *NEMICHAND BHICK CHAND MARWADI v. KEVAICHAND JASRAJ MARWADI.* 26 Bom. L. R. 380 : 80 I. C. 748 :

1924 Bom. 440.

— O. 33, R. 3—Leave to sue in forma pauperis—Rejection of—Doubtful claim.

An application for leave to sue as a pauper cannot be rejected on the ground that he claim is doubtful for such a conclusion can be reached only when the case is tried. (*Hallifax, A.J.C.*) *MT. RUPIBAI v. SADASHIV.* 75 I. C. 744.

— O. 33, R. 3—Pauper application—Presentation to Sheristadar—If valid—Madras Civil Rules of Practice, R. 14—If ultra vires

In O. 33, R. 3 Civil Procedure Code the insistence is on the words "in person" and not on "to the court" as meaning the Judge himself. There is no reason to hold that R. 14 of the Civil Rules of Practice is *ultra vires* and the mere fact that an applicant *in forma pauperis* presented his application to the sheristadar is no ground for

C. P. CODE (1908), O. 34, R. 1.

rejecting the same. (*Jackson, J.*) *CHIDAMBARAM CHETTIAR v. KADAR MO IDEEN ROWTHER.*

(1924) M. W. N. 749 (1) : 50 L. W. 622 : 1924 Mad. 901 (2) : 47 M. L. J. 522.

— O. 33, R. 5—Leave to sue in forma pauperis—Enquiry into the merits of the case.

It is the duty of the court enquiring into an application for leave to sue *in forma pauperis* not merely to read through the plaint but to make a very extensive enquiry as to the facts on which the plaint is based. 41 M. 620 d'ss. (*Neave and Kandall, A. J. C.*) *MAHOMED ISMAIL v. KARAM ALI.* 10 O. and A. L. R. 579 :

11 O. L. J. 568 : 79 I. C. 922 : 1 O. W. N. 311.

— O. 33 R. 5 (d)—Nature of inquiry—Complicated questions of law—Not to be inquired into.

The scope of the inquiry in O. 33, C.P.C. is limited primarily to determining the pauperism of the petitioner and the Court is not justified in determining complicated questions of law. The court can reject the application if the allegations do not show a cause of action but it ought not to go into evidence as to the merits of the case. (*Moti Sagar, J.*) *MT. BHAGWANTI v. BUA DITTA.* 1924 Lah. 659.

— O. 33, R. 6—Leave to sue in forma pauperis—Examination of applicant—Limitation.

The Court could enter into the merits of the case on an application for leave to sue as a pauper under O. 33 R. 4, C.P.C. and for that purpose the court could examine the plaintiff seeking leave. But the court cannot take other evidence and examine other witnesses for deciding the question of limitation or any other question arising in the case other than the applicant's pauperism 19 M. 197 not foll. 46 C. 651 folld. (*Jwala Prasad and Adami, JJ.*) *SHAIKH MAHOMED NASIRULIAH v. SHAIKH MAHOMED SHUKRULLAH.* 3 Pat 275 : 1925 P. 30.

— O. 33, R. 7—Pauperism of plaintiff—No objection on behalf of Government—Defendant to be given opportunity to disprove same. See LETTERS PATENT (MADRAS) CL. 15

20 L. W. 845.

— O. 33, R. 15—Application for leave to sue in forma pauperis—Rejection of, for default—Fresh application, if sustainable.

Where an application for leave to sue in forma pauperis is dismissed for default, it is not competent to the court to entertain a fresh application for leave. (*Suhrawardy and Durr, JJ.*) *KHONDKAR ALI AFZAL v. UTKA CHANDRA TIWARI.* 40 C. L. J. 188 : 1924 Cal. 1039.

— O. 34, R. 1—Parties—Persons setting up title paramount—Title if can be gone into.

1924 Oudh 19.

— O. 34, R. 1—Parties to suit—Mortgage to some members of a joint Hindu family—Other members if necessary parties—Position of mortgage.

C. P. CODE (1908), O. 34. B. 1

Where a mortgage document is executed to some members of a joint Hindu family, they can bring a suit on the mortgage without impleading the other members of the family in the suit.

A person who is named in a mortgage deed as a mortgagee although in fact merely a *benamidar* for the beneficially interested can institute a suit in his own name, either for sale or foreclosure and the suit should not be dismissed merely because the beneficial owner is not added as a party. This principle extends to a mortgage taken by some only of the members of a joint Hindu family who unlike as in the case of a *benamidar* have a beneficial interest themselves in addition to their authority to act on behalf of the family. (*Miller, C. J. and Kulwant Sahay, J.*) *HIT LAL MAHTON v. JIBOO MAHTON*. 5 Pat. L. T. 142; 3 Pat. 81; 75 I. C. 378; 1924 P. 458

— O. 34, R. 1—*Mortgage—Prior and subsequent—Suit by first mortgagee without impleading puisne mortgagee—Subsequent suit by puisne mortgagee—Rights of parties.*

Where a mortgagor sued on his mortgage without impleading the subsequent mortgagee and in execution of his mortgage-decree purchased the mortgaged property, obtained delivery of possession and the subsequent mortgagee sued on his mortgage in pleading the first mortgagee auction-purchaser, held that the right of redemption possessed by the second mortgagee was not affected by the previous suit and auction sale, and he could redeem the first mortgagee, but as the first mortgagee occupied the double capacity of first mortgagee as well as the owner of the equity of redemption he was to redeem the subsequent mortgagee, on payment. (*Jurka Prasad and Kulwant Sahay, JJ.*) (*MT. DHANWANTI CHAUDHRAIN v. HARGOBIND PRASAD*). 3 Pat. 435; 5 Pat. L. T. 103; 1924 P. 464

— O. 34, R. 1—*Mortgage suit—Necessary parties—Prior mortgage—Paramount title.*

A plaintiff mortgagee cannot be allowed to frame his suit so as to draw into controversy the title of a third party, who is in no way connected with the mortgage and has set up a title paramount to that of the mortgagee or the title of a puisne mortgagee. 33 C. 425, Foll. (*Pratt, J.*) *MAUNG SAN MYAING v. U. PEN GYAW*, 2 R. 106; 1924 R. 240

— O. 34, R. 1—*Mortgage suit—Transferee not impleaded—Effect of.*

Where in a suit on a mortgage the transferee of the equity of redemption is not impleaded, the decree is not binding on him and a sale in execution relates only to the mortgage interest. (*Kennedy, J. C. and Raymond, A. J. C.*) *SIND BANK LTD. v. AMERSI DYAL*. 78 I. C. 279

— O. 34, R. 1—*Parties to suit.*

All persons whose rights and interests may be adjudicated upon and determined in the suit ought to be added as parties under O. 1, R. 9 read along with O. 34, R. 1; but failure to add one or two persons should not have the effect of

C. P. CODE (1908), O. 34. R. 1.

defeating the suit if the Court in their absence, can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it 2 Pat. 175; 4 Pat. L. T. 698; 1922 A. I. R. (Pat.) 651. (*F. H. Jwala Prasad and Kulwant Sahay, JJ.*) *PARMESHWAR PANDRY v. RAJKISHORE NARAYAN SINGH*. 5 Pat. L. J. 646; 80 I. C. 34; 3 Pat. 829; 1925 Pat. 59;

— O. 34, R. 1—*Suit on mortgage—Parties—Joint Hindu family—Addition of junior members after expiry of period of limitation.*

In a suit for sale on a mortgage executed by the adult members of a joint Hindu family, the sons of the defendants were joined as parties after the expiry of the period of limitation prescribed for instituting the suit. Held that the suit was not barred by limitation and that the added defendants were sufficiently represented by their fathers. 30 A. 549; 34 A. 572; 34 A. 615, Ref. (*Daniels and Neave, JJ.*) *CHETAN SINGH v. SARTAJ SINGH*. 92 A. L. J. 702; L. R. 5 A. 480; 46 A. 709; 79 I. C. 1001; 1924 A. 808 (1).

— O. 34, R. 1—*Suit by puisne mortgagee—Prior mortgagee impleaded but discharged—Purchase in execution—Suit by prior mortgagee—Puisne mortgagee not impleaded—Right of redemption.*

A puisne mortgagee brought a suit on his mortgage, impleading the prior mortgagee. The latter set up his paramount lien and was discharged. In execution of the decree the puisne mortgagee purchased the property. The prior mortgagee then brought a suit on his mortgage without impleading the puisne mortgagee, foreclosed and obtained possession before the execution sale in the prior suit. Thereupon the puisne mortgagee sued to redeem the prior mortgagee and the latter claimed to redeem the former. Held, as the prior mortgagee had not impleaded the other in his suit, he could not take advantage of his foreclosure proceedings and redeem the subsequent mortgagee. The latter was entitled to redeem. (*Prideaux, J. C.*) *GOVINDRAO v. RUKHMANAND*. 1924 Nag. 198.

— O. 34, R. 1—*Person in possession of properties—If a necessary party—Prior mortgagee—When to set up his rights.*

It is only in a suit brought by a puisne mortgagee for the express purpose of selling the mortgaged property free of the prior incumbrance that the prior mortgagee is bound to set up and prove his mortgage. Merely because a person is in possession of the mortgage property it cannot be said to amount to an interest in the mortgage security or in the right of redemption as to the necessity of his being impleaded under O. 34, R. 1 (*Kinkhede, A. J. C.*) *BALAH VINAYAK BUTI v. VOTHABA*. 1924 Nag. 191.

— O. 34, R. 1 and O. 1, R. 9—*Suit for sale on mortgage—Non-joinder of necessary parties—Effect of.*

C. P. CODE (1908), O. 34, R. 1.

The omission to bring all the necessary parties on the record in a mortgage suit has no effect of the dismissal of the entire suit. The court can order the sale of the defendant's interest in the property in suit. (*Dalal, J.*) SHEO KUMAR PANDEY v. BABU NANDAN DUBEY.

L. R. 5 A. 431 : 1924 All. 928

— O. 34, R. 1—*Omission to implead party—Some heirs of mortgagor not impleaded—Effect.*

The omission to implead a necessary party to a mortgage is not necessarily fatal to the suit. If one of the heirs of a mortgagor is not impleaded, a decree can be passed proportionate to the shares of the other heirs who have been sued on the mortgage. (*Suhrawardy and Graham, JJ.*) KHE RODAMOYI DAS v. HARB SINGH.

82 I. C. 633 : 23 C. W. N. 51.

— O. 34 R. 1—*Subject to O. 1, R. 9.*

In a suit by the mortgagees against the members of a joint family for enforcement of the mortgage and it was contended that the suit was bad for defect of parties. Held where a bond was executed by a karta, and he and other members known to be existing are impleaded, failure to add one or two persons should not have the effect of defeating the suit, if the Court in their absence can deal with matters in controversy so far as regards the rights and interests of the parties actually before it, relying on I. L. R. 2 Pat. 175 (*Jasita Prasad and Kumar Sahay, JJ.*) PARAMESWAR PANDEY v. RAJKISHORE PRASAD NARAYAN SINGH.

5 Pat. L. 614 : 80 I. C. 34 : 3 Pat. 829 : 1925 P. 59.

— O. 34, R. 2—*Appeal from preliminary decree—Pendency of—Final decree—Appeal—If necessary.*

When an appeal is pending from the preliminary decree in a mortgage suit, it is not necessary for the mortgagee to file another appeal from the final decree. The result of the appeal from the preliminary decree will govern the final decree as well. (*Dalal, J. C. and Neave, A. J. C.*) MAHOMED SHEER KHAN v. SETH SWAMI DAYAL.

78 I. C. 411.

— O. 34, R. 2 and 3—*Mortgage—Preliminary decree—Death of plaintiff after—Abatement of suit. See C. P. CODE, O. 22, R. 3, 46 M. L. J. 181*

— O. 34, R. 2 and 4—*Mortgage decree—Costs—Personal liability.* 1924 A. 104.

— O. 34, R. 3—*Mortgage decree—Preliminary decree before the new Code—Final decree after the new Code—Limitation*

Where in a mortgage suit the preliminary decree was passed before the passing of the new C. P. Code and the final decree was passed after the new C. P. Code came into existence, the final decree is the only executable decree in the case

C. P. CODE (1908), O. 34, R. 4.

and the provisions of the C. P. Code apply to the execution of the said decree. (*Ryvs and Mukerji, JJ.*) BOHRA TARA CHAND v. MURTAZA HASAIN.

L. R. 5 A. 52 :

78 I. C. 1030 : 10 O. & A. L. R. 244.

— O. 31, Rr. 3 and 7—*Mortgage—Decree on—Execution allowed to be barred—Effect of—Sale of property at the instance of prior mortgagee—Rights of purchaser.*

The property in dispute was sold to a third person by its owner subject to two mortgages. The vendee did not pay anything. The prior mortgagee sued on his mortgage impleading the puisne mortgagee and the purchaser from the mortgage. The suit was decreed and the mortgagee himself purchased the property in execution and paid the surplus sale proceeds into Court in 1920. The puisne mortgagee had obtained a decree on his mortgage in 1914 but had allowed execution of it to become barred. A dispute arose between the puisne mortgagee and the vendee from the mortgagor as to who was entitled to the money in court deposit. Held, that the rights of the puisne mortgagee had merged in his decree, that his remedy was to execute the decree, that having allowed the decree to become barred it could not be said he had any interest in the property and that the puisne mortgagee was not entitled to be paid the money. 40 All. 407 Full. (*Sulaiman and Kanhaya Lal, JJ.*) MAHOMED ABDUL RAHIM KHAN v. RAM BHAROS OJHA.

22 A. L. J. 825 :

L. R. 5 A. 596 : 1925 A. 6.

— O. 34 Rr. 4 and 5—*Scope of—Mortgage—Arbitration—Decree for money—Realization by sale—Final decree. NRIPENDRA NATH CHATTERJEE v. JHUMAK MANDAR.*

3 Pat. 221 :

2 Pat. L. R. 9 : 1924 P. 263.

— O. 34, R. 4—*Mortgage—Decree under O. 34, R. 4 of the Civil Procedure Code—Receiver of property under mortgage—Effect of appointment of—Action by Receiver against decree-holder for account and possession.*

In 1899, the mortgagee in the exercise of his right under a mortgage executed in 1892, obtained the usual decree for sale of the mortgaged property (the village Jainagar). In 1910, on the application of the judgment-debtors and with the consent of the mortgagee (decree-holder) the Court appointed a Receiver of the properties of the judgment-debtors. After various subsequent proceedings the Receiver and the judgment-debtors instituted proceedings against the mortgagee for an account of his receipts from the mortgaged property, and for delivery of possession of the said village. The Subordinate Judge of Fyzabad decided that the Receiver was not entitled to possession, but only to debit the mortgagee in the account with the sum of Rs. 1,471-3-5 per annum (instead of Rs. 1,600 as previously), for sums received from the property. The High Court on

C. P. CODE (1908), O. 34, R. 4.

appeal reversed this judgment and made a decree directing the Maharaja to deliver up possession of the said village to the Receiver.

Held, by the Privy Council (affirming the judgment of the High Court) that the Receiver was entitled to *khas* possession of the village, and should in future administer and manage it as part of the estate under his charge, subject to being credited into acc. units by the mortgagee with Rs. 1,471-3-5 for collections made up to the last decree of the High Court. (*Lord Shaw*) MAHARAJADHIRAJ SRI RAMESHWAR SINGH BAHADUR v. HITENDRA SINGH.

20 L. W. 438 :

33 M. L. T. (P.C.) 179 (P.C.) : 22 A. L. J. 963 :

40 C. L. J. 444 : 82 I. C. 794 :

1924 P. C. 206 : 47 M. L. J. 294

———O. 34, R. 4—*Sale of mortgage properties—Order in which properties should be sold—Power of court to direct.*

Ordinarily, the right of selling a property in a particular order rests with the decree-holder and in the absence of any contract between the parties, the decree holder may proceed to sell the properties in whatever order he thinks best so as to facilitate his realization of his mortgage debt. But the Court can, in the circumstances of a case and in view of the equities arising in various parties, direct the order in which the properties should be sold. Whereas the decree-holder has the right in the first instance to prescribe the order of the progress of the sale; the final orders rest with the Court which has to adjust and determine the equities of the parties before it. (*Jwala Prasad and Kulwant Sahai J.*) RAJESHWAR PRASAD NARAIN SINGH v. MAHOMED KHALIL-UL-RAHMAN.

3 Pat. 522 : 5 Pat. L. T. 223 :

78 I. C. 796 : 1924 P. 459.

———O. 34, R. 5—*Mortgage-decree for sale—Sale of mortgaged property in execution and purchase by stranger—Sale of portion of property in execution of money-decree against mortgagor subsequent to mortgage but prior to sale in execution of decree thereon—Purchaser not made party to the suit—Effect of rights of parties—Fresh suit for sale—Maintainability.*

The 5th defendant, a mortgagee of certain properties from the 1st defendant and the father of defendants 2 and 3, sued upon his mortgage and obtained a decree for sale. In execution of that decree all the mortgage properties were sold and purchased by the plaintiff being sufficient to discharge the mortgage-debt. The 4th defendant was an auction purchaser of one-half of the mortgaged properties at a sale held, subsequent to the mortgage (in favour of the 5th defendant) but prior to the sale at which plaintiff became purchaser, in execution of a money-decree obtained against the father of defendants 2 and 3. He (4th defendant) was not made a party to the suit by the 5th defendant, though the latter had notice of his (4th defendant's) rights.

In a suit brought by the plaintiff against defendants 1 to 5 for the recovery from the 4th defendant of the mortgage-debt and interest from the date of the mortgage up to the date of the plaintiff's sale together with future interest and for a sale of the properties in his possession in default of payment, *held*, that plaintiff as the

C. P. CODE (1908), O. 34, R. 6.

assignee in law of the original mortgagee's rights by virtue of his purchase in Court sale, was entitled to institute a second suit for sale on the mortgage as against persons who were not parties to the prior suit, that the only right of the 4th defendant was to redeem the mortgage, that the amount payable by him as a condition of redemption was the amount of the decree in execution of which the property was purchased by the plaintiff, and that the plaintiff was not entitled to future interest as he had been in possession of one half of the properties purchased by him and the whole difficulty arose out of the default to make the 4th defendant a party to the original mortgage suit.

The effect of the omission in O. 34, R. 5 of the present C. P. Code, of the words "and thereupon" (on an order absolute being passed) "the defendant's right to redeem and the security shall both be extinguished" is that the mortgage is kept alive for all purposes as regards persons having an interest but not made parties to the mortgage suit. (*Kumaraswami Sastry and Waller, JJ.*) VENKAT REDDY v. KUNJAPPA GOUNDAN.

20 L. W. T. 137 : (1924) M. W. N. 366 :

34 M. L. T. (H. C.) 225 : 47 M. 551 : 924 M. 60 :

46 M. L. J. 391.

———O. 34, R. 5—*T. P. Act, S. 89—Difference between—Execution sale—Erroneous description of property—Rectification.*

There is a substantial difference between the provisions of S. 89 of the T. P. Act and O. 34, R. 5, C. P. Code, and the former provision governs sales held before the new C. P. Code. As soon as an order absolute was made the mortgage security was extinguished and the relative rights of the mortgagor and the mortgagee were regulated by the decree. But it does not follow that thereafter the mortgagee is debarred from proving that the description of the property mentioned in the Schedule to the decree was itself erroneous. (*Mookerjee and Cuming, JJ.*) NANDI v. AL AGRANI v. JOGENDRA CHANDRA DUTTA.

28 C. W. N. 403 : 39 C. L. J. 222 :

82 I. C. 297 : 1924 Cal. 881.

———O. 34, R. 5 (2)—*Decree on mortgage before 1908—Order absolute—Final decree—Applicability of C. P. Code.*

Where prior to the passing of the C. P. Code of 1908 a decree on a mortgage had been obtained under S. 88 of the T. P. Act, further proceedings have to be continued under the T. P. Act as it stood before repeal and not under O. 34, C. P. Code. 35 M. L. J. 194 Rel. (*Schwabe, C. J. and Waller, J.*) PEDDA ASWATAPPA v. ANKULU GADU.

19 L. W. 290 : (1924) M. W. N. 306 :

78 I. C. 70 : 1924 Mad. 603.

———O. 34, R. 6—*Personal decree against mortgagor—Form of.*

75 I. C. 188.

———O. 34, R. 6 *Application for personal decree—Formalities required for.*

No formalities are required for an application for personal decree under O. 34, R. 6 of the C. P. Code and the application need not be in writing. Even if a written application were necessary, the

C. P. CODE (1908), O. 34, R. 7.

Court may allow it to be signed at any stage by the decree-holder. (*Muerji and Dalal, JJ.*)
SANTI LAL v. RAI NARAIN. L. R. 5 A. 565 :
82 I. C. 65 : 1924 All. 804

— O. 34, R. 7 — Redemption suit — Decree for possession on payment of money—If executable.

A redemption decree provided that on payment of a certain sum of money within a certain time possession of the lands was to be given—Held, it was not a preliminary decree under O. 34, R. 7 and could be executed. (*Moti Sagar, J.*) MAHABIR PARSAD v. KARTAR SINGH. 1924 Lah. 635.

— O. 34, R. 7—Redemption decree—Rights of parties—Failure to apply for sale—Effect.

A mortgagee in possession against whom a redemption decree is passed can remain in possession until the amount due to him is fully paid. If the mortgagor dispossesses him without paying the money it is a violation of the redemption decree and the mortgagee can sue to get back his rights. Where within the period fixed the money is not paid, the mortgagee gets the right to apply for sale under O. 34, R. 8. But this does not take away the right to redeem which remains open to the mortgagor even after sale under O. 21, R. 89. (*Wazir Hasan, A.J.C.*) MOHAMMAD BAQAR KHAN v. JAGAT NARAIN LAL. 1 O.W.N. 500 : 80 I. C. 703 : 10 O. & A. L. R. 1149.

— O. 34, R. 7—Suit for redemption—Procedure—Preliminary decree—Direction as to taking up accounts—Procedure. MOHKAN SINGH v. THAKUR CHANDRA PAL.

1924 Oudh 140

— O. 34, Rr. 7 and 8—Scope of—Scond suit for redemption whether barred by res judicata, if the previous decree of redemption is not executed within time—Framing a final decree under O. 34, R. 7.

The plaintiffs filed a suit for redemption, and was given a preliminary decree by the trial court, which he failed to execute within the time prescribed by the Court. But the decree was not in the manner laid down under O. 34, R. 7 and did not contain a clause that the plaintiff would be debarred from all right to redeem for non-payment on the fixed date. A second suit for redemption was filed and the lower appellate court dismissed it on the ground that it was barred by the rule of *res judicata*.

Held, on appeal, that the doctrine of *res judicata* will not apply. "That if the original decree had been framed properly under O. 34, R. 7 and the decree-holder had committed default the defendant by an application for final decree under O. 34, R. 8 could prevent the plaintiffs from redeeming the lands and where no such final decree was passed, plaintiff could not be deprived of the right of redemption under R. 7 (d) *Ramdas v. Meherdad* 12 P. R. distinguished *Sita Ram v. Madholal* 24 A.T. 44. *Dhanpatmal v. Juggar Singh* 93 P. R. 1908 (F. B.) *Ramji v. Pandunath*. 43 Bom. 334 (F. B.) referred to. (*Scott Smith and Fford, JJ.*) ARURA v. BUR SINGH. 5 Lah. 371 : 1925 Lah. 31.

C. P. CODE (1908), O. 37, R. 3.

— O. 34, R. 14 Contravention of—Effect of—Sale in execution of money decree—Purchase. 76 I. C. 241.

— O. 34, R. 14—Object of.

The object of O. 34, R. 14, C. P. Code is to prevent mortgagees from suing their mortgagors on the mortgage debt as such and in execution selling the mere equity of redemption depriving the mortgagor of the right of redemption that would be given to him by the decree for sale (*Raymond and Madgavkar, A J C.*) MURAH v. DAYARAM. 78 I. C. 49.

— O. 34, R. 14—Sale contrary to provision of—Validity Mortgage with possession and lease forming part of same transaction—Rent under lease—Decree for—Sale of mortgaged property in execution—Validity—Omission of judgment-debtor to raise plea of invalidity of order for sale in prior execution proceedings—Effect—Constructive *res judicata*—Applicability of rule of, to execution proceedings.

Held, that a mortgage with possession and lease back on the same day formed part of one and the same transaction.

Held, further that although the mortgagee in such a case might obtain a decree for rent on the lease document alone, his claim would nevertheless be one arising under the mortgage, and a sale by him of the mortgaged property in execution of that decree would be within the mischief of O. 34, R. 14 of Civil Procedure Code.

Seemle the principle of constructive *res judicata* is not applicable to execution proceedings.

A decree-holder cannot demand that the Court shall intringe a statutory provision merely because the judgment-debtor has omitted to demand that it shall not. (*Jackson, J.*) LAKSHMI KUTTI AMMAL v. MARIATHUMMAL. 20 L. W. 649 : 35 M. L. T. 118 (H.C.) : 1924 M. W. N. 771 : 82 I. C. 504 : 1925 Mad. 127 : 47 M. L. J. 798.

— O. 37, R. 3—Leave to defend—Grant of—Discretion of Court—Principles—Payment into Court or furnishing security—Condition as to—Order imposing—When proper.

The question to be considered on application under O. 37, R. 3, C. P. C. is whether or not a triable issue is disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. The defendant must state what his defence is and must, as a rule, bring something more before the Court to show that it is a *bona fide* defence, and not a mere attempt to gain time by getting leave to defend. Once the Court comes to the conclusion that there is a triable issue in the case, it must grant leave to defend without requiring the defendant either to pay the amount claimed into Court or to furnish security therefor. Such a condition must be imposed only in exceptional cases, where, for instance, there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only in order to obtain further time. (*Schwabe, C J. and Ramesam, J.*) PERIYA MIYANA MARAKAYAR v. SUBRAMANIA AIYAR.

19 L. W. 342 : (1924) M. W. N. 240 : 34 M. L. T. (H.C.) 310 : 78 I. C. 505 : 1924 Mad. 612 : 46 M. L. J. 255.

C. P. CODE (1908), O. 37, R. 7.

— O. 37, Rr. 7 and 8—Interest up to redemption. *MANGEL v. BIKHA LAL*.
76 I. C. 916 : 6 Lah. L. J. 457.

— O. 38, Rr. 1 and 5—Arrest and attachment before judgment—Mortgaged property.

The power of the court to issue simultaneous execution for arrest and attachment is entirely discretionary and the court has the same power in matters before judgment limited by the provisions of O. 38, C. P. Code. Even mortgaged property may be attached before judgment in a mortgage suit. (*Duckworth and Godfrey, JJ.*) *K. O. M. SYED HOOSSEIN v. S. R. M. M. C. T. CHERTY FIRM*.
3 Bur. L. J. 159;
2 Rang. 362 : 1924 Rang. 361.

— O. 38, R. 5—Attachment before judgment—Execution of security bond—Dismissal of suit by first Court—Appeal allowed—Effect of.

Appellant sued respondent and attached before judgment the property of the appellant under O. 38, R. 5 C. P. Code. The respondent agreed to furnish security and executed bond as follows: "I have hereby given as security all the rights which I have in the property described hereunder for the aforesaid suit amount. In case the aforesaid suit is decided in favour of the plaintiff, the under-mentioned property myself and my heirs hereby bind ourselves to be responsible for the said amount. This security bond is executed for 5,000 rupees to the Court." The trial Court dismissed the suit but on appeal the suit was decreed. *Held*, that the security bond ceased to be operative with the dismissal of the suit by the first Court and that the same did not ensure for the benefit of the appellate decree. (*Krishnan and Odgers, JJ.*) *DOORVAS S. S. SUBBA RAMA AIVAR v. SOMALINGA SUBBA AIVAR*. (1924) M. W. N. 495;
82 I. C. 461 : 1925 Mad. 114 ;
47 M. L. J. 523.

— O. 38, R. 5—Attachment before judgment of immoveable property—Power of Small Cause Court to order. *See Prov. S. M. C. C. Act S. 17*.
28 C. W. N. 1056.

— O. 38, R. 5—Mortgage suit—Power to attach other properties.

In a suit on a mortgage, a court has power to attach before judgment properties other than the properties mortgaged, if it is satisfied that circumstances exist for such an action being taken and the mortgaged property will not be sufficient to meet the decree. (*Das and Ross, JJ.*) *RANI JOTIRMOYEE DEBI v. RAGHUNATH PATTAK*.
3 Pat. 966.

— O. 38, Rr. 5, 8 and 10—Attachment before judgment—Effect on survivorship.

An attachment before judgment does not rank in the same position as an attachment after judgment. O. 38, R. 10, C. P. Code makes it clear, and therefore an attachment before judgment will

C. P. CODE (1908), O. 39, R. 1.

not defeat the right of a co-parcener by survivorship in a joint Hindu family. (*Jwala Prasad and Foster, JJ.*) *SUNDAR LAL v. RAGHUNANDAN PRASAD*,
3 Pat. 250 : 5 Pat. L. T. 135 :
1924 Pat. 465.

— O. 38, Rr. 8 and 11—Attachment before judgment—Decree subsequently passed in the suit—Execution of the decree—Dismissal of execution petition owing to the default of the decree holder Attachment ceases. *See C. P. CODE, O. 21, R. 57*.
46 M. L. J. 415.

— O. 39, R. 1—Fraudulent decree—Injunction to restrain proceedings in execution—If maintainable.

A judgment-debtor can sue for an injunction restraining the execution of a decree which he alleges to be fraudulent, even before steps are taken in execution. (*Kinkhede, A. J. C.*) *SULTAN ALI v. BATAJI*.
1924 Nag. 413.

— O. 39, R. 1—Injunction pending suit—Scope of.

An injunction granted *pendente lite*, until the disposal of the suit or until further orders will end in any case on the disposal of the suit or on any earlier date, on which further orders may be passed, the reference to further order not applying to anything after the disposal of the suit. (*Oldfield and Devadoss, JJ.*) *AYISA UMMA v. P. K. ABDULLA*.
1924 M. W. N. 638.

— O. 39, R. 1—Injunction—Alienation pending suit prohibited—Mortgage after decree—Effect.

Where a temporary injunction was passed restraining the parties from alienating a property till the disposal of the suit, a mortgage after decree does not contravene the injunction order. (*Le Rossingnot, J.*) *PARAS RAM v. FIRM OF HARGOLAL & SONS*.
79 I. C. 444.

— O. 39, R. 1—Interim Injunction—Order refusing—Appealability of. *See C. P. CODE, O. 43, R. 1 (R)*.
(1924) P. H. C. C. 169.

— O. 39, R. 1—Injunction when granted.

Unless plaintiff proves by definite evidence that the defendant threatened to remove or dispose of his property with a view to defraud his creditors a temporary injunction cannot be granted. (*Moti Sagar, J.*) *KALIAN SINGH v. MT. SHANNO ALIAS GOVIND KAUR*.
1924 Lah. 718 (2).

— O. 39, R. 1—Suit for declaration—Injunction staying proceedings in another suit—Propriety of.

In a suit for a mere declaration, it is not proper to grant an injunction staying proceedings in another suit pending in another court. (*Abdul Raouf, J.*) *SAMANDAR v. FAZAL*.
78 I. C. 802 (1).

— O. 39, R. 1—Plaintiff out of possession—Injunction when granted.

C. P. CODE (1908), O. 39, R. 1.

When plaintiff is out of possession and claims possession, Courts will refuse to grant a temporary injunction unless the injury which is threatened is a material one which cannot adequately be compensated for by damages. (*Moti Sagar, J.*) SEWARAM SINGH v. SARDARNI MAYA DEVI 80 I. C. 727.

—O. 39, R. 1—*Restraining proceedings in Superior Court—If can be granted.*

Temporary injunctions are governed not by the Specific Relief Act but by the C. P. Code. A temporary injunction may be granted by a subordinate Court against a party even in respect of proceedings in a superior Court. (*Mukerji, J.*) RAM SADHAN BISHWAS v. MATHURA MOHAN HAZRA. 81 I. C. 2.

—O. 39, R. 1—*Suit dismissed for default—Application to restore to file—Pendency of—Injunction if can be passed.*

During the pendency of an application to restore a suit to file which had been dismissed for default, a court has no jurisdiction to pass an injunction order, as there is no suit pending then. (*Neave, A. J. C.*) RAMSARUP v. EMPEROR. 25 Cr. L. J. 350; 77 I. C. 238; 1924 Oudh 345.

—O. 39, R. 1—*Temporary Injunction—Prima Facie case—Defendant residing outside jurisdiction—Property within jurisdiction.*

75 I. C. 381; 5 Pat. L. T. 121.

—O. 39, R. 1—*Temporary injunction—When granted—Prima facie case—Balance of convenience.*

A party who asks for a temporary injunction pending suit must show a *prima facie* case on the merits of his action. The granting of the application would then depend on the balance of convenience. If the other party has already invested lots of money on the project which is sought to be restrained, but he is a man of means who can easily pay any damages that may ultimately be awarded against him, no interim injunction should be granted. (*Mulick and Bucknill, JJ.*) KENNETH ARTHUR HILL v. KANJAN BARDHAN. 5 Pat. L. T. 196; 75 I. C. 859; 1924 r. 526.

—O. 39, R. 2—*Temporary injunction—When granted—Principle guiding.*

A person asking the Court to exercise its discretionary jurisdiction must make out a strong *prima facie* case in support of the title which he asserts and must satisfy the court that its interference is necessary to protect him from irreparable or at least serious injury before the legal right could be established at the trial. Being an exceptional injury, an injunction will be refused in the first instance except on a clear *prima facie* case and "upon positive averments, of the equities on which the application for relief is based." The rule of law is that the court, should, before disturbing any man's legal right or stripping him of any rights with which the law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the suit. (*Moti Sagar, J.*) RAMESHWAR DAS v. YAKIN-UD-DIN KHAN. 1924 Lah. 633.

C. P. CODE (1908), O. 40, R. 1.

—O. 39, R. 2—*Election to Municipal Council—Inquiry by Civil Court into disputes—Power of Court to issue interim injunction restraining successful candidate from acting.* See MAD DT, MUN. ACT, S. 303. 47 M. L. J. 201.

—O. 40—*Sapurdar—If a receiver.*

A *sapurdar* is not a receiver of court and the provisions of the C. P. Code, relating to a Receiver appointed by court do not apply to him. (*Zafar Ali, J.*) ALLAH UDD v. EMPEROR. 25 Cr. L. J. 43; 75 I. C. 731; 1924 Lah. 697 (2).

—O. 40, R. 1—*Applicability—Execution proceedings—Possession of Receiver—If amounts to a transfer.*

O. 40, C. P. Code does not specifically refer to execution proceedings. When in execution proceedings a Receiver is appointed, he is put in the position of the judgment-debtor and there is no transfer of the property from the judgment-debtor to him. (*Mukerji and Dalal, JJ.*) KIKTARATH GIR v. MATHURA PRASAD R.M. 81 I. C. 741.

—O. 40, R. 1—*Appointment of Receiver Right to—Suit for partition—Malabar tarwad.*

For the appointment of a receiver in a suit, there must be some substantial ground for interfering with the existing rights of possession. The fact that no harm would be done by such appointment is not a sufficient ground.

As regards the rights to have a Receiver appointed, a member of a Malabar tarwad suing for partition of tarwad property is not in the same position as a member of a Mitakshara joint family suing for partition. (*Spencer and Devadas, JJ.*) MELB VITIL KUNHAN MENON v. KANNAN MENON. (1924) M. W. N. 202; 79 I. C. 661; 1924 Mad. 482; 46 M. L. J. 133.

—O. 40, R. 1—*Appointment of Receiver—Order dismissing objection—Appeal.*

An order dismissing an objection to the appointment of a receiver of property, the objector not being a party falls under O. 40, R. 1 and is appealable. (*Baker, A. J. C.*) RAMSWARUP v. RAGHUNANDAN. 1924 Mad. 165.

—O. 40, R. 1—*Receiver—Appointment in respect of property under attachment in execution—Execution sale—Leave of Court.*

The general rule is well settled that property in the hands of a Receiver is exempt from judicial process except of course to the extent permitted by the appointing court. 11 C. L. J. 489; 16 L. W. 322 Rel.

Where a receiver is appointed for certain property subsequent to its attachment in execution of a decree in a different suit the properties cannot be sold in execution without the leave of the court appointing the receiver. (*Krishnan and Oagers, JJ.*) THAYUMANA PILLAI v. RAMASWAMI CHETTIAR. 18 L. W. 681; 79 I. C. 632; 1925 Mad. 51.

—O. 40, R. 1—*Receiver—Removal of—Receiver appointed by Court on application of judgment-debtors—Consent of decree-holder—Powers and duties of such Receiver—Res judicata—Civil Procedure Code, 1908, S. 11—Civil Procedure Code, 1877 (Act X of 1877), S. 13—Consent order.*

C. P. CODE (1908), O. 40, R. 1.

A Receiver appointed by Court, by consent of all parties, will not in the absence of proof of maladministration, be removed or discharged. His powers of "realisation, management, protection, preservation and improvement of the property" include a discretionary power of sale, "to be exercised in good faith in the interests of the estate, with the approval of the Court." A consent order does not prevent a party from impeaching the administration thereunder "which is of such character as either (a) amounts to a malfeasance, and, accordingly, releases the consentor, or (b) has been proved by experience to be in substance so protracted and imperfect as to be futile, 40 M. L. J. 423; 11 I. A. 37 Ref. (*Lord Shaw*) MAHARAJADHIRAJ SRI RAMESHWAR SINGH BAHADUR v. HITENDRA SINGH. 5 Pat. L. T. 491:

20 L. W. 456; 35 M. L. T. (P. C.) 182;
L. R. 5 P. C. 178; 40 C. L. J. 431;
L. R. 5 P. C. 188; 10 W. N. 457; 81 I. C. 576;
1924 P. C. 202; 47 M. L. J. 286.

— O. 40, R. 1—Receiver—Choice of person—Parties to suit—Partition suit.

The general rule in selecting receivers for estates is not to appoint a party to the suit without the consent of the other party except in special cases. This is subject to an exception in partnership and partition suits. Even in the latter class of cases, if the Court cannot expect honest and disinterested management by appointing a party as receiver, it should appoint a stranger. (*Das and Ross, JJ.*) BHAGWAN DAS v. SHIVONANDAN PRASAD SAHU. 3 Pat. 964.

— O. 40, R. 1—Arbitration proceedings—Power of Court to appoint arbitrator. See C. P. Code, Sch. 11, para. 3 (2). 78 I. C. 84.

— O. 40, Rr. 1 and 4—Receiver—Accounts—Vouchers—Mal-administration—Remedy for.

A receiver's account must be vouched by the production of proper receipts. The vouchers will be admitted as evidence of the payment of the sums therein specified and credit given to the accounting party in the account, unless the other side shows some reasonable ground for impeaching the vouchers, but if any party objects, the affidavit or oral evidence of the person who received the money is required, and if this cannot be had, then proof must be given of his signature to the voucher. The question of bad management by the Receiver of the estate does not arise when a Receiver submits his accounts in order that it may be passed. Questions with regard to the soundness or prudence of the system of management adopted by a Receiver or charges of wilful default or neglect are not matters that can be disposed of in the share of exceptions to account. (*Mookerjee and Chatterjee, JJ.*) HAJI TELLER RAHMAN v. GOLAM GONE. 40 C. L. J. 28; 82 I. C. 419; 1924 Cal. 1063.

— O. 40, R. 1 and O. 43, R. 1 (s)—Manager appointed under—Position and rights—Receiver—Removal of person from position of—Order refusing—Appeal from.

An order refusing to remove a person from his position of a receiver is not an order coming under O. 40, R. 1 or R. 4, C. P. C. and, therefore no appeal lies against it under O. 43, R. 1 (s).

C. P. CODE (1908), O. 40, R. 3.

There is no provision in the Code for appointing a manager; when a manager is appointed, it is really another name for the appointment of a receiver under O. 40, C. P. Code. (*Krishnan and Waller, JJ.*) RAMASWAMI NAIDU v. AYYALU NAIDU. 19 L. W. 247; 34 M. L. T. (H. C.) 6; 78 I. C. 625; 1924 Mad. 614; 46 M. L. J. 196.

— O. 40, R. 1—Receiver—Concurrent jurisdictions—Appointment of receiver by two courts in respect of the same property.

It is of the utmost importance that where concurrent proceedings for similar relief are taken in two different and independent Courts, no order should be passed which may lead to friction or conflict of jurisdiction.

A Receiver is merely the Officer of the Court through whom the Court takes possession of property, the subject of a litigation. Consequently where a Receiver of certain properties has been appointed by a Court, it is inexpedient that another court of independent jurisdiction should appoint another receiver for the same property. (*Das and Ross, JJ.*) SRIDHAR CHOWDHURY v. MUGNIRAM BANGAR. (1924) P. H. C. 54; 3 Pat. 307; 5 Pat. L. T. 243; 78 I. C. 620; 1924 P. 491.

— O. 40, R. 1—Receiver—Position and status of—Possession of receiver enures for rightful owner.

When the court has appointed a receiver and the receiver is in possession his possession is the possession of the court and the possession of the court by the receiver is the possession of all parties to the action according to their titles. The property passes into legal custody as the receiver is in the position of a stakeholder and such custody is for the benefit of the true owner. 22 C. L. J. 283; 30 M. L. J. 12; 17 C. 814; 5 A. I. 5 C. L. J. 270 Rel. (*Mookerjee and Suhrawardy, JJ.*) DWIJENDRA NARAYAN ROY v. JAGES CHANDRA DE. 39 C. L. J. 40; 79 I. C. 520; 1924 Cal. 600.

— O. 40, R. 1—Receiver—Powers of—Appointment when takes effect—Furnishing of security.

Where a Receiver is appointed his title to possession accrues on the date of his appointment. The appointment of the Receiver is complete on the entry of an order of appointment although he may not be able to take actual possession of the property until security is approved. The appointment of a Receiver operates as an injunction against the parties, their agents and persons claiming under them with notice. (*Baker, O. J. C.*) DEOBAX v. KALU RAM.

7 N. L. J. 16; 78 I. C. 811; 1924 Nag. 136.

— O. 40, Rr. 3, 4—Order fixing Receiver with liability—Order to levy amount from him—Appeal—Scope of.

Where an order is passed under O. 40, R. 3, making a Receiver indebted to the estate to a certain amount, the order is not appealable but can in suitable cases be revised—when such an order is followed by an order to take co-ercive steps to force the Receiver to pay what is due from him under O. 40 R. 4, the order is appealable and in the appeal the propriety of the prior order under R. 3. will also be open to attack otherwise

C. P. CODE (1908), O. 40, R. 1.

the right of appeal is of no value. (*Kennedy and Aston, A. J. Cs.*) KHAN CHAND v. ABDUL MAJID. 1924 S. 35.

—O. 41, R. 1—Two appeals and two decrees in suit—Only one decree filed for second appeal—If valid presentation. 77 I. C. 541.

—O. 41, R. 1—Two appeals against same respondent—Single judgment—One appeal—Validity.

Where two appeals against the same respondent were disposed of by one judgment and allowed and he files a single appeal impleading both the successful appellants as respondents, the defect was only a technical one and the appeal is competent. (*Mukerji, J.*) BIJAI BAHADUR v. PARAMESHWARI RAM.

1924 All. 834.

—O. 41, R. 1—Copy of decree—Failure to supply—Effect.

A memorandum of appeal which is not accompanied by a copy of the decree is liable to be dismissed. (*Kinnhede, A. J. C.*) BALIRAM v. GHASIRAM. 81 I. C. 1001.

—O. 41, R. 2—Factum of Adoption not questioned. 1924 A. 162.

—O. 41, R. 4—Appeal—Persons not made parties to—If can appeal from appellate decree.

Where one of several plaintiffs prefers an appeal in which other plaintiffs are also interested, O. 41, R. 4 of the Civil Procedure Code does not authorize him to proceed with the appeal without making the other plaintiffs parties thereto. At the same time if the plaintiffs are not made parties to the appeal they have no *locus standi* to go in appeal against the decree of the appellate court. (*Daniels, J.*) BALKARAN LAL v. MALIK NAMDAR.

L. R. 5 A. 279 : 78 I. C. 637 : 1924 All. 873.

—O. 41, R. 4—Co-judgment-debtors—Appeals filed by some—Effect on others.

Where some of the judgment-debtors appeal against an order allowing execution and succeeded, the benefit of the appellate order enures for those judgment-debtors who did not appeal and who consented to the decree being executed in the lower court. (*Newbould and Ghose, J.J.*) KHAJEH SALAUDDIN v. ABZAL BEGAM. 39 C. L. J. 590: 28 C. W. N. 953 : 1925 Cal. 23.

—O. 41, R. 4—Decree against several defendants forming a partnership—Appeal against the whole decree by some of the defendants—Death of one of the appellants—Legal representative not impleaded—Power to pass a decree.

The plaintiffs obtained a decree for money against four defendants in respect of a loan alleged to have made for the purposes of a partnership of which the defendants were members. Against the decree there was an appeal by only three of the defendants. Pending the appeal one of the appellants died and his legal representative who happened to be non-appealing defendant was not brought on record. The appellate Court dismissed the appeal as having abated. On second appeals held that the legal representative of the deceased appellant was not a necessary party inasmuch

C. P. CODE (1908), O. 40, R. 5.

as there was no necessity for taking of accounts and that even if the legal representative was necessary party, the lower appellate court could have proceeded under the provisions of O. 41, R. 4, C. P. C. (*Stencer, O. C. J.*) NAMINENI CHEN. GAMAMA NAIDU v. GANGULU NAIDU.

20 L. W. 402 : 82 I. C. 420 : 1924 M. W. N. 789.

—O. 41, R. 4 and 33—Parties—Transposition of respondents as appellants—Power of court.

The trial court passed a decree against two defendants jointly on the ground that they were equally liable. One appealed from the decree and the other filed a memorandum of cross-objections. On appeal held that as the decree of the lower court proceeded upon a ground common to both it was competent to the appellate court to transpose the other defendant as an appellant and decide the appeal. (*Sulaiman an Kakaiva Lal, J.J.*) EAST INDIAN RY. CO. v. LALA JANKI PRASAD.

L. R. 5 A. 586 : 80 I. C. 737 : 1924 A. 605.

—O. 41, R. 4—Several plaintiffs—Revision application by some—Interference.

Where some out of several plaintiffs prefer a revision on grounds common to all of them, it is open to the Court to interfere and set aside the order sought to be revised in favour all the plaintiffs. (*Fremantle, S. M. and Burn, J. M.*) DEOKINANDAN v. MAHADEO SINGH.

L. R. 5 O. 136 (Rev.) : 10 O. & A. L. R. 942 :

L. R. 5 A. 281 (Rev.).

—O. 41, R. 5—Notice to decree-holder—Possession delivered—Effect.

Before a final order staying execution is passed under O. 31, R. 5, notice to show cause should issue to the decree-holder. If by that time decree is executed or possession delivered, there is nothing to stay. (*Kulwant Sahay, J.*) HIRA LAL v. CHUNI SAH. 5 Pat. L. T. 556 : 79 I. C. 1 : 2 Pat. L. R. 263 : 1924 P. 715.

—O. 41, R. 5—Stay of execution—Powers of executing Court after appeal filed.

After an appeal is filed from a decree or order, it is only the appellate court which could order stay of execution under O. 41, R. 5. and recourse cannot be had by the trial Court to S. 151 to override the provisions of R. 5. (*Martineau, J.*) FIRM GOBIND RAM—RAM CHANDER v. FIRM RULIA RAM—NAURTA RAM.

1924 Lah. 602.

—O. 41, R. 5—Stay of execution—Delivery of possession—Absence of notice—Effect of.

79 I. C. 188 : 76 I. C. 49.

—O. 41, R. 5—Stay of execution—Security furnished—Insolvency of debtor—Rights of Official assignee.

Pending an appeal against a decree for money the defendant-appellant applied for stay of execution and obtained an order for stay on depositing the decretal amount into Court. Subsequently the defendant-appellant was adjudicated insolvent and the Official Assignee did not prosecute the appeal. The Official Assignee claimed to be entitled to be paid out the money deposited in Court and the decree-holder opposed the application. Held, that the amount was ear marked for the decree-holder and could not be paid out

C. P. CODE (1908), O. 41, R. 6.

to the Official Assignee, (*Sanderson, C. J. and Wainwright, J.*) CHOWTHMULL MAGANMULL v. THE CALCUTTA WHEAT AND SEEDS ASSN. 51 C. 1010.

—O. 41, R. 6—Stay of sale—Claim proceedings—Suit—Stay if can be granted in appeal MULAR v. KANHAIYALAL. 77 I. C. 116 (1).

—O. 41, R. 5—Application for stay—Delay in applying—Dismissal without going into the merits—Propriety of.

An application for stay of execution was filed more than 9 months after the filing of the appeal. The court dismissed it on the ground of delay, without going into the merits. *Held Per Subramanyam, J.* It is the duty of the court to go into the merits and decide, failing which the order can be revised by the High Court.

Per Graham, J. the power conferred by O. 41, R. 5 being discretionary, the order is not capable of revision if judicial discretion is used. The rule contemplates that application for stay should be made as soon as possible after filing the appeal (*Subramanyam and Graham, JJ.*) BIREN CHANDEA DAS v. HARI DAST BOSE. 82 I. C. 435.

—O. 41, R. 6 (2)—Appeal from decree—Duty of Court to stay sale.

Where an appeal is pending against a decree, an order for stay of sale of immovable property in execution of the same should be passed under O. 41, R. 6 (2) on such terms as to giving security or otherwise as the court thinks fit. (*Moti Sagar, J.*) THE FIRM PHAGGU MAL MATA DIN v. BENARSI DAS. 75 I. C. 1001.

—O. 41, R. 6 (2)—Duty of Court—Stay pending appeal.

Where pending an appeal an application for stay of sale is put in, it is the duty of the court to stay the sale on such terms as to giving security or otherwise as the court thinks fit. (*Scott-Smith, J.*) FIRM OF PHALLU MAL HIRA LAL v. BANARSI DAS. 1924 Lah. 631.

—O. 41, R. 6 (2)—Stay of sale—Terms—Nature of.

Under O. 41, R. 6 (2), it is incumbent on a court to stay sale on such terms as to giving security or otherwise as the court thinks fit until the appeal is disposed of. Where the court stays a sale on condition that the decree amount is deposited and paid to the decree holder who is not required to furnish security, the order is one in effect refusing to stay the sale. (*Martineau, J.*) SHANKAR DAS v. KASTURI LAL. 75 I. C. 789.

—O. 41, R. 10—Security for costs—Appeal dismissed—Effect. 1924 Cal. 528.

—O. 41, R. 10—Security for costs—Order for Letters Patent appeal from decision of a single Judge of the High Court.

Both under the provisions of O. 41, R. 10, C. P. Code and apart from it, there is ample jurisdiction for the High Court to demand security for costs in an appeal under cl. 15 of the Letters Patent from the decision of the single Judge of the High Court on the original side. 27 M. 121 not

C. P. CODE (1908), O. 41, R. 17.

follo: 20 C. W. N. 49: 48 C. 481 Ref. (*Sanderson, C. J. and Richardson, J.*) AVIS MARY KATHLEEN GOULDING, In the matter of. 28 C. W. N. 676: 51 Cal. 695: 80 I. C. 295: 1924 Cal. 781.

—O. 41, R. 11—Rejection of appeal—Restoration—Ex parte order—Notice.

A second appeal was summarily dismissed under O. 41, R. 11, C. P. Code. Then on application for review made by the appellant the court cancelled the order dismissing the appeal summarily and directed that the appeal should be heard. This order was passed *ex parte* and without notice to the respondent. *Held* that having regard to the uniform practice of the Calcutta High Court for over 40 years, the order restoring the appeal was legal and valid. 43 C. 178 foll. (*Newbould and Ghose, JJ.*) OFFICIAL TRUSTEE OF BENGAL v. BENODE BEHARI GHOSE MAL. 51 C. 843.

—O. 41, R. 17—Council instructed merely to apply for adjournment of appeal—Refusal of application—Appearance—Dismissal for default—Preparation of formal decree by mistake—Appeal, whether competent.

An application by a counsel or a pleader who is instructed only to apply for adjournment which is refused is not an appearance within the meaning of the Civil Procedure Code. 15 W. R. 143: 15 A. 359, 34 C. 403; 30 M. 274; 3 P. L. J. 355: 4 Pat. L. J. 712; 5 Pat. L. 117, and 22 All. 66 followed. 26 M. 1. 277 not followed.

Where a counsel applies for adjournment of the appeal and on the request being refused expresses his inability to argue the appeal and the Court after referring to the judgment of the lower Court as clear and well reasoned and free from any defect of error in law or fact dismisses the appeal.

Held that the dismissal of the appeal is not based on any determination of the merits but only on the failure of the appellant's counsel to put in an appearance and must be regarded as an order under O. 41, R. 17, C. P. Code, against which no appeal is provided by the Code.

Held further that though the appellant might have been misled, by reason of a formal decree having wrongly been prepared by the office in the case, into thinking that he was bound to file an appeal, yet he was not entitled to file an appeal to which he had no right under the statute (*Neave, A. J. C.*) MURLIDHAR v. FAQUIR BAKSH, 1 O. W. N. 736.

—O. 41, Rr. 17 and 19—Dismissal of appeal for default—Pleader in some other Court—Duty of.

When an appeal is dismissed for default owing to the pleader for the appellant being engaged in some other court and there was nobody left there to represent the matter to the Judge the pleader fails in his duty to the court. (*Dalal, A. J. C.*) SRI MAHANT BABA HARI DAS FAQUIR v. PRADUMAN NATH. 79 I. C. 550.

—O. 41, Rr. 17 and 19—Dismissal of appeal without hearing appellant or pleader—Remedy.

When an appeal is decided in the absence of the appellant or his pleader, without giving him a chance of being heard, and the appeal is dismissed, the order of dismissal must be treated as one

C. P. CODE (1908), O. 41, R. 19.

for default and not on the merits, whether the Judge actually considers the merits of the case or not. The only course open to the appellant was to apply for restoration under O. 41 R. 19, and not by way of appeal, as the order of dismissal is not a decree and hence no right of appeal exists. (*Brown, J. C.*) MAUNG THAN GE v. MAUNG PO THIN. 76 I. C. 166.

— O. 41, R. 19—Dismissal of appeal for default—Restoration—Case transferred from one Court to another—Want of knowledge.

Where an appeal is dismissed for default and an application for restoration is put in, the court should allow both parties to let in evidence as to whether there is sufficient cause for restoration and then dispose of the petition. Where the appeal was transferred by the District Judge to the Additional District Judge and the appellant and his pleader said they were not aware of the transfer and on the same day it was dismissed for default a good case is made out for restoration. (*Suhrawardy and Graham, JJ.*) JAYA BAKSHA v. ABDUL LATIF. 79 I. C. 319.

— O. 41, R. 19—Dismissal of appeal for default—Opportunity to show cause of default.

Where a petition is put in under O. 41, R. 19 to set aside the dismissal of an appeal for default, the petitioner should be given an opportunity to show he was prevented by sufficient cause from being present. A summary rejection of the application is not proper. (*Pearson and Graham, JJ.*) KRISHNA CHARAN MONDAL v. CHINIBASI MANDAL. 82 I. C. 330 (1)

— O. 41, R. 19—Dismissal for default—Case put down lower in the list without notice to petitioner's vakil—Absence when case called on—Dismissal for default. NANAKCHAND v. SAJJAD HUSSAIN. 1924 Lah. 189.

— O. 41, R. 20—Applicability of law of limitation. THE MUNICIPAL COMMITTEE BHARA v. SHIV RAM. 75 I. C. 90 J.

— O. 41, R. 20 and 33—Addition of parties by appellate Court—Limitation—Powers of second appellate Court.

In a suit by a co-sharer landlord against the tenant and his other co-sharer landlords, plaintiff claimed rent from the tenant and if it was found that he had paid it, from the other co-sharer landlords who had collected it. The trial Court passed a decree against the co-sharer landlords on the ground that they had received the whole rent. On appeal by the co-sharer landlords impleading the plaintiff alone, the lower appellate Court held that the appellants had not received the whole rent and allowed the appeal and dismissed the suit holding that the tenant had not been made a party to the appeal and the question of limitation would arise if the tenant were now to be made a party. On second appeal. *Held* that it was competent to the appellate Court to make the tenant (defendant) a party to the appeal in order to secure the ends of justice under O. 41, R. 20, C.P.C. The court of second appeal had power under O. 41, R. 20, C.P.C. to bring the parties on record in order to carry out the powers given to it under

C. P. CODE (1908), O. 41, S. 21

O. 41, R. 33, C. P. Code. (*Miller, C. J. and Foster, J.*) PADARATH MAHTON v. HITAN SINGH.

1924 F. H. C. G. 249 : 5 Pat. L. T. 509 : 82 I. C. 600 : 1924 P. 773.

— O. 41, Rr. 20 and 23—Appellate Court—Addition of parties—Persons interested in the result of the appeal—Suit dismissed against several defendants—Appeal against some of them—Persons deriving title from others.

A person added under O. 41, R. 20, C. P. C. must be a person who is interested in the result of the appeal. Where a defendant has been exonerated by the lower court and there is no appeal against that part of the decree he cannot be added as a party to an appeal filed against the other defendants because he cannot be said to be interested in the result of the appeal. O. 41, R. 20, C. P. C. does not empower an appellate court virtually to make an appeal for an appellant who has refrained from availing himself of his privileges under the law, by introducing for him other respondents than those he has included in the petition of appeal. 38 C. 913 : 33 C. 329 dist. 31 M. 442 foll. (*Young and Baguley, JJ.*) V. P. R. V. CHOKALINGAM CHETTY v. SEETHAI ACHA.

2 Rang 541.

— O. 41, R. 20—Omission to implead necessary parties—Joint Hindu family—Members of—Appeal—Discretion of Court.

In an appeal by the plaintiff against a decree dismissing a suit in ejectment brought against three tenants who formed members of a joint Hindu family, the name of one of the tenants was omitted from the array of parties by mistake. *Held* that under O. 41, R. 22, C.P.C. the appellate Court had power to adjourn the case in order to make the omitted defendant a party to the appeal and that its omission to do so amounted to a denial of justice. (*Fremantle, S. M. and Burn, J. M.*) BUDH RAM v. KRISHNANAND. L.R. 5 A. 177 (Rev.).

— O. 41, R. 20—Power to add party—Discretion.

The power of an appellate court under O. 41, R. 20, to add a party to an appeal is one which is not circumscribed by any rule of limitation. It is a discretionary matter, on which a higher court will not interfere if the discretion has been soundly and reasonably exercised. Where without a plaintiff being amended a new defendant was added, and the decree also omitted his name as a result of which he was omitted in the memo. of appeal, the Court can direct him to be added as a respondent even after the appeal time has expired. (*Broadway, J.*) AMAR SINGH v. KANSHI. 1924 Lah. 629.

— O. 41, R. 21—Appeal—Ex parte hearing and decision—Application to rehear the appeal.

It is in the highest degree improbable that a litigant having the advantage of a decree in his favour in the lower court would not be present on appeal to support the decree if he had been aware of the appeal. The un rebutted oath of the person to be served that he never was served and knew nothing of the case is sufficient to require the reopening of the case. 46 B 130 : 19 C. W. N. 1231 Ref. (*Young, J.*) MAUNG SHWE HLA v. SOOLAY NAIDU. 3 Bur. L. J. 101 : 82 I. C. 812 : 1924 Rang 336.

C. P. CODE (1908), O. 41, R. 22.

—O. 41, R. 22—Contentions negated by trial Court—No cross objections—Effect of.

Where the defendant pleaded certain defences in bar of the suit and they were disallowed by the first court and on appeal by the plaintiff, no cross-objection was filed *held* that it was not open to the defendant as the respondent to raise the same contentions on second appeal. (*Newbould and Ghose, JJ*) SHAILESH CHANDRA GUHA *v* BICHAI GOPE. 40 C. L. J. 67 : 1925 Cal. 94

—O. 41, R. 22—Cross-objections—Filing of appeal by respondent—If can file objections.

A respondent who has preferred an appeal cannot file cross-objections under O. 41, R. 22. (*Martineau and Campbell, JJ.*) MT. TEHL KAUR *v* AMAR NATH. 1925 Lah. 2.

—O. 41, R. 22—Cross-appeal—Objection if can be filed.

Where after a party files an appeal against a part of a decree the opposite party files a separate cross appeal, the first party has a statutory right to file a memorandum of objections to the cross appeal. (*Kanhaiya Lal, J.*) KANHAIYA LAL *v* M. AZMATUNNISSA. 1924 All. 840.

—O. 41, R. 22—*Ex parte* decree—Appeal from decree—Right to prefer—Conditions.

1924 Mad. 107.

—O. 41, R. 22—Memorandum of cross objections—Appeal barred by limitation—Effect of

1924 Lah. 43.

—O. 41, R. 22—Memorandum of objections—Right to file an appeal, after dismissal of memorandum.

O. 41, R. 22, C. P. Code allows a respondent to take any cross-objection which he could have taken by way of appeal. It does not allow him to take any objection which he had already taken by way of appeal and which had been decided against him. In an appeal relating to the specific performance of a contract of sale, cross-objections filed by the plaintiff were dismissed on the ground that it was not competent to him to file cross objections after the appeal of the other side had been dismissed. *Held* that it was open to the plaintiff to appeal on his own account. "Cross-objection," in O. 41, R. 22, C. P. C., implies that the objections are taken in a pending appeal. (*Daniels, J.*) PARBHU DAYAL *v* MURLIDHAR.

22 A. L. J. 365; L. R. 5 A. 298 : 10 O. & A. L. R. 528 : 78 I. C. 677.

1924 All. 867.

—O. 41, R. 22—Scope of.

A partition suit having been decreed both parties appealed. Plaintiff's appeal was dismissed while the defendant succeeded in part. The defendant filed a second appeal and then plaintiff filed a memo. of objections, attacking all that was unfavourable to him in the decree of the first Court. *Held* he was entitled to do so. The fact that he had filed an appeal in the Court below does not affect the question. (*Jwala Prasad and Ross, JJ.*) HARDHAN MAHTO *v* GOKUL MAHTO 5 Pat. L. T. 411 : 76 I. C. 257 : 1924 P. 775.

—O. 41, R. 23—Issue settled and tried—Remand, 1924 Cal. 148.

C. P. CODE (1908), O. 41, R. 25.

—O. 41, R. 23 and 25—Award—Setting aside—Remand order when proper.

The award of arbitrators in a suit was set aside by the Court on the ground it seemed so unreasonable and in appeal it was reversed and a remand ordered under O. 41, R. 23 : *held* it was not a decision on a preliminary point and the Court should have acted under O. 41, R. 25 (*Piton, J. C.*) CHANDAN *v* MT. BIBI. 75 I. C. 198.

—O. 41, R. 23—Erroneous order of remand—Appeal

To say that there is no appeal where a Court acts in contravention of O. 41, R. 23 and reverses the judgment of the Trial Court and remands the case would be to refuse an appeal in every case where the order of remand is erroneous. (*Wulmsley and Ghose, JJ.*) SASI MUKHI DAS *v* ABINASH CHANDRA HALDER. 80 I. C. 172.

—O. 41, R. 23—Evidence taken on all issues—Remand—If proper.

Where all the evidence had been taken by the Trial Court on all the issues, a remand under O. 41, R. 23 is not proper. The Court should in such a case act under O. 41, R. 24 or R. 25. (*Krishnan and Waller, JJ.*) ADURI CHELMAYYA *v* LAKSHMI DEVANMA. 79 I. C. 857.

—O. 41, R. 23, S. 151—Remand—Amendment of plaint—Appeal. 1924 Lah. 245.

—O. 41, R. 23 and 25—Order of remand—Propriety of Decision by trial court on all issues—Appellate court differing on one issue and remanding the case. MUNISAMI NAICKEN *v* MUNISAMI NAICKEN. 79 I. C. 1041 (1).

—O. 41, R. 23—Remand—Evidence recorded—Absence of specific issue.

Where all the information necessary for the decision of a point was supplied by the papers on the record and the Court applied its mind to the point and actually decided it, the mere fact that no issue was framed by the Court on the point did not necessitate a remand by the appellate Court. (*Fremantle, S. M.*) RAM DEO KUNWAR *v* ALI HUSSAIN. L. R. 5 O. 51 : 11 O. L. J. 401.

—O. 41, R. 23—Remand for retrial—Proper issues not raised by trial Court.

Where the trial court had not raised the proper issues arising from the pleadings of the parties and had not given them an opportunity to produce evidence thereon *Held* that the appellate court would remand the case for retrial after framing the proper issues which it was the duty of the trial court to raise. (*Fremantle, S. M. and Burn, J. M.*) MAUJI RAM *v* DULARI LAL. L. R. 5 A. 153 (Rev.).

—O. 41, R. 23—Remand—Consideration inadmissible evidence. 1924 Cal. 370.

—O. 41, R. 23—Remand—Opportunity to plaintiff to supplement his case. 1924 Cal. 396.

—O. 41, R. 23—Remand—Powers of an Appellate court—Inherent power. MT. UMRI *v* SHAH MAHOMED. 1924 Lah. 36.

—O. 41, R. 25—Findings called for—If can be questioned in second Appeal.

C. P. CODE (1908), O. 41, R. 25.

When the finding and evidence upon issues remanded under O. 41, Rule 25, Civil Procedure Code, are returned to the High Court the finding is conclusive and cannot be challenged on the evidence before the High Court as in first appeal the reason being that a second appeal is not allowed on questions of fact. (*Scott-Smith and Harrison, JJ.*) *RAM MEHR v. PALI RAM*.

6 Lah. L. J. 145 : 78 I. C. 404 :
5 Lah. 268 : 1924 Lah. 455.

—O. 41, R. 25—Partial remand—Appeal.
Maung Shwe On v. N. K. R. P. Mudaliar.
1924 Rang. 131.

—O. 41, R. 25—No specific issue framed but evidence given—No remand is necessary.

Where the point as to the existence of custom was substantially alleged in the plaint, but there was no formal issue, and both the lower Courts had considered that question.

Held : that the defendants could not possibly contend that he had no opportunity to adduce evidence on the point. (*Shah and Coyajee, JJ.*)
GUNDAPPA BHARMA GOWDA v. SANTAPPA BHARAO.
1924 Bom. 113.

—O. 41, R. 25—Remand—Omission to frame issues—Effect of.

It is no doubt within the power of an appellate Court to remand a case where proper issues have not been framed by the Court below but this power need not be exercised unless there appears a reasonable chance that a decision of those issues would affect the final result of the suit. (*Pullan, A. J. C.*) *GANGA v. PANCHAM*.
80 I. C. 591 :
10 O. & A. L. R. 725.

—O. 41, R. 25—Second appeal—Issue not raised—Procedure.

Where the right to redeem in a mortgage suit was based alternately on a will as well as on a lease and the first court found the will genuine and decreed redemption, but the appellate court held the will to be spurious and dismissed the suit, *held* in second appeal that the proper thing to do was to frame an issue on the question of lease and call for findings under O. 41, R. 25. (*Schwabe, C. J. and Wallace, J.*) *MANAMAL KORU KUTTY v. AHAMAD*.
78 I. C. 1.

—O. 41, R. 27—Additional evidence—Admission of, by appellate Court—Improper rejection by trial Court.

It is competent to an appellate court in its discretion to admit and consider material and relevant evidence refused by the trial court. (*Wazir Hasan and Neave, A. J. Cs.*) *MT. RACHHPALI v. MT. CHANDRESAR DEI*.
10 O. L. J. 595 :
78 I. C. 256 : 27 O. C. 114 : 1924 Oudh 252.

—O. 41, R. 27—Additional evidence—Record of rights published after decision of trial Court—Admission of.

In a suit by some tenants for recovery of possession of lands, it became necessary to ascertain the status of the tenants for determining whether or not the suit fell within Sch. III, art. 3 of the B. T. Act. After the decision of the trial Court and before the judgment was pronounced by the lower appellate Court the record of rights was pub-

C. P. CODE (1908), O. 41, R. 31.

lished. The appellants could not with due diligence have produced the record of rights before the hearing of the appeal by the lower appellate Court. *Held* that it was open to the higher Court in second appeal to admit the record of rights in evidence and remand the case to the lower appellate Court in order that the Court may try the question of the status of the defendants after admitting the record of rights as evidence in the case. (*Sukrawirdy and Chotzner, JJ.*) *INDRA BHUSAN SAHA v. JANARDAN SAHA*.

82 C. W. N. 945 : 82 I. C. 104 :
1924 Cal 1071.

—O. 41, R. 27—Admission of document on appeal—Documents received after close of the arguments. *MANJURI DASSI v. KHETRAMANI DASSI*.
73 I. C. 96.

—O. 41, R. 27—Additional evidence—Admission of—Second appeal.

Even if a second appellate Court has power to admit fresh evidence under O. 41, R. 27, C.P. Code it will not admit such evidence in the absence of a valid reason for the delay in the production of this evidence. (*Broadway and Fford, JJ.*) *WALI MAHOMED v. MAHOMED BAKHSH*.
5 Lah. 64 :
80 I. C. 993 : 1924 Lah. 444.

—O. 41, R. 27—Additional evidence—Admission of by lower appellate Court without recording reasons—Duty of second appellate Court—Remand. See C. P. CODE, ss. 99 AND 100.
39 C. L. J. 261.

—O. 41, R. 27—Additional evidence—Reasons for admission by appellate court—Opportunity to rebut.

An appellate Court ought not to admit additional evidence without recording reasons and without giving the opposite side an opportunity to adduce evidence in rebuttal. Where the Court admits such additional evidence without following this procedure the appeal must be remanded for fresh disposal. (*Abdul Raoof and Moti Sagar, JJ.*) *RAMZAN v. NABI BUX*.
6 Lah. L. J. 234.
80 I. C. 580 : 1924 Lah. 638.

—O. 41, R. 27—Appointment of Commissioner—Additional evidence. *MT. RAM PIARY v. SULTAN BAKSH*.
77 I. C. 207.

—O. 41, R. 27 and O. 47, R. 4—If mutually exclusive—Application can be disposed of even at a preliminary stage—Opportunity to rebut.

The provisions of O. 41, R. 27 and O. 47, R. 4 are not mutually exclusive and without resorting to an application for review in the Trial Court, an appellant can apply for additional evidence being let in, in appeal. When a party applies for such purpose, the appellate Court can make an order even before the hearing of the appeal, while in cases where the Court decides *suo motu* to call for additional evidence, it does so only at the final hearing of the appeal. Under proper circumstances, the other side can be allowed to let in evidence to rebut the same. (*Venkatasubba Rao, J.*) *BRAHMA SUBEAYYA v. KANALA RANGA RAO*.
20 L. W. 840 : 48 M. L. J. 32.

—O. 41, R. 31—Adoption of judgment of lower Court. *MT. AISHIA BI v. MT. SUGRA JAN*.
75 I. C. 1013.

C. P. CODE (1908), O. 41, R. 31.

— O. 41, R. 31—*Appeal—Judgment—Contents of.*

In appealable cases it is desirable that Courts below should pronounce opinion on all important points in order to enable the appellate court to dispose of cases finally and thus avoid delay and the expenses of a remand. (*Chakraparti, J.*) HARISADHAN PATARI *v.* DINANATH BANERJEE.

82 I. C. 318

— O. 41, R. 31—Appellate judgment—Reasons for decisions to be stated. L. R. 5 A. 21 :

1924 A. 100.

— O. 41, R. 33—*Applicability—Revision petitions.*

The principle underlying O. 41, R. 33 can be applied to revision petitions also, and in order to do justice to all parties the High Court can correct the decree of the Courts below even in favour of parties who have not set the law in motion. (*Kinkhede, A.J.C.*) RANGRAO *v.* PANDURANG

1924 Nag. 154.

— O. 41, R. 33—*Applicability of—If can be used in favour of person who has appealed or filed cross objections.*

In the absence of special circumstances Courts will not use their powers under O. 41, R. 33 in favour of persons who have appealed or filed memorandum of cross-objections (*Martineau and Campbell, JJ.*) MT. TEHL KUAR *v.* AMAR NATH.

1925 Lah. 2.

— O. 41, R. 33—*Suit for possession or alternatively for mortgage money—Decree for possession reversed in appeal—Alternative case.*

A suit for possession as mortgagees contained an alternative prayer for recovery of the mortgage amount. The first court gave possession, but this was upset in appeal. Held the appellate court in the interests of justice ought to consider if the alternative relief claimed could not be awarded. (*Scott-Smith, J.*) QAMAR-UD-DIN *v.* MATHRA.

6 Lah. L. J. 464.

— O. 43, R. 1 (a) and O. 7, R. 10—*Order returning plaint—Appeal—Revision.*

An order of an appellate Court returning a plaint for presentation to the proper court is appealable under O. 43, R. 1 (a), C.P. Code and consequently the order is not open to revision. (*Neave and Kendal, A. J. C.*) BADRI SINGH *v.* LALTA SINGH.

10 O. & A. L. R. 437:

79 I. C. 1024: 1 O. W. N. 156.

— O. 43, R. 1 (a)—*Remand—Inherent power—No appeal.*

There is no appeal provided in the Civil Procedure Code against an order made under the inherent power of the Court conferred by S. 151, Civil Procedure Code, to remand a case for retrial. (*Moti Sagar, J.*) WISAKHI RAM *v.* ALAWAL.

6 Lah. L. J. 153: 78 I. C. 408 (2) 1924 Lab. 487.

— O. 43, R. 1—*Remand—Appeal from—Order under O. 41 R. 23—Order under inherent power of Court—Distinction.*

An order of remand, which is passed not under O. 41, R. 23 but under the inherent power of the Court is not appealable.

In a case in which the first Court heard and decided the case before it fully on all issues the

C. P. CODE (1908), O. 44, R. 1.

appellate Court permitted the plaint to be amended before it and remanded the case for trial on the amended plaint to the first Court. Held, that the order of remand was not one passed under O. 41, R. 23. (*Wallace and Madhavan Nair, JJ.*) MUPPAVARAPU VENKATA RADHAKRISHNA RAO *v.* VENKATA RAO. 20 L.W. 711: 35 M. L. T. (H.C.) 135: 47 M. L. J. 552.

— O. 43, R. 1(d)—*Award—Decree—Ex parte—Setting aside—Refusal—Appeal.* See C. P. CODE, S. 104 (f). 1924 P. H. C. 170

— O. 43, R. 1 (k)—*Appeal—Order refusing to set aside abatement.*

An order refusing to set aside the abatement of an appeal is appealable under O. 43, R. 1 (k). (*Jwala Prasad, A. C. J. and Kulwant Sahay, J.*) HARI SARAN SINGH *v.* SYED MOHAMMAD E. ADAT HUSSAIN. 2 Pat. L. R. 279.

— O. 43, R. 1 (m)—*Order recording or refusing to record compromise—Subsequent passing of decree—Effect of—Appeal if maintainable against order.* See C. P. CODE, O. 23, R. 3. 80 I. C. 696.

— O. 43, R. 1 (r)—*Appeal—Order directing notice on an application for the issue of a temporary injunction.*

There is no appeal against an order issuing notice on an application for temporary injunction under O. 39, R. 3, C. P. Code. (*Krishnan and Waller, JJ.*) SREEMATH DEIVASIGAMANI ANNAMALAI *v.* DESIKAN GOVINDA RAO.

20 L. W. 556: 1924 Mad. 857.

— O. 43, R. 1 (r)—*Interim injunction—Order refusing—Appealability.*

An appeal lies from an order granting an injunction as well as from an order refusing an injunction. 17 C. W. N. 996; 35 A. 425 Ref. An order refusing an application for a temporary injunction until the disposal of the main application for injunction pending the disposal of the suit is an order under O. 39, R. 1, C. P. Code and is appealable. The Code provides in O. 43, R. 1 (r) for an appeal from all interlocutory and final orders passed under O. 39, R. 1 granting or refusing an injunction. (*Jwala Prasad and Kulwant Sahay, JJ.*) SHYAM BEHARI SINGH *v.* BIKESWAR DAYAL. 1924 P. H. C. C. 69: 1924 P. 713.

— O. 43, R. 1 (s)—*Receiver—Refusal to remove—Appealability of order.* See C. P. CODE, O. 40, R. 1 AND O. 43, R. 1 (s).

46 M. L. J. 196.

— O. 44, R. 1—*Leave to appeal in forma pauperis—Merits of the case—How far to be considered.*

It is no doubt open to the Court when an application for leave to appeal in *forma pauperis* comes before it for admission, to reject the application if it is not satisfied that the judgment is contrary to law or otherwise erroneous or unjust. But once the Court has admitted the application and ordered notice to the opposite party and the Government, the question whether the proviso under O. 44, R. 1, C. P. Code, has been complied with or not cannot be considered. (*Miller, C. J. and Mullick, J.*) MT. BUCHAN DAI *v.* JUGAL KISHORE. 2 Pat. L. R. 153: 1924 P. 791 (1),

C. P. CODE (1908), O. 44, R. 1.

—O. 44, R. 1—*Proviso—Applicability of—Leave to appeal in forma pauperis.*

The proviso to O. 44, R. 1, C. P. Code is not applicable unless it should be found that the applicant is a proper person. (*Zafar Ali, J.*) SHRIMATI VIDYA WANTI v. JAI DAVAL KAPUR.

6 Lah. L. J. 205:
80 I. C. 649 (2) : 1924 Lah. 536.

—O. 45—Application for leave to appeal—Review petition successful—Reversal in appeal—Effect on original application.

1924 Lah. 225.

—O. 45—Privy Council appeal—Death of second respondent—Abatement—Application for certificate declaring who are deceased respondent's legal representatives—Refusal of certificate—Delay in preparation of record—Enquiry ordered.

Where an appeal abates as against a party to a Privy Council appeal, it abates as regards all orders regarding costs incidental thereto as a consequence. 34 M. 76 followed.

A delay of three years having occurred in the preparation of the record of the appeal for His Majesty in Council, the office was directed to report the reasons for the delay and to show how far that delay was due to inaction and want of prosecution on the part of the appellants with a view to action being taken by the Court under R. 70 of the rules relating to appeals to the Privy Council. (*Robinson, C. J. and May Crag, J.*) D. L. SALKAT v. BELLA. 2 R. 91 : 3 Bur. L. J. 30 : 80 I. C. 744 : 1924 R. 217.

—O. 45, R. 2—Application for leave to appeal—Copy of judgment—If necessary.

Quære, if for an application for leave to appeal to His Majesty in Council, a copy of the judgment appealed from is necessary. (*Kennedy, J. C. and Raymond, A. J. C.*) NUR MAHOMED v. HASSOMAL. 78 I. C. 933

—O. 45, R. 7—Decree amended on review—Leave to appeal to Privy Council—Limitation. NAWAZ ALI v. ALIU. 6 Lah. L. J. 44 : 75 I. C. 520 : 1924 Lah. 82.

—O. 45, R. 7—Deposit out of time—Effect—Act XXVI of 1920. L. R. 5 A. 40.

—O. 45, R. 7—Security for the costs of respondent—Time for furnishing—Extension of—Limitation Act (XXVI of 1920), S. 3 (1).

1924 Mad. 44.

—O. 45, R. 7—Security for costs—Power of High Court to demand—Special leave to appeal granted.

O. 45, R. 7, applies to cases where leave to appeal is granted by the High Court. In a case where special leave to appeal is granted by the Privy Council, unless that tribunal passes any orders regarding security for costs, the High Court has no jurisdiction to call on the appellant to furnish security. KUAR MATA PRASAD v. NAGESAR SAHAL. 10 O. & A. L. R. 303 : 76 I. C. 335 : 11 O. L. J. 195.

—O. 45, R. 15—Mandatory—Non-compliance—Effect.

C. P. CODE (1908), O. 47, R. 1.

The provisions of O. 45, R. 15 are mandatory and failure to comply with them renders an execution application liable to dismissal. (*Adami and Bucknill, JJ.*) MT. BHAGWANTA KOER v. ZAMIR AHMAD KHAN. 5 Pat. L. T. 451 : 78 I. C. 766 : 3 Pat. 596 : 1924 P. 576.

—O. 45, R. 15—Provisions of—Mandatory—Non-compliance with—Execution proceedings void. See LIM. ACT, ART. 183.

1924 P. H. C. C. 221.

—O. 46, R. 1—Reference—Subject of—Sanction to prosecute.

O. 46, R. 1 refers only to such questions as may arise in the trial of a suit and not to questions arising on an application for sanction which cannot, in any sense of the word, be considered as a trial of a suit. A reference arising out of such an application is incompetent. (*Moti Sagar, J.*) BALWANT RAI v. NIAMAT KHAN.

1924 Lah. 566.

—O. 47, R. 1—Error in judgment—Amendment of decree—If proper—Excusing delay in applying for review.

1924 Mad. 225.

—O. 47, R. 1—Error of law—If ground for review.

Where the view of law on which a judgment is based is subsequently overruled by a superior tribunal that is no ground for a review. (*Kennedy, A. J. C.*) SALLEH MAHOMED UMOR DOSSAL v. NATHUMAL KISSAMAL. 78 I. C. 993.

—O. 47, R. 1—Grounds for review—Error apparent on the face—Ruling of superior Court ignored. MURARI RAO v. BALAVANATH DIKSHIT.

1924 Mad. 98.

—O. 47, R. 1—Review—Error apparent on the face of the record—Subsequent decision of the Privy Council.

The High Court disposed of a second appeal relying on a particular interpretation of a decision of the Privy Council. Subsequently the Privy Council construed its own decision in a different way. An application was put in for review of the judgment of the High Court relying on the later decision of the Privy Council. Held, that the ground relied on for review was an "error apparent on the face of the record" and that the application for review was competent. (*Walmsley and Suhrwardy, JJ.*) BRINDABAN CHANDRA GHOSH v. DAMODAR PRASAD PANDAY.

29 C. W. N. 148.

—O. 47, R. 1—Review—Sufficient cause—Negligence of party or pleader—When sufficient—Government as a party not entitled to special consideration—Adjournment—Grounds for, to be made out—Not to be claimed as a matter of course.

Petitioner applied for probate of a will. The respondent, the Collector, representing the Secretary of State, moved the Court for an enquiry under S. 19 (h) of the Court Fees Act as to the true valuation of the estate. The case was adjourned several times and on the date last fixed for hearing the Government Pleader examined two witnesses who did not advance his case. The

C. P. CODE (1908), O. 47, R. 1.

Government Pleader was not ready with any further evidence and the Court dismissed the case. Thereupon the Collector applied for review on the ground that the Government Pleader expected a short adjournment of the case and that the matter involved a question relating to the public revenue. The Court below granted a review. *Held*, that no sufficient case had been made out for review and that the order of the Court below was bad. Under the words "other sufficient reason" in O. 47, R. 1, C. P. Code, the reason must be one having sufficiency of a kind analogous to the two specified cases, that is to say, analogous to excusable failure to bring to the notice of the court new and important matter or analogous to error on the face of the record. 6 A. W. N. 697, *Foll*.

It is not the law that in almost every case where there was some little excuse for a manifest negligence the Court would be entitled to re-open the matter by granting a review.

It is not the duty of the lower Courts to maintain, still less to interest any special practice as regards the grounds upon which adjournments of cases are given. The notion is erroneous that parties whose cases are fixed have a sort of right to get adjournments without any reason being given provided that somebody else undertakes to keep the Court busy.

Obiter: The Court should treat a vakil appearing for the Government with the same stringency as, but with no greater stringency than any of the other vakils appearing for other litigants. (*Rinkin and Ghose, JJ.*) BINDUBASHINI ROY CHOWDHURY v. SECRETARY OF STATE FOR INDIA. 51 C. 70.

—O. 47, R. 1—Review—Sufficient reasons—Discretion of Court.

The expression "any other sufficient reason" in O. 47, R. 1, C. P. Code, must be interpreted to mean a reason sufficient on grounds at least analogous to those specified immediately previously. Whether any analogy can be discovered between the two grounds specified, namely, the discovery of new and important matter or evidence and some mistake or error apparent on the face of the record need not be considered. But the question whether a particular reason is analogous to either the one or the other of these two grounds, may obviously lead to very refined if not settled arguments. The discretion of the Court in saying what is sufficient reason within the meaning of O. 47, R. 1 of C. P. Code is not so rigidly circumscribed that an analogy must in every case be discovered between the two grounds above specified. (*Mookerjee and Chitambar, JJ.*) KUMAR GOPIKA RAMAN RAY v. MAHARAJA. 39 C. L. J. 217 : 81 I. C. 738 : 1924 Cal. 872.

—O. 47, R. 1—Grounds for review—Other sufficient cause—Compromise decree obtained by wrongful confinement and extortion.

The expression "or for any other sufficient reason" in O. 47, R. 1 of the C. P. Code must be taken to refer to something *ejusdem generis* with the words that precede. An application to set aside a compromise of a suit on the ground that it was obtained by wrongful confinement, extortion and coercion does not fall within O. 47, R. 1 of

C. P. CODE (1908), O. 47, R. 1.

the C. P. Code. (*Piggott, J.*) BARU DWARKADHISH PRASAD SINGH v. MAHARAJA KESHO PRASAD SINGH. 46 A. 245 : 22 A. L. J. 118 : T. R. 5 A. 46 : 82 I. C. 1022 : 1924 A. 398.

—O. 47, R. 1—Judgment on a wrong view of the law—Full Bench decision not noticed—If ground for review. 5 Pat. L. T. 52 : 3 Pat. 134 : 75 I. C. 177 : 1924 P. 250.

—O. 47, R. 1—Power of review—Commissioner for taking accounts. 1924 Bom. 231.

—O. 47, R. 1—No time fixed for payment of process fees—Dismissal—Propriety of.

Under the new Code, the Court should in all cases fix a time for the payment of process fee and it is only in default of payment within the time fixed that it can dismiss the suit. Where no time is fixed in the order, dismissal for non-payment of process fees is not proper. (*Rinkhede, A. J. C.*) AJODHYA PRASAD v. THE SECRETARY OF STATE. 1924 Nag. 298.

—O. 47, R. 1—"Or could not be produced by him at the time"—Meaning of.

The words "or could not be produced by him at the time" in O. 47, R. 1, C. P. Code, must refer to the words which precede, namely "was not within his knowledge". The whole clause means that the new and important matters alleged by the applicant were not within his knowledge and as such could not have been produced by him at the trial. (*Das and Matherson, JJ.*) RAMESHWARDHARI SINGH v. SADHO SARAN SINGH. 1924 P. 809.

—O. 47, R. 1—Review—Application for—Admission of—Effect on judgment sought to be reviewed.

When an application for a review of judgment is admitted and review is ordered, the judgment sought to be reviewed is not set aside but only held in suspense until the case has been reheard. (*MacLeod, C. J. and Crump, J.*) ACHYUT VISHNU PATANKAR v. TAPIBAI KRISHNAJI.

48 Bom. 210 : 26 Bom. L. R. 103 : 79 I. C. 753 : 1924 Bom. 310.

—O. 47, R. 1—Review—Grounds for—Erroneous admission or conduct of counsel.

When a point of fact or law has been brought to the notice of a Court trying a case and has been referred to in its judgment and decided by it, no ground for review is furnished by the fact that such decision was considered erroneous by the party against whom it was given. It would be impossible to draw any definite line and any party considering himself aggrieved by a decision against him could always contend either that his counsel had not competently argued the point or that his counsel was not justified in yielding when he did. (*Neave, A. J. C.*) MADHO PRASAD v. SUKHDIN. 10 O. & A. L. R. 1044.

—O. 47, R. 1—Under S. 151, Civil Pro. Code, also Court can review—Civil Pro. Code, S. 151.

Apart from O. 47, R. 1 the Court has inherent power under the new Section 151 of the Civil Procedure Code of 1908 to make such orders

C. P. CODE (1908), O. 47, R. 1.

as may be necessary for the ends of justice and thus to review its wrong orders or decisions passed previously. 20 All. 11, Foll. (*Jwala Prasad and Foster, JJ.*) *MANI LAL v. DURGA PRASAD*.

5 Pat. L. T. 425 : 1924 P. H. C. C. 254 :
3 Pat. 930 : 80 I. C. 667 (2) : 1924 P. 673.

— O. 47, Rr. 1 and 7—Review—Grant of—Grounds for—Rebutting evidence not allowed.

Where an applicant for review was deprived of his right to rebut certain evidence which the other side had adduced at the trial, as he was entitled to do, it is a "sufficient reason" for allowing a review of judgment within the meaning of O. 47, R. 1 of the C. P. Code. Such order cannot be appealed against under O. 47, R. 1 or O. 43, R. 1, cl. (iv) of the C. P. Code. (*Wazir Hasan, J. C.*) *KUNJAN v. CHANDRA HAS.*

10 O. & A. L. R. 809 : 11 O. L. J. 682

— O. 47, R. 2—Decree in accordance with judgment—Clerical mistake—Review by successor.

In a pre-emption suit, the money was directed to be given to a wrong person and the decree was passed in pursuance of the judgment. An application for review was made to the successor of the judge who passed the decree. Held, the erroneous direction in the decree as to the person to whom the pre-emption price was to be paid was not a clerical mistake apparent on the face of the decree under O. 47, R. 2 and the successor in office cannot entertain such an application. (*Kotwal, A. J. C.*) *BALIRAM PIRAJI v. YESWANTA*.

1924 Rang. 190.

— O. 47, R. 2—Review by successor in office—Grounds for.

Where a decree that is sought to be reviewed was passed by the predecessor in office of the Judge hearing the same, there must be new and important matter which could not have been produced at the original trial. (*Das and Macpherson, JJ.*) *RAMESHWARDHARI SINGH v. SADHO SARAN SINGH*.

1924 P. 809.

— O. 47, R. 3—Right of appeal—Not provided for.

O. 47, R. 3 of the C. P. Code relates to the form of application and defines the method by which the form should be adopted and ascertained. It does not relate to the right of appeal. (*Walsh, A. C. J. and Ryves, J.*) *GIRDHAR LAL v. ZORAWAR SINGH*.

80 I. C. 649 (1) : L. R. 5 A. 603.

— O. 47, R. 4—Absence of notice—Effect.

75 I. C. 656.

— O. 47, Rr. 4 and 7—Appeal—Order granting review.

5 Pat. L. T. 52 : 3 Pat. 134 :
75 I. C. 177 : 1924 P. 260.

— O. 47, R. 7—Review—Discovery of new and important evidence—Other sufficient cause.

Where the new evidence alleged as the basis of a review application did not comply with the requirements of O. 47, R. 1, the review cannot be admitted on the ground of other sufficient reason. (*Daniels, J.*) *RAM NAFESH SINGH v. JACARNATH SINGH*.

L. R. 5 A. 392 : 1924 All. 759.

C. P. Code (1908), Sch. II.

— O. 47, R. 7—Review—Order granting—Appeal against—Grounds of—Grounds specified in—Final decree—Appeal from—Scope of—Appellant if can argue appeal on its merits.

An appeal against order granting review may be challenged only on one of the grounds specified in O. 47, R. 7, C. P. Code.

In an appeal from the final decree itself, if the grounds of appeal relate to the granting of the review, the grounds must be those that are set out in R. 7. The appellant will not, however, be precluded from arguing the appeal on its merits. (*Venkatasubba Rao, J.*) *KOLACHINA VENKATA SEETHARAMAYYA v. VEENA TOLASI BABU*.

(1924) M. W. N. 355 (1) :
34 M. L. T. (H. C.) 224 : 19 L. W. 649 :
1924 M. 602 (2) : 46 M. L. J. 463.

— O. 47, R. 7 and S. 115—Decree in favour of a deceased plaintiff—Mistake on the face of the record—Grant of review—Order upheld on appeal—Revision.

When a review is granted on the ground that there was a mistake on the face of the record, e.g., a decree was given to a plaintiff, as if he had been alive, when as a matter of fact he was known to be dead, and the order granting review is upheld on appeal, the Court of appeal, in upholding the order, does not act without jurisdiction, illegally or with material irregularity and the order cannot be interfered with on revision. 11 Bom. L. R. 1070 referred to. (*Kendall, A. J. C.*) *RAM LAL v. RAM DHANI*.

1 O. W. N. 349 : 10 O. & A. L. R. 832 :
11 O. L. J. 700.

— O. 47, R. 7—Dismissal for default—Application for restoration dismissed—Appeal.

An order refusing to restore to file an application for review which was dismissed for default is not appealable, but the High Court can interfere in revision. (*Parson and Graham, JJ.*) *HEM SANKAR ROY CHOWDHURY v. NISHI KANTA DAS GUPTA*.

81 I. C. 1017.

— O. 48, R. 1 (2)—Order directing process to be paid "at once"—Propriety of.

An order directing a party to a suit to pay process fees for witnesses "at once" is contrary to the spirit of the C. P. Code and to dismiss the suit or default because no witnesses appeared on account of process fees being paid late is to defeat justice. (*Kinkhede, A. J. C.*) *PANDU v. RAJESHWAR*.

20 N. L. R. 131 : 75 I. C. 996 :
1924 Nag. 271.

— Sch. II—Award not filed in time—Order fixing date for hearing of trial—Extension of time to submit award.

Where an award not being filed within the time fixed, the court fixes a day for the hearing of the suit and within that time the award is filed, the order may be taken to be an order extending the time for filing the award. (*Suhrawaray and Page, JJ.*) *DEBIR-UD-DIN v. AMINA BIBI*.

78 I. C. 335.

C. P. Code (1908), Sch. II.

—Sch. II, para. 1—*Pending suit—Reference to arbitration—Oral consent of both parties recorded by Court—Effect of.*

On the day of hearing of a suit the pleaders for both the parties stated that they had agreed to arbitration and wanted to refer the matter in dispute to a certain pleader named by them for decision. Their statements were recorded by the court and a reference was made in accordance with their agreement. The arbitrator made an award. Subsequently it was objected that the award was bad because the agreement to refer was not in writing. *Held*, that the objection was unsustainable. A record taken down of an oral statement made by the parties or their pleaders is as much an agreement in writing as a written application made by the parties or their pleaders themselves. 27 C. 61; 30 A. 32; 43 C. 290 Ref. (*Kanhaiya Lal, J.*) MAHABIR *v.* MANOHAR SINGH. 46 A. 208; 22 A. L. J. 67; 79 I. C. 816; 1924 All. 540

—Sch. II, para. 1—Reference—All Persons interested in suit to be parties. 1924 Cal. 353 (1).

—Sch. II, para. 1—Reference to arbitration—Oral application—Parties attending arbitration proceedings—Award—Estoppel.

During the pendency of an appeal the parties thereto agreed to refer the matter in dispute to arbitration but no application in writing under Sch. II, Para. 1, Cl. (2) of the C.P. Code was made. The plaintiffs however signed their names on the order sheet of the Court in relation to the order of reference, attended the proceedings before the arbitrator who however did not admit the evidence produced by them. The award of the arbitrator was objected to by the plaintiffs on the ground that there was no application in writing asking for a reference. *Held*, that the plaintiffs were estopped from objecting to the award on the ground of want of a written application for reference. Where an award of arbitrators is good on the face of it the parties cannot object to the arbitrator's decision either upon law or on fact and the Courts will not ordinarily review his decision provided he acts within his authority and acts in accordance with the principles of natural justice. Nor is a mere mistake a ground for interference with an award. (*Wazir Hasan A. J. C.*) MIRZA MAHOMED HASAN BEG *v.* MIRZA SHAKIR BEG. 10 O & A. L. R. 55; 78 I. C. 378; 11 O. L. J. 142; 1924 Oudh 400.

—Sch. II, para. 1—Failure of all parties to agree to reference—Effect.

Where all parties interested do not agree to a reference to arbitration, the same is illegal and the award made therein invalid. (*Kinkhede, A. J. C.*) HUSSAINBHAI BHORA *v.* BANSILAL. 1924 Nag. 338.

—Sch. II, para. 1—Failure to pay is a matter in difference.

A mere failure to pay a claim constitutes a difference between the parties to a submission. (*Raymond, A. J. C.*) TYEBALLY ABDUL HUSSAIN *v.*

C. P. CODE (1908), Sch. II.

MRS. JAMES FINLAY & Co. 17 S. L. R. 15 :
80 I. C. 969; 1924 S. 105 (2):

—Sch. II, para. 1—Matter in difference.

A failure to pay a claim constitutes a matter in difference between the parties to a submission (1911) 5 S. L. R. 4 Foll. (*Raymond, A. J. C.*) MRS. BEITH STEVENSON & CO., LTD. *v.* FIRM OF NAROOMAL KHEM CHAND. 17 S. L. R. 86 :
80 I. C. 1009; 1924 S. 117.

—Sch. II, paras. 1, 16, 17, 20 and 21—Reference to arbitration pending suit without sanction of court—Suit subsequently withdrawn—Decision by arbitrators—Error of law—Effect—Enlargement of time for award—Fresh submission.

Para. 1 of Sch. II, C.P. Code is not mandatory; it is permissive. If the parties apply to the Court for an order of reference then the Court must keep control over the proceedings up to the end. But it is not necessary for the parties to take this course, and there is nothing to prevent their getting the suit dismissed by consent. Then the whole matter is at large and the parties can go on with the arbitration.

Where there is no suit pending when an application is made to the Court under para. 20, Sch. II, C. P. C. there is nothing to bar the procedure under Para. 20 in the fact that the original agreement to arbitrate was made while a suit was pending. Paras. 20 and 21 provide for an adequate check of the proceedings before the award becomes a rule of the Court. This is all that is necessary. *Held* that where pending a suit a reference to arbitration was made without the intervention of the court and subsequently the suit was withdrawn proceedings fell directly within the terms of para. 20 because the matter was referred to arbitration without the intervention of the Court. The Court made no order in the matter of arbitration in the original suit which was simply dismissed, 29 C. 167; 30 C. 218; 38 B. 687; 36 M. 358 Ref.

An enlargement of time for the award is equivalent to a fresh submission to arbitration.

Arbitrators are judges of law as well as judges of fact and error of law certainly does not vitiate their award. (*Das and Ross, JJ.*) KOKIL SINGH *v.* RAMASRAY PRASAD CHOWDHURY.

3 Pat. 443; 1924 P. H. C. C. 110 :
81 I. C. 994; 1924 Pat. 488.

—Sch. II, para. 3 (2).—Arbitration—Power of court to appoint receiver.

Where arbitration is actually proceeding the Court is not to appoint a Receiver except in exceptional circumstances without the concurrence of the arbitrator. Where the arbitrator is *functus officio* and the award has been passed, the Court has power to appoint a Receiver in the *interim* between the submission of the award and the final acceptance or rejection of it. (*Kennedy, J.C.*) CHETANSINGH BAGASINGH *v.* GULIBAI.

78 I. C. 84.

—Sch. II, para. 3 (2)—Reference to arbitration—Cases appearing in the special list—Power of court to make necessary orders.

C. P. CODE, (1908), Sch. II.

It does not necessarily follow that when a case referred to arbitration appears in the special list, the order for arbitration cannot be superseded by the court for proper reasons and the necessary orders passed for the trial of the suit. Parties who wish to take advantage of the 2nd Sch. to the C. P. C. and agree to refer suits to arbitration rather than have them tried by court, may not thereby make opportunity to delay the solution of their differences. (*Buckland, J.*) SARUPCHAND HUKUMCHAND v. MADHORAM 28 C. W. N. 755 : 1925 Cal. 843.

— Sch. II, paras. 5, 15 and 16—*Arbitration—Award—Setting aside—Personnel of arbitrators changed by parties without reference to Court—Award if valid*

Where during the pendency of an arbitration proceeding a change in the personnel of the arbitrators is made with the consent of both the parties but without the intervention of the Court, this cannot be said to be a defect which strikes at the root of the arbitration. The foundation of proceedings by arbitration is the consent of the parties to a decision by an extrajudicial tribunal and where there is such consent the omission to move the Court under para. 5, (2) Sch. II, C.P.C. does not render the award a nullity. As an award it can only be set aside on any of the grounds specified in Sch. II, para. 15, C.P. Code. (*Walmsley and Suhrawardy, JJ.*) MAHOMED SHEIKH v. KANKINARAH & Co., LTD. 28 C. W. N. 634 : 81 I. C. 574 : 1924 Cal. 665.

— Sch. II, paras 11 and 16—*Arbitration—Special case stated—scope of—Court answering special case—Objections to award—Time for filing.*

Para. 11 of Sch. II of the C. P. Code is intended to meet a class of cases in which any question of law which the arbitrator or umpire may feel himself unable to decide can be referred to the Court for its opinion with the leave of the Court. Where the special case stated for the opinion of the Court goes beyond the scope of para. 11 of Sch. II of the C. P. C. and covers questions of fact arising in the case it is not open to the Court to decide the questions of fact raised by the umpire. It is for the umpire to decide them. The scope of paragraph 11 of Sch. II of the C. P. Code is really confined to questions of law though it is true that it is not expressly stated that the statement of the special case must relate to questions of law. Sufficient indication in this direction is given as to the scope of this rule by the wording of Form No. 4 of the Appendix to this schedule which expressly refers to questions of law to be stated for the opinion of the court. Where a special case is submitted for the opinion of the Court and the Court completes the award of the arbitrator by deciding the special case, it is bound to give to the party an opportunity of objecting to the award before a judgment is pronounced upon it. (*Shah, A. C. J. and Fawcett, J.*) LAKSHMAN BABU RAO v. RAMACHANDRA. 26 Bom. L. R. 836 : 48 Bom. 663 : 1925 Bom. 22

— Sch. II, para. 12—*Court's power to modify award—Accounts—Arbitrator an officer of Court—Position of.*

C. P. CODE (1908), Sch. II.

The fact that an arbitrator in a particular case happens to be an officer of the Court does not affect the power of the Court to modify or correct the award. Where no misconduct is proved, except for a patent error apparent on the face of the award as made, the award is final and the Court cannot set it aside. Where in a suit for accounts, the arbitrator gave an award for a sum larger than that claimed in the plaint, the same is binding irrespective of the fact that the Court itself would have come to a different figure. (*Kennedy, J. C. and Madgavkar, A. J. C.*) JAN MAHOMED v. HAJI MUKHI GAZI. 78 I. C. 60.

— Sch. II, paras. 12, 14 and 15—*Reference to arbitration pending suit—Award going beyond matters in dispute in the suit—Decision on rights of strangers.*

The C. P. Code deals with arbitrations under three heads:—

1. Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit in that case all proceedings from first to last are under the supervision of the Court.

2. Where parties without having recourse to litigation agree to refer their differences to arbitration, and it is desired that the agreement of reference should have the sanction of the Court, in that case all further proceedings are under the supervision of the Court.

3. Where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award.

Full directions are to be found in the Code as to the course of procedure in cases falling under head No. 1, and large powers are given to the Court with the view of making the award in such cases complete, operative and final. The Court makes an order of reference on the agreement (which must be the agreement of all parties to the suit), being brought before it and fixes a time for delivery of the award with power to enlarge the time, if necessary. When the award is submitted to the Court, the Court may in certain specified cases correct or modify it, subject to a right of appeal. In certain specified cases, it may remit the matter to the arbitrators or to the umpire, as the case may be. No award is to be set aside except in one of three cases specified and defined. In cases falling under heads 2 and 3, the provisions relating to cases under head 1 are to be observed, so far as applicable. But there is this difference. In cases falling under head 1, the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned, and the actual reference is the order of the Court, so that no question can arise as to the regularity of the proceedings up to that point. In cases falling under heads 2 and 3, proceedings described as a suit and registered as such must be taken in order to bring the matter, the agreement to refer or the award, as the case may be under the cognizance of the Court. That is or may be a litigious proceeding—cause may be shown against the application and it would seem that the order made thereon is a decree within the meaning of

C. P. CODE (1908), Sch. II.

that expression as defined in the Civil Procedure Code. The Indian Arbitration Act, on the other hand, relates exclusively to arbitration by agreement without intervention of a Court of Justice, and, subject to the provisions of Sec. 23, applies only in cases where if the subject-matter submitted to arbitration were the subject of a suit the suit could, whether with leave or otherwise, be instituted in a Presidency Town.

An examination of the provisions of the second schedule of the Code of Civil Procedure and of the Indian Arbitration Act leaves no room for controversy that the legislature has made clear and distinct provisions to regulate the procedure in respect of each of the four types of arbitration which have special characteristic features. The jurisdiction thus created in respect of each type of arbitration must be exercised through the machinery provided and in conformity with the procedure prescribed. The Legislature never contemplated a confusion of these jurisdictions. No provision can be traced for simultaneous arbitration, by private agreement and on reference by Court, in respect of subject-matters within and beyond the scope of a suit and amongst persons, some parties and some strangers to a litigation. What has happened in the present case is, in essence, an arbitration in a manner neither known to nor contemplated by the law, and the Court must consequently decline to affix the stamp of its authority on the product of the labour of the arbitrators. From this standpoint, the award must be treated as invalid.

The arbitrators on such a reference are consequently limited to questions in dispute between the parties in the cause referred to, and they are not competent to mix up, in their investigation and determination, other controversies wherein strangers to the suit are interested. When an award has resulted from proceedings so carried on in a manner not contemplated by the law, the Court cannot be called upon to invoke the aid of the doctrine of separability.

This is not a case where the arbitrators have failed to act with regularity from lack of care or knowledge; the proceedings have been deliberately organised and carried on by the parties in a manner not contemplated by law and they have thus contrived to defeat the object they had at heart, namely, to settle their differences, in a tribunal of their choice.

It is quite impossible that one and the same arbitration should be held as to matters within the jurisdiction of the Court and matters without the jurisdiction of the Court: between the parties to the suit and between them and other persons: under the Code provided by the Indian Arbitration Act and under the Code provided by the Second Schedule: under the superintendence and control of the Judge who has seized of the suit and of the Judge disposing of business under the Indian Arbitration Act: partly upon an order of reference and partly under an agreement. (*Mookerjee and Rankin, JJ.*) *RAM PRATAP CHAMARIA v. DURGA PRASAD CHAMARIA.*

28 C. W. N. 424 : 1924 Cal. 567.

—Sch. II, para. 12 (b)—*Arbitrator taking wrong view of evidence—If award can be corrected.*

C. P. CODE (1908), Sch. II.

Even where a Court thinks an arbitrator has taken a wrong view of the evidence and that such wrong view was palpable or apparent on the face of the evidence, the Court cannot rectify or correct the award unless the award was imperfect in form or the obvious error was of such a character that it could be amended without affecting the decision of the arbitrator. It is well settled that a Court acts without jurisdiction if it modifies an award because it takes a view different from that held by the arbitrator. (*Mukerjee, J.*) *MAHENDRA NATH KUNDU v. SURESH CHANDRA FRAMANIK.* 80 I. C. 10.

—Sch. II, paras. 14 and 15—*Private award—Arithmetical mistake—Court's powers to correct.*

A private award cannot be amended by the Court on the ground that the arbitrator had made an arithmetical mistake in arriving at it, as it does not amount to an illegality. (*Le Rossignol, J.*) *RIAZ-UD-DIN v. SHUJA-UD-DIN.* 78 I. C. 1042.

—Sch. II, para. 14 (c)—*Awarding excess as jeshi tabagam—If illegal.*

Where arbitrators in partitioning joint family property gave an excess amount to the eldest brother for his trouble in managing the estate the award cannot be said to be illegal on the face of it. (*Krishnan and Waller, JJ.*) *VAITHIANATHA AIYAR v. SUBRAMANIA AIYAR.* 78 I. C. 238.

—Sch. II, para. 15—*Arbitration—Private enquiries by arbitrators—Court superseding arbitration and taking up case—Propriety of.*

When an appeal was pending the parties agreed to refer their disputes to arbitrators who made an award. The award was attacked as vitiated by misconduct on the ground that the arbitrators made secret enquiries. The Court below held this to be misconduct and therefore entertained and decided the appeal on its merits without reference to the arbitration. Held, that it could not be said that the Court below acted without jurisdiction or illegally or with material irregularity in the exercise of its jurisdiction. (*Danicks, J.*) *BABU RAM LAL v. BEHARI SINGH.* L. R. 5 A. 367.

—Sch. II, paras. 15 and 16—*Arbitration—Award—When open to attack jurisdiction of Court.*

An arbitration, in substance, ousts the jurisdiction of the court, except for the purpose of controlling the arbitrators and preventing misconduct and for regulating the procedure after the award. So far as the hearing of the merits is concerned and the decision contained in the award, the Court has nothing to say, good, bad or indifferent. It has no right to review it or to consider it and in substance hear an appeal therefrom. (*Walsh, A. C. J. and Ryves, J.*) *AFTAB BEGAM v. HAJI ABDUL MAJID KHAN.*

22 A. L. J. 816 : 81 I. C. 525 (1) : 1924 All. 800 (1).

—Sch. II, para. 15—*Award—Invalidity—Objection to, when to be taken—Appeal against decree on award.*

An objection to an award on the ground that it is not an award or on the ground it is invalid must be made at the time when it is filed. If no

C. P. Code (1908), Sch. II.

objection is then taken or if it is made and disallowed, the party objecting cannot reargue the matter by way of appeal from the decree. 26 M 47; 31 A. 450 disb. 36 B 105 Rel. (*Pratt and Fawcett, JJ.*) MAHOMED VALLI ASMAL v. VALLI ASMAL. 26 Bom. L. R. 171; 79 I. C. 723; 1924 Bom. 324.

—Sch. II, para. 15—Award unreasonable—If ground for setting aside.

The fact that the award does not seem reasonable to the judge is not a ground for setting aside the award under the provisions of para. 15 of Sch. II, C. P. Code. (*Pipon, J. C.*) CHANDAN v. MT. BIBI. 75 I. C. 198.

—Sch. II, para. 15—Patent error of law vitiates award—Breach of duty though honestly caused is legal misconduct—Arbitration Act, S. 14.

The Court will set aside an award if there is an error of law patent on the face of it. The term misconduct has in the legal sense a wider significance than personal misbehaviour. "Legal misconduct" means misconduct in the judicial sense of the word not from a moral point of view and means some honest though erroneous breach of duty causing a miscarriage of justice. Where the arbitrators had admitted improper evidence, and were misled by it;

Held, that they had committed an error of law patent on the face of the award and that this could amount to legal misconduct.

Per *Madgavkar, A. J. C.*—Patent errors of law are legal misconduct on which Courts can in their inherent power, set aside the award under S. 14 of the Arbitration Act. Whether the Courts should do so or should only remit the award is a matter on which no hard and fast rules can be laid down, depending as it does on the peculiar circumstances of each case. (1918) 13 S. L. R. 201 Foll.; (1920) 44 Bom. 780 Rel (1907) 1 S. L. R. 86 Ref. (*Kinnaird, J. C.*) *Aston and Madgavkar, A. J. C.*) GUNNIS & CO., LTD. v. AMANMAL TULSI DAS. 1924 S. 75.

—Sch. II, para. 15 (1) (c)—Filing of suit—If takes away arbitrator's jurisdiction.

The filing of a suit regarding the same subject-matter does not *ipso facto* render the arbitrators *functi officio* and their award void. (*Raymond, A. J. C.*) TYEBALLAY ABDUL HUSSAIN v. MRS. JAMES FINLAY & CO. 80 I. C. 969; 17 S. L. R. 15; 1924 S. 105 (2).

—Sch. II, para. 15—Umpire—Misconduct—Determination of rights of parties by the casting of lots—Effect of.

Where the parties appointed, each two arbitrators and also an umpire, the two arbitrators took different views. The umpire being unable to choose between the two views drew lots and decided accordingly. *Held*, that the conduct of the umpire did not amount to misconduct within the meaning of Sch. II, para. 15, C. P. Code and that the award of the umpire was legal. There was therefore no ground for interfering with the award in revision. (*Pullan, A. J. C.*) PURAN CHAND v. RAM NATH. 10 O. & A. L. R. 807; 11 O. L. J. 685.

C. P. CODE (1908), Sch. II.

—Sch. II, para. 15—Award would be set aside if umpire does not inform the parties the date of hearing.

The arbitrators to whom a dispute was referred having differed, appointed an umpire under the express terms of the contract. The umpire informed both the parties of his appointment, but fixed no date of hearing. No further steps were taken by any of the parties concerned and the umpire made his award whereupon the applicants objected on the ground that they had desired to lead evidence before him, but had no opportunity to do so.

Held, that the duties of an umpire are identical with those of an arbitrator. And therefore the parties are entitled to a hearing before an umpire no less than before the arbitrator and it is incumbent on the umpire on appointment, to fix a day of hearing and apprise the parties of it. (5 S. L. R. 89 Foll.) And in the absence of an opportunity of hearing of the parties before the umpire, the decision filing the award must be set aside. (*Kennedy, J. C.* and *Madgavkar, A. J. C.*) FIRM OF DHANASING v. FIRM OF RAM CHAND. 1924 S. 27.

—Sch. II, para. 16—Award—Oral award—Effect of—Bar to fresh suit. (*Robinson, C. J.* and *May Oung, J.*) MA MYA v. KO PO SA. 1924 Rang. 60.

—Sch. II para. 16 (2)—Appeal—Maintainability—Test of—Validity of reference.

A restrictive provision like the one in Sch. II, para. 16 (2), C. P. C. must be strictly construed. The decree in respect of which that section prohibits an appeal must be one which has been passed after a substantial compliance with the preceding provisions of Sch. II. In a case where the validity of the reference is attacked, the court in order to determine whether an appeal lay must decide whether the reference was valid or not. If the reference is valid and a decree is passed in terms of the award no appeal lies therefrom but if the reference is not valid it is not a decree under Sch. II and an appeal will lie as from any other decree: (*Kinkhede, A. J. C.*) HUSSAINBHAI BHORA v. BANSILAL. 1924 Nag. 338.

—Sch. II, para. 16—Time to file objections—Decree passed before expiry of time for objections—Remedy.

A party who objects to an award is given 10 days under art. 158 Lim. Act to file objections to the award. If a decree is passed before the expiry of this period, the aggrieved party's remedy is not by way of appeal but by way of revision. (*Young, J.*) ACHABER PANDE v. KULDIP SINGH. 76 I. C. 307 (1).

—Sch. II, para. 16—Where application to set aside award is refused a decree must be passed in accordance with it.

An award having been made and an application to set it aside on the ground of misconduct or any other illegality having been refused the Judge has no option but to pronounce a decree in accord-

C. P. CODE (1908), Sch. II.

ance with it. [P. 789 C. 2]. (*Walsh, A. C. J. and Ryves, J.*) *GOBND SINGH v. BHIRGUNATH SINGH*.
22 A. L. J. 676 :
L. R. 5 A. 465 : 82 I. C. 16 :
10 O. & A. L. R. 820 : 46 All. 686 :
1924 A. 758.

—Sch. II, paras. 17 and 20—*Application under a suit within Deccan Agr. Rel. Act, S. 3.*

An application to file a reference under clause 17 of Sch. II, C. P. Code, is not a suit and it is doubtful if an application under clause 20 to file an award even when an agriculturist is a party, can be called a suit : but in any case it is not a suit of the description mentioned in S. 3, Cl. (w), (y) or (z) of the Deccan Agriculturists' Relief Act and the Court can file the award to which an agriculturist is a party and on whose property a mortgage is created by the award without adjusting accounts under Ss. 12 and 13 of the Act. (*Kennedy, J. C. and Madgavkar, A. J. C.*) *HOT CHAND BAL CHAND v. KISHIN CHAND*.
1924 S. 23.

—Sch. II, para. 20 (2)—Application to file an award—Lim. Act, S. 6. *MA THEIN TIN v. MAUNG BATHAN*.
76 I. C. 493.

—Sch. II, cl. 20 and O. 23, R. 3—*Filing award—If overrides power to adjust disputes.*

The power given by Sch. II, cl. 20 to any person interested to apply to a court to have an award filed in court does not override the general power under O. 23, R. 3, to adjust disputes by a lawful compromise at any time after the institution of a suit. (*Spencer and Devadoss, JJ.*) *CHINTALAPALLI CHINNA DORAYYA v. VENKANNA*.
1925 Mad. 50.

—Sch. II, para. 20—*Jurisdiction over subject-matter—What is.*

Where the facts were that there was no substantial question decided by the award affecting property within the jurisdiction of the Berar Court and no one of the three temples to the management of which the award related, was within that jurisdiction, and two of them were within the dominions of the Nizam and outside British India and a large part of the award related to family questions and money payments to be made by members of the family and all the members of the family were residing within the Nizam's Dominions but merely two of the villages which formed the principal endowments of the temples were situated in Berar.

Held, that does not give the Berar Courts jurisdiction to file the award especially when there was no dispute concerning the ownership or management of the villages nor any denial that the revenues must be appropriated to the three temples. (*Lord Phillimore*). *RAMLAL HARGOPAL v. KISAN CHANDRA*.
51 Cal. 361 :
7 N.L.J. 62 : 20 N.L.R. 33 : 34 M. L. T. (P. G.) 62 :
19 L.W. 549 : 22 A. L. J. 386 : 26 Bom. L. R. 586 :
51 I. A. 72 : (1924) M. W. N. 79 : (1924) P. C. 95 :
28 C. W. N. 977 : 46 M. L. J. 628.

—Sch. III, para. 1—*Transfer of decree for execution—Powers of Collector.*

Where the decree of a civil court is sent to the Collector for execution, the Collector has absolute

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jurisdiction to find out the best method for raising money in order to satisfy the Civil Court decree, but beyond that he had no jurisdiction to decide how much money was due to the decree holder and how much of the decree had been satisfied. (*Stuart and Mookerjee, JJ.*) *ABDUL SHAKUR v. MAHOMED MATIN*.
22 A. L. J. 202 : L. R. 5 A. 93 : 78 I. C. 429 :
46 A. 414 : 1924 A. 307.

—Sch. III, para. 11—*Incompetency to alienate—Extent of.*

Where a decree is transferred to a collector for execution, the incompetency to alienate prescribed by para. 11 of Sch. III, C. P. C. exists till the decree is satisfied and proceedings in appeal or revision therefrom are completed. (*Baker, J. C.*) *SETH BALLABHDAS v. SOBHA SINGH*.
1924 Nag. 216 (2).

—Sch. III, para. 11—*Sale in contravention of—Obligation to refund.*

Where a sale takes place in contravention of para. 11, Sch. III, C. P. C. without either party knowing he was violating the law, equity requires that money paid should be refunded. (*Prideaux, A. J. C.*) *NARAYAN v. MOTISA*.
20 N. L. R. 87 : 78 I. C. 343 : 1924 Nag. 132.

—Appendix G—*Form of security for stay.*

The forms given in App. (C) of the C. P. C. for security bonds indicate that what is required is a mortgage of property to secure the decree. (*Duckworth and Godfrey, JJ.*) *P. R. P. R. SOMASUNDARAM CHETTIAR v. T. P. N. NATCHIAPPA CHETTIAR*.
2 Rang. 429 : 1925 Rang. 55.

COMPANY—*Directors—Remuneration of—Position of directors.*

For doing duties which the Directors of a company have to perform they cannot claim any higher remuneration than what is provided for by the Articles of Association. The Directors are the agents of the shareholders and thus act in a fiduciary capacity with all the consequential rights and liabilities. (*Mukerjee and Dalal, JJ.*) *DIKSHIT & Co., LTD. v. MATHURA PRASAD*.
22 A. L. J. 883 : 82 I. C. 21 : L.R. 5 A. 722.

—Directors—Suit by one director against another director restraining latter from preventing him in the discharge of his duty—jurisdiction of Civil Court. See C. P. CODE, S. 9.

28 C. W. N. 803.

—*Liquidation—Members of a provident fund maintained by company—Subscriptions paid by members supplemented by contributions from company—Right of provident fund holders—Priority—Unsecured creditors—Shareholders—Fiduciary relationship—Payment of interest—Effect of.*

The Alliance Bank of Simla had created and controlled a Provident Fund for its employees. The Bank suspended payment and went into liquidation. The question arose whether the members of the Provident Fund had priority over the unsecured creditors or whether they were only to rank *paripassu* with them. Under the rules those of the Bank's employees who fulfilled the conditions required for membership of the fund were

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compelled to subscribe thereto and every half year the Bank contributed a sum equal to the aggregate amount of the subscriptions of the members during the preceding half year. Every half year the Bank also contributed interest at a rate not exceeding the rate at which interest was paid on fixed deposits and not exceeding 5 per cent per annum. The half yearly contributions of capital were divided (by book entry) among the members in proportion to the amount of their subscriptions and the half yearly interest was paid upon the capital amount from time to time standing to the credit of each member. The account of the fund was kept in the general books of the company at their head office where a subsidiary ledger was also maintained showing the amount from time to time standing to the credit of each member. Each member was supplied with a pass book which was made up and balanced half yearly. In the case of a member who was also a customer of the Bank in the ordinary sense, his Provident Fund Account was wholly distinct from his personal account. As regards the mode of collecting subscriptions those who had no personal accounts received their salaries in full and returned their subscriptions to an office of the Bank whose duty it was to collect them. Members with personal accounts were credited in those accounts with their salaries in full and debited with their subscriptions. *Held*, that there was a fiduciary relationship between the bank and its employees who were members of the Provident Fund; that the provision as to interest was not wholly inconsistent with the existence of a fiduciary relationship and that the money in this fund so constituted never became the property of the bank in the sense that the relationship between the Bank and the members was merely that of debtor and creditor. The amount standing to the credit of each member was his property in the possession and under the control of the bank. The members of the fund were entitled to priority not only in respect of the contributions made by him but also in respect of the contributions made by the Bank which contributions included the sums equivalent to the aggregate sums subscribed by the members and the interest provided by the Bank. Consequently the members of the Provident Fund were entitled to receive payment in full of the amounts standing to their credit in respect of the fund in priority to the unsecured creditors and shareholders of the Bank. *Gee v. Liddell* 35 Bead 629; *In re Hallett's Estate* 13 Ch. D. 696; *Ex parte Blave* (1894) 2 Q. B. 237; *Sinclair v. Brougham* (1914) A. C. 398 *Ref.* (*Sanderson, C. J. and Richardson, J.*) *Re ALLIANCE BANK OF SIMLA, LTD.* 28 C. W. N. 721; 1924 Cal. 818.

—Management—Interference by Court with internal management when justified—Rights of share-holders and minority of them.

The Court will not interfere with the internal management of the companies acting within their powers, and in fact has no jurisdiction to do so. *Burland v. Earl* (1902) A. C. 83 *Foster v. Foster* (1916) 1 Ch. 532 *Rel. on.* In order to redress a wrong done to the company or to recover moneys or damages alleged to be due by the company, the action should *prima facie* be brought by the company itself. But an exception is made to the

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second rule, that is to say, that the company ought to bring the action "where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company and will not permit an action to be brought in the name of the company. In that case the Courts allow the share-holders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious in such an action the Plaintiffs cannot have a larger right to relief than the company itself would have if it were Plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the share-holders, or capable of being confirmed by the majority. The cases in which the minority can maintain such an action are therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other share-holders are entitled to participate. No mere informality which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the share-holders is clear (*Mookerjee and Rankin, JJ.*) *GHANDY v. L. P. E. PUGH.* 28 C. W. N. 479; 1924 Cal. 598.

—Meeting—Directed to be held under the orders of Court—Appointment of Chairman—Powers and privileges of Chairman—Polling time—Scrutineers not appointed—Opportunity not given to test validity of votes—Report of Chairman—Confirmation of Court.

A meeting of the shareholders of a limited Company was held under the orders of the Court for the purpose of electing directors. The Chairman was one appointed by the Court. At the meeting various names for the directorate were proposed and seconded. At the time of the poll the Chairman ordered the doors of the meeting room to be closed and took votes and proxies of those only who were present. Under the articles of Association of the Company no one was entitled to vote at the meeting who was indebted to the Company in respect of call money on his shares. A person using proxies at any meeting of the Company must himself be a shareholder at the time. No scrutineers were appointed to examine the voting. The report submitted to the Court by the Chairman showed that the persons proposed by the defendants were duly elected. The plaintiffs took out a notice of motion for inspection and discovery of the papers connected with the meeting to see if only qualified persons had taken part in the meeting. It was also objected that the action of the chairman in closing the door at the time of the polling vitiated the proceedings. The Court below discharged the motion and overruling the plaintiffs' objections confirmed the report of the chairman. *Held on appeal* that the order of the lower court was not improper, though no doubt the plaintiffs had a right to inspect the papers relating to the voting

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at the meeting and it would have been better to have given an opportunity of doing so. The action of the chairman in closing the doors of the hall at the time of the polling and in omitting to appoint scrutineers was not an illegality, he having a discretion in the matter. In the absence of anything to show that something improper was done at the meeting so as to affect the voting and the proper recording of votes, the report of the chairman must be accepted. (*Shah, A. C. J. and Faizell, J.*) **F. A. C. REBELLO v. CO-OPERATIVE NAVIGATION AND TRADING CO., LTD.**

28 Bom. L. R. 907.

— Meeting — Resolution — Amalgamation with another Company — Notice of meeting to Shareholders — Sufficiency of — Amendments to resolutions — Scope of Amendment negating resolution — Not proper — Right of members to speak — Limits of — Closure — Legality of. See COMPANIES ACT, S. 213. 26 Bom. L. R. 287.

— Shares — Liability of share-holders — Transfer or forfeiture of shares — Liquidation — Contributories — Transaction of business of company — Absence of quorum provided by rules — Business done by Circulation — Legality of.

A company cannot purchase the shares from a share holder. It can accept a surrender of the shares subject to the conditions and limitations applicable to a forfeiture of the shares. Where the facts are against it no presumption arises that an entry of forfeiture of shares in the books of the company has been properly made. Even after a transfer, surrender or forfeiture of the shares, the liability of the shareholder continues and he is liable as a contributory on liquidation of the Company if it takes place within a year. It is not necessary that a list of contributories should have been placed before a meeting of the creditors to make the share-holder liable as a contributory. Where under the rules of business of a company a quorum for a meeting of directors is required before they can transact business, it is not open to a less number of directors by themselves to transact business by circulation even though the rules authorising the transaction of business by circulation do not fix any number of directors among whom the matter should be circulated. (*Devadoss, J.*) **INDIAN COMPANIES ACT, In the matter of.** 20 L. W. 74 : (1924) M. W. N. 582: 1924 Mad. 703.

— Shareholders — Position of — Dividends — Company not a trustee for shareholders — Auction-purchaser of shares — Refusal by company to register the purchase — Rights and remedies of purchaser — Limitation. See LIM. ACT, ART. 116. 46 M. L. J. 563.

— Voluntary — Liquidation — Shareholders — Surrender of shares in exchange for other shares — Meeting of shareholder — Transaction of business — Transfer of assets — Unregistered deed — Effect of.

A bank went into voluntary liquidation and the respondents who held certain fully paid up shares in the bank surrendered them to another company in lieu of certain preference shares in that other company which had in the mean time by an

COMPANIES ACT (VII OF 1913), S. 4.

unregistered deed of assignment taken over the assets of the bank in liquidation. *Held*, that after the surrender of their shares the respondents had ceased to be shareholders and that any meeting convened by them or proceedings taken by a meeting in which they took part were invalid and inoperative.

Per *Walsh, C. J.* — The transactions which do not purport to comply with statutory requirements, although in every other way the object to be achieved by the transaction has been executed, can be recognised in law or rather at equity so as to bind the parties by their conduct so irrevocably as to make it impossible for them to reopen the transaction or retrace their steps. (*Walsh, A. C. J. and Ryer, J.*) **HUNTER v. DAMODAR DAS.** 22 A. L. J. 719 : L. K. 5 A. 518 : 46 A. 759 : 81 I. C. 503 : 1924 A. 712.

— Winding up — Shareholders — Liability as contributory — Fraud.

A shareholder cannot be relieved of his liability as a contributory in the winding up proceedings on the ground he was induced to buy the shares by a fraudulent misrepresentation. (*Le Rossignol and Broadway, J.*) **THE ORIENTAL BANK OF INDIA v. HABIBULLAH KHAN.**

1924 Lah. 649.

— Winding up — Petition by creditor — Opposition by other creditors — Agreement to sell property — Loss to shareholders. 1924 Rang. 108.

— Winding up — Enforcement of payment of debt.

If a creditor presents a petition to wind up a company whose insolvency is not admitted, with the object of bringing pressure to bear upon the company and make it pay cheaply and expeditiously a heavy debt which it desired to dispute in the civil Court the petition for winding up is an abuse of the process of court and will be dismissed. L. R. 19 Eq. cases 445; 39 B. 47 referred to. (*Spencer and Srinivasa Ayyangar, J.*) **SATYARAJU v. THE GUNTUR COTTON JUTE AND PAPER MILLS CO., LTD.** 47 M. L. J. 710.

COMPANIES ACT (VI OF 1882), S. 28 — Transfer of shares — Registration — Necessity for.

— (VII OF 1913), S. 4 — "Person" — Meaning of — Collection of persons — Person figuring in different capacities if can be treated as one person. 1924 Lah. 173.

A person who was shown as beneficially interested in one block of shares in a company and as holding shares on behalf of his two grandsons in another block. The entry against another person's name was "for self and as guardian of a minor." *Held*, that each of the two persons should be counted as one member for the purposes of S. 4 of Companies Act, although his name figured in different capacities and the Company must be held accountable to him alone although he in his turn was responsible to a number of other persons.

'Person' can be used to include a collection of people and an appropriate illustration is that the association of individuals known as a joint Hindu

COMPANIES ACT (VII OF 1913), S. 134.

family. (*Mears, C. J. and Piggott, J.*) *MOTI RAM v. KUNWAR MD. ABDUL JALIL KHAN.*

L. R. 5 A. 235 : 22 A.L.J. 487 : 78 I. C. 441 :
46 A. 509 : 1924 All. 414.

—S. 134—*Fine—Imposition of—Realisation from Directors.*

An order directing the Directors individually to pay fine imposed on the company is illegal. (*Broadway, J.*) *DWARKA DAS v. EMPEROR.*

6 L. L. J. 160 : 1924 Lah. 489.

—S. 136—*Company—Publication of statements—Limited Company—Omission to publish statements—Liability.*

Under S. 136 Sub-s. (1) of the Indian Companies Act 1913, every limited banking company is bound to publish a statement provided in the third schedule on the dates specified in the section and failure to comply with its provisions is punishable under S. 136 Sub-s. (4). The fact that statements could not be published in time on account of the change in the closing date of the financial year of the company is not a valid answer to the charge. (*Shah, A. C. J. and Crump, J.*) *PARASHURAM D. SHAMDASANI, In re.*

46 Bom. 305 : 26 Bom. L. R. 68 : 48 Bom. 305 :
82 I. C. 58 (2) : 25 Cr. L.J. 1194 (2) : 1924 Bom. 308.

—S. 162 (5)—*Company—Winding up—Application by creditor whose debt is disputed.*

Where a debt claimed as due by a creditor of a company is *bona fide* disputed by the Company, an application for finding up of the Company by the creditor must be rejected. (*Young and Carr, JJ.*) *COALFIELDS OF BURMA v. H. H. JOHNSON.*

3 Bur. L. J. 226 : 2 Rang. 525.

—S. 186—*Summary process—Recovering money from firm of which Contributory a partner—Contract Act, S. 43—Applicability.*

1924 Lah. 148.

—S. 195—*Examination—Right of petitioning Creditor to attend. MOOLA DAWOOD COTTON MANUFACTURING CO., LTD., In re.*

1924 Rang. 24.

—S. 207, Cl. IX—*Voluntary Liquidation—Removal of liquidators—Measure of 'due cause.'*

The power of the Court to remove a liquidator under S. 207, Cl. ix of the Indian Companies Act is not confined to cases of unfitness on the part of the liquidator, but, also extends to cases where 'due cause' is shown which in its turn must be measured to the real interests of the liquidation. (1887) Ch. D. 299 cited and followed. (*Per Macleod, C. J. and Shah, J.*) *KAI KUSHRU NUSSERWANJI v. TATA INDUSTRIAL BANK, LTD.*

80 I. C. 515 : 48 Bom. 471.

—S. 213 (1)—*Meeting of shareholders—Notice of meeting—Resolution—Amendment negating Original proposition—Chairman ruling its out of order—Shareholder—Right of speech at meeting—Scheme of amalgamation—Resolution by directors—Sanction for.*

The directors of the Tata Industrial Bank having approved of a proposal to amalgamate their Bank with the Central Bank resolved on 5-7-1924 to place the scheme of amalgamation before the

COMPANIES ACT (VII OF 1913), S. 213.

shareholders of the Bank for approval. One of the directors had entered into a provisional agreement with the Central Bank for amalgamation. A summary of the terms of amalgamation was notified to the shareholders and the provisional agreement was also kept open for inspection by the shareholders at the Registered office of the Company. The notice also referred to an extraordinary general meeting of the shareholders on 19-7-1923 for considering the resolution that the Tata Bank be wound up voluntarily, that the Tata Bank be amalgamated with the Central Bank, that the provisional agreement be adopted and that the liquidators be authorised to work out the scheme. A further meeting of the Shareholders of the Company was fixed for conforming the above resolution. The first meeting was held on 19-7-1923 as notified. The Chairman of the meeting delivered a speech in support of the resolution and moved for its adoption. Next the resolution was opposed by the Shareholders. The plaintiff, who was also a shareholder, raised a long point of order attacking the legality of the notice convening the meeting, the directors and other officers of the Tata Bank and opposing the amalgamation. The chairman of the meeting ruled the point of order as being in itself out of order. Subsequently the plaintiff moved an amendment to the resolution requiring that the entire value of the properties and assets and capital and liability of the Tata Bank as on 30-6-1923 be credited on amalgamation to the capital of the Central Bank without any reduction and that nothing out of the said value be allowed to be carried by way of premium or otherwise to the reserve fund of the Central Bank. The shareholders present at the meeting refused to give a hearing to the speech attempted to be made by the plaintiff in support of his amendment. The chairman also disallowed the amendment as being out of order. The original resolution was put to the vote and declared carried by an overwhelming majority. A poll was demanded and before its result was declared, the plaintiff raised a further point of order challenging the validity of all the votes tendered in support of the resolution. The chairman ruled this point of order also as being out of order and declared the result of the poll. The resolution was passed and confirmed at subsequent meeting held on 6-9-1923 and the appointment of the liquidator was then considered. Originally two names were proposed as liquidator and two amendments were moved, the last of which was declared lost on a show of hands. A poll having been demanded, it was taken, but before the result of the poll was declared, the chairman of the meeting in consultation with the proposer and seconder of the resolution came to an agreement to appoint four named individual as liquidators. The demand for a poll was then withdrawn and the chairman moved an amendment to the effect that the four named persons be appointed liquidators. The amendment was carried both as an amendment and as a substantive proposition. The plaintiff thereupon sued for a declaration that the notices convening the meetings of the shareholders were not sufficient, that the meetings were not duly convened, that the amendments were out of order and that the resolutions were

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invalid and not binding on the Company. *Held*, that under S. 79 of the Companies Act read with art 68 of the Articles of Association of the Tata Bank all that was required by law to be stated in the notice was the general nature of the business. The general nature of the business was clearly indicated in the notice and sufficient details were given, which were necessary for the purpose of enabling the shareholders to consider the question. Where there is any secret agreement or any interest of the directors in the agreement not disclosed in the circular, or in the notice, the court will view with strictness any omission to refer to it in the notice; and the omission to mention any secret arrangement would constitute a serious defect in the notice. But where no secret agreement is proved or suggested and where there is no indication that there was anything to conceal, the court will as far as possible take a liberal view of the terms of the notice and will not upset the proceedings taken on a notice for some defect which might have been avoided, but which was not avoided on account of some honest mistake. Every limited company has a statutory right of going into voluntary liquidation and selling its assets to another company if the prescribed conditions are satisfied. An amalgamation may take place either by the transfer of undertakings A and B to a new corporation, C, or by the continuance of A and B by B upon terms that the shareholders of A shall become shareholders in B. It is not necessary that there should be a new company.

The point of order raised by the plaintiff was a request to the chairman to hold that the meeting was not competent to consider and confirm the said arrangement which was *ultravires* of the company. The chairman acted properly in ruling it out of order and that was the only course which the chairman could adopt in dealing with it. It was for the shareholders to consider whether to accept or reject the resolution, and the point of order might well have been made the subject of a speech against the resolution; but as a point of order it was properly ruled out. Though an amendment to a resolution might be allowed, even though notice of such amendment has not been given, an amendment which practically negatives the resolution could not be allowed. In other cases it depends on the nature of the resolution and the nature of the amendment, whether it could be or should be allowed by the chairman. Any proper amendment, which is moved by any member at a meeting, should be put to the meeting for consideration and if the chairman rules out any such amendment, the resolution is liable to be set aside.

With regard to a right of speech of a shareholder at a meeting, the majority must not refuse to listen to the speech of a member in reasonable terms for a reasonable time and if having regard to the circumstances of the case, the court is satisfied that the closure was properly applied, then even if it resulted in negating the right of speech to a particular member, it does not vitiate the resolution. It is difficult to lay down any general rule as to what should be the result where the right of speech is denied to a member in a general meeting of the

COMPANIES ACT (VII OF 1913), S. 282.

shareholders. The proper test to lay down is to consider the facts and circumstances of each case and to determine whether the denial of the right of speech is sufficient to vitiate the resolution under the circumstances of the case. Those who refuse unnecessarily out of sheer impatience to listen for any reasonable length of time, to any arguments in support of the opposite views incur a grave risk in adopting the attitude of exposing the very resolution, which they may be anxious to adopt to the scrutiny of the court and to render it liable to be set aside. The very purpose which they may have in view may be defeated by those who resort to it. A shareholder is not entitled to speak at such a meeting as he pleases but has a right to be heard in reasonable terms for a reasonable time. (*Shah, A. C. J. and Fawcett, J.*) *PARSHURAM DATTARAM v. THE TATA INDUSTRIAL BANK, LTD.* 26 Bom. L. R. 987 : 1925 Bom. 49.

—S. 232—Execution—Voluntary winding up—Effect of.

A voluntary winding up of a company does not have the effect *ipso facto* of putting an end to an attachment already in force. (*Daniels, J. C.*) *THE NATIONAL BANK OF UPPER INDIA v. SHEO MAN-GAL RAJPAL.* 10 O. & A. L. R. 115 : 11 O. L. J. 349 : 1 O. W. N. 118 : 79 I. C. 968 : 1924 Oudh 406.

—S. 234—Compromise between liquidator and contributory when binding.

1924 Lah. 148.

—S. 235—Misfeasance—Claim for compensation—Limitation—Commencement—Limitation Act, Art. 36—Applicability.

1924 Lah 285.

—S. 235—Scope of—Payment of sums due by a director under a contract of tenancy.

On the liquidation of a company, an application was made by the liquidator under S. 235 of the Companies Act for recovery of arrears of rent due from a director to the company under the terms of a lease. The lease was given to the director not by virtue of his position as such but precisely as it would be given to any private person not connected with the company. *Held*, that the proper remedy was by way of suit and that the application was misconceived. The object of S. 235 of the Companies Act was to facilitate the recovery by the liquidator of assets of a company improperly dealt with by its promoters, directors or other officers. The section applies to breaches of trust and to misfeasance by such persons. A debt due by a director to a company upon foot of an ordinary contract and which he has failed to pay cannot be held to be money of the company. (*Scott-Smith and Fforde, JJ.*) *SRI RAM v. NUR MAHOMED.* 5 Lah. 461.

—S. 282—Limited Company—Prospectus sent to Registrar—Directors undertaking to subscribe certain shares—Failure to discharge obligation by two Directors—Application to start business with incorrect declaration—Offence.

According to the prospectus for the floatation of a limited company sent by the accused to the Registrar of Joint Stock Companies it appeared that five persons who had agreed to be Directors of the Company had as such undertaken to subs-

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cribe for 500 shares. Two of these Directors never paid any sum due from them but in spite of this the accused applied to the Registrar for permission to commence business after making the necessary declaration that the directors had taken 500 shares and paid for them. *Held*, that the accused led the Registrar to believe that even the two Directors who never paid any money had taken the shares and paid for them and he was therefore guilty under S. 282 of the Companies Act. (*Mears, C. J.*) *BOSE v. EMPEROR*.

46 A 218 : L. R. 5 A. 71 (Cr.) :
77 I. C. 826 : 22 A. L. J. 83 : 1924 A. 314 :
25 Cr. L. J. 474.

COMPROMISE—Authority of counsel—Extent of
—Compromise when binding on client. *See*
PLEADER AND CLIENT. 5 I. C. 385.

COMPROMISE—Binding character of—Consensus
adidem—Necessity for—Interposition of third
party to fix amount—Conclusive or leading element
in contributing to compromise—Compromise
by counsel—Compromise empowering counsel
for opposite party to fix amount—Legality of.

A suit, which had been heard for two days, was on the representation of counsel on both sides that it was likely to be settled, passed over. Later in the day counsel for the defendant stated that the case was settled and that the terms would be put in later. What happened was that counsel for both parties left the amount to which the plaintiff was entitled to be fixed by the counsel for the defendant. The counsel named a certain sum, but on the plaintiff being informed of it, he repudiated the suggestion that the counsel's opinion was final. On an application by the defendant asking that the terms of the settlement arrived at might be recorded and decree passed in accordance therewith, the question arose whether the parties to the compromise were truly *adidem*. *Held*, that though the impression upon the minds of counsel for both parties was that the settlement had been achieved, yet in point of fact there was a misapprehension as to the exact ambit of the terms of that agreement, that as the defendant's Counsel was under the impression that his interposition was merely to be accepted as a leading and predominant element in contributing to the compromise, while the plaintiff's Counsel though that it was to be conclusive, the parties were not *adidem* in connection with the compromise and that the same had failed as a settlement of the suit between the parties. *See* *ibid*: Express authority on the part of Counsel from the client is necessary to entitle counsel to commit the fortunes of his client to the determination of the Counsel for the other side. (*Lord Shaw*.) *JAGATPUT SINGH DUGAR v. PURAN CHAND*.

47 M. L. J. 136 :
35 M. L. T. 136 (P. C.) : 26 Bom. L. R. 772 :
1924 M. W. N. 646 : L. R. 5 P. C. 145 :
20 L. W. 571 : 1 O. W. N. 598 :
10 O. & A. L. R. 1011 : 1924 P. C. 200 (P. C.).

—Binding nature of—Hindu father—Parti-
tion by will among sons—Compromise in suit
among sons ignoring conditions in father's will—
Effect of—Compromise estops parties thereto
from questioning it. *See* **HINDU LAW, WILL.**

22 A. L. J. 521.

CONTEMPT.

—Construction—Easement Light and
air—Obstruction to—Ancient light.

In a prior suit between the parties for the closing of two windows alleged to have been unauthorisedly opened the parties entered into a compromise under which the plaintiff secured the closing up of one of the windows and the defendant secured the maintenance of the other window with liberty to heighten it by one foot, if that were possible, otherwise to leave it as it was before suit. *Held* that the effect of the compromise was to give to the window that was maintained the character of an ancient light together with all the advantages and disadvantages attaching to such light. (*Mears, C. J. and Pigott, J.*) *GUR PRASAD MUKERJI v. BISHUN DAT*.

L. R. 5 A. 262 : 79 I. C. 349 : 1924 All. 816.

—Decree—Interest—Penalty—Executing
Court not entitled to relieve against. **CONTRACT ACT, S. 74.** 22 A. L. J. 491.

—Effect of—Not a transfer.

Where there is a *bona fide* compromise of disputed claims under which each party gets a portion of the property in dispute, the proper view is to hold that whatever each got under it was in recognition of his antecedent right and not by way of transfer by one to the other. 1, I. A. 157 : 38 I. A. 87 Rel. (*Datal, J. C. and Wazir Hasan, A. J. C.*) *MT. INDARKUAR v. MT. NAND RANI KUAR*.
10 O. L. J. 657 : 1 O. W. N. 67 : 80 I. C. 333 :
1924 Oudh 273.

—Trust—Trustees entering into compro-
mise—Decree on compromise—Person excluded
by will from trusteeship brought in as trustee
under compromise—Legality of compromise. *See*
LIM. ACT ART. 120. 47 M. L. J. 801.

COMPROMISE DECREE—Extension of time to pay
money—Power of court. *MT. NAND RANI KUAR*
v. DURGA DAS NARAIN. 1924 P. H. C. C. 123 :
5 Pt. L. T. 401 : 82 I. C. 505 : 1924 P. 387.

—Time fixed to pay money—If of the
essence of the contract. *See* **HINDU LAW—WIDOW.**
79 I. C. 938.

CONSENT DECREE—Collusion—Burden of proof.
See **BURDEN OF PROOF.** 79 I. C. 1055.

—Interpretation—Compromise of suit fol-
lowed by decree if subject to ordinary incidents
of contract between the parties—*See* **B. T. Act,**
ss. 49, 89 AND 178. 28 C. W. N. 989.

—Variation of.

The general rule that a consent decree can only be varied by consent has exceptions. (*Madgavkar, A. J. C.*) *RAMJI HANSRAJ v. CHINAI*.
82 I. C. 73 (2).

CONTEMPT—Contempt of court—newspaper
criticism—Immediate apology—Effect of.
25 Cr. L. J. 388 : 77 I. C. 436.

—Misconduct of litigant—Penalty—
Right of audience—Refusal of—Appeal—Rejec-
tion of.

The breach of an undertaking given to a Court by a litigant, pending proceedings, on the faith of which the Court sanctions a particular course of action or inaction is misconduct amounting to

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contempt. It is well-settled that when a person is guilty of such contempt, he places himself in a perilous situation so as not to be heard by the Court till he has purged his contempt. It is in fact an elementary rule that one in contempt may be denied certain favours of the Court and privileges, until he has purged himself of contempt.

The rule denying privileges is limited to proceedings in which contempt occurs. A litigant in contempt has no standing in the Court. Where the attitude of the plaintiff in the case in refusing to pay the deficit court fee in spite of his undertaking to do so put him in contempt he cannot appeal from the decree nor would he be heard on the appeal. (*Mookerjee and Cholsner, JJ.*) **RAJ RAJESWARI JIU v. GATI KRISHNA CHAKRABARTI.** 39 C. L. J. 217 : 82 I. C. 292 (2) : 1924 Cal 953.

CONTRACT—Agreement to give passage to England on completion of service—If money claimable. **OFFENHEIMER & CO. v. H. LONG.** 1924 Rang. 112.

——— **Agreement — Where terms are being negotiated and a document is contemplated to be signed, parties are not bound till the signing of the document. But in absence of intention to sign such document the principle does not apply.**

Where parties are negotiating as to the terms of an agreement and it is contemplated that a written document shall eventually be signed everything which takes place until the document is finally signed amounts merely to negotiation. But where at the time of agreement it was not contemplated that any document should be signed, the principle does not apply. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) **HARIHAR PRASAD v. KESHOR PRASAD.** 5 Pat. L. T. Supp. 1: 1925 Pat. 68.

——— **Avoidance of— Misrepresentation, etc., —Election—Laches—Effect.**

A contract entered into through misrepresentation, undue influence, non-disclosure of material facts, etc., is valid till the party defrauded elects to avoid it. The right to avoid subsists so long as innocent third parties have not acquired interests or the delay is such that it amounts to waiver. 7 Ex. 26 and 5 P. C. 221 followed. (*Schwabe, C. J. and Courts Trotter, J.*) **BRUNTON v. BRUNTON.** 78 I. C. 299.

——— **Breach what entitles parties to repudiate.**

It is not every breach but breach of an essential term alone by one party which entitles the other to repudiate the contract, the breach in non-essential terms entitling the other party to damages (*Raymond and Madgavkar, A. J. C.*) **MANOKJI FRAMJI v. FIRM OF MANIKLAL PRITAMDAS.** 1924 S. 105 (1).

——— **Breach of covenant—Right to sue—Cause of Action.**

When a contract had been entered into and repudiated by one of the parties before the time for fulfilment the repudiation gives rise to a cause of action to sue at once and he need not wait till the date fixed for the performance; for a right to sue accrues whenever a person becomes clothed

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with a legal character entitling him to a relief which a court is competent to grant (*Broadway and Campbell, JJ.*) **ALI NAWAZ v. FAZIL ALI.** 79 I. C. 165.

——— **Consideration—Promise to pay decree debt—If can be enforced after decree is barred.** 28 C. W. N. 322 : 79 I. C. 489 (2) : 1924 Cal. 388.

——— **Consideration — Father's debt — Son after attaining majority hypothecating his property—Effect.**

Where certain debts were due by the father and the son on attaining majority hypothecates his property to the creditor, there is no consideration for the same, unless the creditor proves the prior debt was for the benefit of the minor. A liability under a contract which is void on the ground one of the parties is a minor is no consideration for a fresh contract by the minor after attaining majority. (*Miller, C. J. and Kulwant Sahay, J.*) **CHIKHURI RAM v. GOPAL NARAIN RAM.** 75 I. C. 1002.

——— **Consideration—Time barred debt.**

A time barred debt may well form a valid consideration for a contract. (*Wazir Hasan, A. J. C.*) **MT. ZOHRA BIBI v. GANESH PRASAD.** 78 I. C. 106.

——— **Construction — Agreement to finance litigation—Property existent but title to which is subject matter of pending suit—Agreement as regards—Validity—Disbursements by borrower of amounts advanced—Vouchers of—Condition to furnish—Breach of—Rights of parties on—Compromise of litigation—Consent of lender and borrower's Vakil—If a condition precedent—Property obtained by compromise—Rights of creditor—Assignment of fruits of—Legality of—Agreement to assign—Property coming into existence subsequently.**

R. and others who had instituted a suit in the District Court to establish R's title to the absolute estate in a Zamindari subject to the life interest of C, being in want of funds to carry on the said litigation approached T. for financial aid and entered into an agreement with him, which provided, *inter alia* as follows :—“(1) It is therefore agreed that you T. should advance for the proceedings of the said suit and appeal money up to a sum not exceeding two lakhs of rupees and within that limit as per the conditions mentioned below; that in respect of the money advanced by you from time to time detailed receipts for the vakil's fees, printing, stamps, etc. should be furnished to you; that as regards the whole of the balance, accounts of receipts and expenses should be rendered to you and for the sum so ascertained you should obtain receipt from R out of us and with respect to the money that may again be required, you should at the request of R out of us advance money, look into accounts, and get detailed vouchers for moneys spent as above stated and settle the accounts then and there without giving room for disputes in future.

(10). We shall not compromise with the debt, or file razinama or withdrawal without your consent. (11) It is agreed that if K. High Court Vakil, who is working on our behalf in this suit advises us from the then existing circumstances of

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this suit, that it would be better for us to compromise, we should agree to it and compromise or, withdraw the suit. (12) Moreover out of the moveable and immoveable properties that may be obtained by such compromise, we shall first pay to you the principal money advanced by you together with interest at one rupee per mensem from the respective dates and out of the moveable and immoveable properties that remain after so giving away to you, we shall at once execute and give you a proper sale-deed and place you in possession of 3/32 share. All of us and our heirs are liable to you and your family members according to all the aforesaid terms and are also bound to give effect to them without fail." T. advanced a portion of the amount which he undertook by the agreement to advance, and before making any further advances, insisted upon vouchers being furnished to him as regards fees alleged to have been paid to pleaders and as regards amounts spent on lodging expenses, etc. R. the settlor sent a reply dated 14—2—1908 to T's demand for vouchers which reply ran as follows:—"while not even one half of the amount agreed to be expended for the suit has yet been spent and while you are liable to pay the entire amount for the expenses of the suit and though the arrangement is that you should not fail to spend the amount required for expenses in this Court (Court of first instance), and though you are fully aware of the fact that in the event of your failing to do so, the agreement would be cancelled, you have, without sending money when required by us, written this letter containing false and unnecessary reasons. I do not know what reply you expected to be given thereto. For the money spent previously, the necessary explanations, accounts of credit and debit and receipts bearing my signature have been sent, when credit and debit accounts have been sent under my signature and on my responsibility. I do not see proper reasons for the transaction being stopped. Held, on a construction of the agreement set out above (1) that T. was entitled to insist upon vouchers of the disbursements made by R. out of the sums advanced by T. under the agreement, the settlor R. was bound to send vouchers of those disbursements whether demanded by T. or not; R's letter dated 14—2—1908 amounted to a refusal by him to send them, coupled with an intimation that if money was not sent, though the vouchers should not be furnished in the first instance, he, R would treat the contract evidenced by the agreement at an end: the settlor R in sending the letter broke the contract and T. might, if he wished have taken the refusal of R. to furnish vouchers as a repudiation by him of the contract and have elected to treat the contract at an end, but if T. did not do so it was not open to R. to put an end to the contract merely by committing a breach of it; (2) that the agreement embodied in Cl. 12 of the agreement was an agreement by the plaintiff in O.S. No. 18 of 1903 to assign to others part of the fruits they might acquire in an action at law and therefore perfectly legal: and there could be no distinction on the point between the fruits of an action which the plaintiffs got by compromise and the fruits he would receive by a decree or verdict in his favour; (3) that even if the money given to the plaintiffs in the compromise was a non-existing thing at the date of the agreement and only

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came into existence subsequently at the date of the compromise decrees contemplated by the agreement, the agreement attached to the things so coming into existence subsequently and (4) that on the true construction of cls. 10, 11 and 12 of the agreement the giving of the consent of T and his vakil K, was not a condition precedent which must be performed before any compromise should be made. "Moveable or immoveable property" in cl. 12 of the agreement included almost every conceivable kind of property and the words of that clause would be satisfied if half the estate sued for or another estate or the jewels of the tenant for life C. deposited in his safe, and the money in his chest had been awarded under the compromise. As regards the clause relating to the consent of T or the vakil to the compromise, it would be unbusinesslike and indeed irrational for the parties in 1907, the date of the agreement, to have entered into a contract making such consent a condition precedent to the compromise which might be entered into years after. A term must, therefore, be implied to exist in the contract to the effect that the consent mentioned should be given when possible. (*Lord Atkinson*). SRI RAJA VATSAVAYA VENKATASUBHADRAYAMMA v. SRI POOSAPATI VENKATAPATHI RAJU.

20 L. W. 293 : 26 Bom. L. R. 786 :
(1924) M. W. N. 607 : 35 M. L. T. (P. C.) 210 :
L. R. 5 (P. C.) 147 : 29 C. W. N. 57 :
80 I. C. 807 : 47 M. L. J. 93.

Construction.

Where a contractor agreed to construct 'kothi' in the bagh at the rate specified less Rs. 10 per cent for commission, and the work was to be done within one year and where within a few weeks of the acceptance of this contract radical changes began to be ordered by the owner.

Held, the arrangement by way of rebate or a reduction of 10 per cent. commission in favour of the owner, was an arrangement which was only exigible and became crystallised when the work was completed and the final accounts at the end of the year were to be made up. As the contract was not possible of completion within the year and as it in point of fact was not completed and as the failure to complete was not due to any fault on the contractor's part the stipulation accordingly disappeared. *A fortiori* such a deduction was never agreed to with regard to the further work. (*Lord Shaw*). SAHU RAM KUMAR v. MAHOMED YAKUB, 26 Bom. L. R. 631 : L. R. 5 P. C. 89 : 34 M. L. T. (P. C.) 102 : 20 L. W. 82 : (1924) M. W. N. 431 : 1924 P. C. 123 : 80 I. C. 203 : 47 M. L. J. 180 (P. C.).

Construction—"Deposit for profit or loss" Meaning of.

Plaintiff entered into a contract with the 1st defendant to buy 2,000 bags of cotton seeds to be delivered at the defendant's factory within one month. The plaintiff agreed to pay the full amount in respect of the said bags, and remove the goods within the said time; and if he failed to remove the same within the same period, he undertook to make good the loss which the defendant might suffer, and treat the contract as cancelled. The contract also contained "In respect of this contract a total sum

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of Rs. 1,025 has been deposited for profit or loss, and the said deposit amount should after the completion of the contract be returned to us."

Held, that Rs. 1,025 was to be security for any loss that defendant might suffer on the plaintiff's failing to take delivery of the goods (*Macleod, C. J. and Crump, J.*) *SHRICHAND ANOP-CHAND v. BOYCE & SONS.* 1924 Bom. 62.

—Construction—Previous negotiations of constitute a condition precedent—Effect of.

If the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain; or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the mere formal document may be ignored. (*Lord Shaw.*) *SETH HUKAM CHAND v. RAJA RAM BAHADUR SINGH.*

34 M. L. T. (P.C.) 120 :
3 Pat. 625 : L. R. 5 (P.C.) 190 : 80 I. C. 841 :
21 L. W. 1 : 5 Pat. L. T. 639 : 1924 P. C. 156 :
47 M. L. J. 562.

—Construction—Contract should be read as a whole.

The general rule of construction of a written contract is that the language of an instrument is to be understood in its ordinary and natural meaning but at the same time the whole of the contract must be considered in order to ascertain the meaning of any particular part thereof. (*Raymond, A. J. C.*) *TYERALLY ABDUL HUSSAIN v. MESSRS. JAMES FIN LAY Co.* 1924 S. 105 (2) :
80 I. C. 969 : 17 S. L. R. 12

—Construction—Price of property to be settled by valuer—Fraud or mistake in valuation—Contract when enforceable.

Where a contract refers the price of property agreed to be sold to a valuer, this does not of itself preclude the Court from inquiring into the adequacy of the consideration and this inadequacy of consideration would, of course, be strengthened as a defence if any circumstances arose which threw a doubt on the accuracy with which the valuation was made. Where the valuer applies a wholly mistaken standard it is open to the court to interfere with the valuation. (*Mears, C. J. and Piggott, J.*) *HIRA LAL v. KHAIRATILAL.* 46 A. 211 : 22 A. L. J. 76 :
L. R. 5 A. 68 : 78 I. C. 1037 : 1924 All. 360.

—Construction—Usage—Evidence of when admissible.

In order to import a commercial usage into a contract, the usage must be so well-known and acquiesced in that it may reasonably be presumed to have been an ingredient tacitly imported by parties into their contract.

Though evidence of known usage is receivable to supplement the provisions of the written agreement on the hypothesis that the contract is in truth

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partly expressed and in writing and partly implied or understood or unwritten, the evidence cannot be admitted to contradict the positive stipulations in the written contract. (*Mookerjee and Rankin, JJ.*) *CHANDANMULL BENGANEY v. NATIONAL BANK OF INDIA, LTD.* 51 Cal. 43 : 79 I. C. 757 :
1924 Cal 552.

—Construction—C. I. F. Contract—Sale of goods—Passing of property.

In the case of a C. I. F. contract, the question whether the property in the goods has passed from the seller to the buyer depends entirely on the question whether the seller has parted with the control over the disposal of the goods. He may intend to do this if he endorses the bill of lading over to the purchaser. But if he endorses the bill of lading in blank and hands it over to his agent for delivery with instructions that he shall not hand it over until the goods are paid for then the seller has shown his intention to retain the disposal of the goods under his control. (*Macleod, C. J. and Crump, J.*) *BANK OF MORVI, LTD. v. BAERLEIN BROS.*

48 Bom. 374 : 26 Bom. L. R. 155 : 79 I. C. 1012 :
1924 Bom. 325.

—C. I. F.—Bills of lading to be delivered on payment of price—Property when passes.
1924 Lah. 239.

—C. I. F. C. I.—Property in goods—When passes—Bank draft what can be included in.

Where goods are shipped on C. I. F. C. I. (cost, insurance, freight, commission, interest) terms and documents of title sent to a Bank to be handed over to consignee on bank draft being accepted, property in the goods does not pass the moment the goods are shipped. The consignor cannot include in the bank draft amounts due in respect of a different transaction, and if included consignee can refuse to accept it. (*Macleod, C. J. and Shah, J.*) *MEHTA & Co. v. JOSEPH HEUREUX.* 26 Bom. L. R. 382 : 48 Bom. 531 :
80 I. C. 766 : 1924 Bom. 422.

—C. I. F. Property passes to purchaser on putting articles on board.

The obligations of a seller under a C.I.F. contract are that he secures the freight for the carriage of the goods in question to their destination, has the goods covered by an Insurance policy for the voyage, places the goods on-board the ship proceeding to the destination mentioned in the contract, and then tenders the necessary documents to the buyer. When he has done this, he has done all that he need do to entitle him to the payment of the price at which the goods have been agreed to be purchased. The insurance of the goods is clearly intended for the protection of the buyer and if the goods are lost in transit, it is the buyer that recovers the amount of the insurance policy. The buyer therefore protects himself against the loss of the goods by getting the seller to insure them as soon as they are placed on board and the property in the goods therefore which are appropriated to the buyer passes to him as soon

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as the seller puts the goods on board a ship bound for the place of destination. (*Raymond, A. J. C.*) *MEHTA & Co. v. PARMESHARDAS PARSHOTAMDAS.* 1924 Sind 4

—Cross contracts—Effect of.

In the case of cross contracts to supply the same goods, the secured contract does not operate as a *novatio*. Each is separate and even if the parties intended only to pay differences, different legal consequences arise. (*Bilaram, A. J. C.*) *FIRM OF KISHINDAS PURSUMAL v. FIRM OF MENGHRAJ KHALDAS.* 81 I. C. 834.

—Enforceability—Sale of land—Agreement by vendee to discharge debt of vendor—Right of suit—Privity of contract—Rule as to—Exception—All parties before Court—Effect.

The vendee of a property undertook to discharge a debt due by his vendor to a third party. The plaintiff alleging that the third party was a benamidar for him sued for the amount due impleading as defendants the benamidar, the vendee and the vendor. It was proved that the third party was a benamidar for the plaintiff, but the vendee pleaded that he was not liable as there was no privity between him and the plaintiff. *Held*, the ordinary rule of law that a stranger to a contract though beneficiary thereunder could not sue upon it does not prevent a Court, in the exercise of its equitable jurisdiction from passing a decree in his favour, when all the parties affected by the contract are before the court, 3 Mer. 582; 31 I. C. 792; 41 Cal 137; 45 M. L. J. 693 followed, 41 M. 488; 38 M. 753, referred to. (*Devadoss, J.*) *ARETI SINGARAYYA v. ARRETI SUBBAYYA.* 20 L. W. 721; 35 M. L. T. 103; 1924 M. W. N. 838; 47 M. L. J. 517; 1924 Mad. 861 (H. C.).

—Enforceability—Right to enter into a contract.

Law does not recognize a contract to enter into a contract and hence it cannot be specifically enforced. (*Jwala Prasad and Kulwant Sahay, JJ.*) *PUDRA DAS CHAKRAVARTHY v. KUMAR KAMAKHYA NARAYAN SINGH.* 3 Pat. 968.

—Evidence of—Admissions of parties—correspondence.

Held, on a consideration of the evidence in the case and on the admissions of the parties that a contract to grant a lease of the right to collect jungle produce had been made out and that the same ought to be specifically enforced. (*Baker, J. C. and Hallifax, A. J. C.*) *SYED ABDUL RAHIM v. IZHARUL SADDIQ.* 7 N. L. J. 42.

—Forward contract in Karachi—Clause 9—Clause 6 is not affected by clause 9.

Clause (6) which gives option to the seller to retain the goods under lien till payment is not affected by clause (9) clause (9) of the usual contract is not intended to require the seller not to part with the goods at all where delivery is to be made to an Indian Merchant, but to further restrict the right of the seller to exercise his option of retaining the goods where delivery is to be made to a European Office. Parting with goods without full payment therefore does not by itself

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divest the vendors of their right to enforce payment of the purchase money. (*Rupchand Bilaram and B. C. Kennedy, A. J. C.*) *FIRM OF BUDHURAM v. KIMATRAL BHOJRAJ.* 1924 S. 137.

—Novation—Fresh and independent cause of action—Amount due on previous account—Consideration, proof of.

The balance due cannot be recovered until it is proved that the sum was due within limitation. But where there is a novation of contract and a promise to pay within a specified period, a fresh and independent cause of action accrues on the date on which payment is promised to be made. (*Dalai, J. C.*) *MENDI LAL v. RAM CHANDER.* 1 O. W. N. 797.

—Novation—Partnership—Debt due by—Mortgage by one of partners for—Effect—When no extinguishment of firm's debt or release of partners' liability for it.

Where during the continuance of a partnership one of the partners executed to a creditor of the firm a mortgage to secure, *inter alia*, the debt due to him from the firm, held on the evidence in the case that the mortgage did not work either as a novation of the firm's debt to the creditor or a release of any of the partners from full liability in respect of it. (*Lord Blanesburgh.*) *VEERAPPA CHETTY v. ARUNACHALAM CHETTY.*

26 Bom. L. R. 661; 1924 M. W. N. 559; 20 L. W. 368; 35 M. L. T. (P. C.) 161; 47 M. L. J. 168.

—Novation—What it consists of—Parties—Tenancy—Change of terms.

The novation of a contract implies a fresh contract, directly or by implication in place of the original one and all the parties to the old contract must agree to it. The terms of a tenancy cannot be changed unless the landlord is a party thereto. (*Jwala Prasad and Macpherson, JJ.*) *GOPAL OJHA v. RAMADHAR SINGH.* 82 I. C. 204.

—Offer and acceptance—Making of offer when a part of the cause of action—Receipt of offer and posting of offer—Receipt of acceptance. See C. P. CODE, S. 20.

46 M. L. J. 371.

—Offer—Sending of quotation card or catalogue of price—If amounts to. See C. P. CODE, S. 20.

76 I. C. 353 (2).

—Primary and secondary—Power of courts to enforce.

The principle to enforce what is called a primary contract, *viz.*, the repayment of the loan with interest, if any, is generally recognised whereas secondary contract to pay an exorbitant rate of interest cannot be enforced apart from its justice and reasonableness 36 M. 229, 42 C. 52; 2 O. L. J. 492, etc. seq. followed. (*Wazir Hasan and Neave, A. J. Cs.*) *MAHABIR PRASAD v. MOHAMMAD MUSTAFA KHAN.*

10 O. & A. L. R. 866; 1 O. L. N. 669.

—Sale—Agreement subject to approval of solicitors—If valid—Enquiry into title.

An agreement to purchase property subject to title being approved by the vendee's solicitors is perfectly valid. It is open to a vendee to claim in the plaint an enquiry into the vendor's title; only

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he must accept the title as it is, if he chooses to purchase the property. (*Chatterjee and Cuming, JJ.*) KAMAL KRISHNA KUNDU CHOWDHURY v. CHATURBHUI DASSA. 78 I. C. 962

—Sale of goods—"Office dhara"—What is—Failure to give notice—Breach of contract—Damages—Customs duty—If to be allowed.

There is a trade usage in Karachi according to which buyers of goods sold by importing offices are within certain limits allowed to keep the goods in the importer's godowns and can ordinarily take delivery of them at their convenience after the time prescribed. In such a case, if the seller fails to give notice to the buyer of the arrival of the goods, he commits a breach and the damages are assessable on the basis of the market rate as on the date of the breach or as on the date of expiry of the days of grace.

Where customs duty is payable by the buyer, the same should be deducted along with the contract price in assessing damages. (*Kennedy, J. C. and Aston, A. J. C.*) FIRM OF RAMSARAN DAS RAMGOOVER v. BHURMAL RECKHAND. 1924 Sindh 38.

—Sale of land—Time essence of contract—Waiver.

Where time has been made the essence of a contract of sale of land, it is open to the parties to waive the term by extending the period and continuing negotiations. But the essential character of the contract is not changed merely on account of the extension of time. (*Chatterjee and Cuming, JJ.*) KAMAL KRISHNA KUNDU CHOWDHURY v. CHATURBHUI DASS. 78 I. C. 962.

—Sale of immovable property—Deposit—Payment of instalments of purchase money—Breach of contract—Rescission—Right of vendor to keep moneys advanced by vendee.

If a party to a contract for sale of land breaks the contract, then if that breach is something that goes to the root of the contract, the other party has his option. He may still treat the contract as subsisting and sue for specific performance; or he may elect to hold the contract as at an end i. e. no longer binding on him, while retaining the right to sue for damages in respect of the breach committed. The test is as to whether such an election has been made. Where money is paid by the purchaser not as a guarantee for the performance of the contract but in part payment of the purchase money and the vendor is entitled to exercise his option of treating the contract as at an end and determines it, the instalments of money paid after the deposit are recoverable from the vendor. But the vendor is entitled to keep the deposit as liquidated damages for breach of the contract. (*Lord Dunedin, Phillimore and Carson, JJ.*) WILLIAM JOSEPH MAYSON v. A. J. CLOUT. 35 M. L. T. 205. (P. C.).

—Time if essence—Agreement for repurchase. 1924 Rang. 57.

—Time—When of the essence.

Where time for performance is fixed but time is not made the essence of the contract either party can give notice to the other fixing reasonable

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period for performance. (*Fawcett, J.*) SHAM-SUDEIN TAJBHAI v. DAHYABHAI MAGANLAL. 48 Bom. 368 : 26 Bom. L. R. 105: 1924 Bom. 357

CONTRACT ACT (IX OF 1872)—If exhaustive.

The Indian Contract Act deals only with a part of the law of contract applicable to British India. (*Mukerjee, J.*) JATINDRA CHANDRA CHOWDHURY v. RANGPUR TOBACCO CO. 1924 Cal. 990.

—S. 2—Contract—Consideration—Bonus to employee—Promise to pay—Suit to enforce—Maintainability—Transfer of ownership in bonus to employee by employer—Suit to recover bonus in case of—Maintainability.

In a suit which was dismissed for want of a cause of action the allegations, in the plaint were that the plaintiff, a godown-keeper in the employment of a Mahomedan firm, was credited with a bonus of Rs. 3,500 out of the profits of the firm in consideration of the good services rendered by him and of the final profits made by the firm, that bonus was carried to plaintiff's credit in the firm's books in 1919, and that in 1920 he was allowed to draw out of it Rs. 420 but that the defendants refused, in spite of his demand to pay the balance.

Held by the Officiating Chief Justice.—The allegation in the plaint disclosed a case of a completed gift and a transfer of ownership in favour of the plaintiff; if ownership in the bonus was completely transferred, and there was more than a mere promise without consideration to give the plaintiff a bonus, it was immaterial that the amount was originally of the nature of a bonus; and the suit was wrongly dismissed on the ground that the plaint disclosed no cause of action.

Held by Srinivasa Aiyangar, J. (Concurring).—The plaintiff's claim should be deemed to be based on a contract, apart from any question whatever of a contemplated gift and apart from any relationship between the parties of depositor and deposit or creditor and debtor, and the plaintiff had a case on the footing of a contract which was clearly sustainable. (*Spencer, O. C. J. and Srinivasa Aiyangar, J.*) KANAKASABAPATHY MUDALIAR v. HAJEE OOSMAN SAHIB. 20 L. W. 910: 47 M. L. J. 791.

CONTRACT ACT, S. 2—Receipt—If requires consideration.

A receipt is merely evidence of a fact. It is not an agreement requiring consideration to make it a valid contract. (*Halliday, A. J. C.*) SALE MUHAMMAD v. RAMRATAN TIWARI. 1924 Nag. 156.

—S. 2 (d)—Compromise of doubtful right is enough basis for agreement—Contract Act, S. 25.

If an agreement is entered into upon a supposition of a right or of a doubtful right it shall be binding. The compromise of a doubtful right is a sufficient foundation for an agreement. 1 Atk. 2 Foll. 5 H. L. 85 Dist. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) HARIHAR PRASAD v. KESHEO PRASAD. 5 Pat. L. T. Supp 1 : 1925 Pat. 68.

—S. 11—Agreement to pay dower—Mahomedan husband—Minor under Majority Act but

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major under personal law--Validity. See MAJORITY ACT. (*Suhrawardy and Duval, JJ.*) MOZHARUL ISLAM v. ABDUL GANI ALA. 80 I. C. 914.

—S. 11—Lunatic—Mortgage in favour of—Valid.

A minor or lunatic is not disqualified, as such, from being the transferee of immoveable property. A mortgage is a transfer of an interest in immoveable property and a lunatic is not disqualified from being the transferee for the same reason that he is not disqualified from being the transferee in the case of a sale. (*Kendal, A. J. C.*) SHEORATAN SINGH v. KALI CHARAN.

11 O. L. J. 498 : 79 I. C. 955 : 10 W. N. 197 : 10 O. & A. L. R. 543.

—S. 11—Minor—Sale in favour of—Covenant annexed to contract of sale—Enforceability. See DEED, CONSTRUCTION. 46 M. L. J. 464.

—S. 11—Minor—Contract for marriage—Contract by parents—Breach—Right to sue for damages.

Where a contract is made by a guardian of a minor so as to be binding on the minor and is for the benefit of the minor, there is an enforceable contract in law and the minor can enforce it. Consequently it is open to a minor to sue for damages for breach of contract of marriage entered into on his or her behalf by the parent. (*Taraporewala, J.*) ROSE FERNANDEZ v. JOSEPH GONSALVES. 26 Bom. L. R. 1035 : 48 Bom. 673.

—S. 11—Minor—Sale—Setting aside—Decree for repayment of money. 1924 A. 156.

—S. 11—Money paid to minor—Agreement to pay on attaining majority—Legality of.

If a minor accepts money except for necessities he cannot be compelled to repay this and any contract to do so made by him as a minor is void against him but if when of full age he takes it upon himself to repay, there is no reason either in law or in equity why this agreement should be deemed unlawful. (*Daniels and Dalal, JJ.*) NARAIN SINGH v. CHIRANJI LAL. 22 A.L.J. 461 :

46 A. 568 : 79 I. C. 945 : L. R. 5 A. 353 : 1924 Ail. 730 (2).

—S. 13—Blind man—Contents of document misread—Signature—If binding.

Where the signature of a blind man is obtained to a document by the contents being misread to him, the plea of *non est factum* is open to him and the document is not binding on him. The same rule applies to an illiterate man but *quaere* if the rule would apply to a man who can read but who forbears to read? (*Das and Ross, JJ.*) HEM SINGH v. BHAGWAT SINGH. 80 I. C. 67.

—Ss. 16 and 74—Mortgage—High rate of interest—Power of court to reduce.

1924 Lah. 21.

—Ss. 16 and 74—Mortgage—Interest—High rate—Penalty—Relief against.

1924 P. 71.

—S. 16—Amending Act of 1899, S. 2—Unconscionableness of bargain. If can be gone into—Position to dominate will.

By Sub-S. 3 of S. 16 three matters are dealt with. In the first place the relations between

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the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached, *viz.*, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi*. The burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of the parties. Even though a bargain had been unconscionable a remedy under the Contract Act does not come into view until the initial fact of a position to dominate the will has been established. Once that fact is established, then the unconscionable nature of the bargain and the burden of proof on the issue of undue influence come into operation. The decision in 42 Cal. 690 which lays down that "where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate," is wrong. (*Lord Shaw.*) RAGHUNATH PRASAD SAHU v. SARJU PRASAD SAHU. 22 A.L.J. 105 :

19 L. W. 470 : 2 Pat. L. R. 87 : 34 M. L. T. (P.C.) 57 : 26 Bom. L. R. 595 : 3 Pat. 279 : 28 C. W. N. 834 : 51 I. A. 101 : 5 Pat. L.T. 72 : 10 W. N. 210 : 82 I. C. 817 : (1924) M. W. N. 638 : 1924 P. C. 60 : 46 M.L.J. 610.

—S. 16—Helplessness of borrower—Caused by lender—Mortgage—High rate of interest.

Defendant a pirdanashin lady had her properties attached in execution. She approached the plaintiffs for a loan and one of them promised a loan on the security of the property at 12 per cent. The defendant thereupon obtained an adjournment of the court sale, but the plaintiffs did not advance the loan. Subsequently on the last adjourned date for the sale, the defendant obtained money on mortgage from the plaintiffs at 24 per cent. with 3 monthly rests and containing a condition of foreclosure.

Held, that the helplessness of the defendant was to a large extent caused by the plaintiffs having promised to lend her at a reasonable interest almost up to the date of sale and thus preventing her from going to other money-lenders, that she was forced to consent to these onerous terms by reason of the last day for sale having approached, and that the terms of the mortgage were hard and unconscionable. (*Wazir Hasan and Pullan, A. J. Cs.*) GHANISHAM DAS v. MT. MASJIDA NARAIN BIBI. 10 O. & A. L. R. 612 : 11 O. L. J. 523 : 10 W. N. 275 : 1924 Oudh 423.

—S. 16—Undue influence—Proof of—Position to dominate—High rate of interest—Urgency of borrower.

In order to prove a case of undue influence against a lender it must first be proved he was in a position to dominate the will of the borrower

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and next that the bargain was unconscionable. The mere fact that the borrower was in urgent need of money does not show undue influence. Nor is a high rate of interest by itself sufficient, in the absence of domination of will. (*Das and Ross, JJ.*) *DEBI BAKCHAND v. MT. BARAKATUN-ISSA.* 78 I. C. 565.

S. 16—Undue influence—Mortgage to creditor—Extent of security.

Where the defendant, mortgagor, was a businessman well aware of the contents of the document he was executing, the well-known principle that the signature attached to a document supposed to be of a wholly different kind or not to contain a clause so important as to substantially alter its character, is invalid on the ground that the mind of the person signing did not accompany the signature, does not apply. The principle does not also apply where the person signing is estopped by negligence from denying that he did not understand what he was signing. (*Barton, J.C.*) *OFFICIAL ASSIGNEE OF MADRAS v. JOHN LOGAN.* 2 Mys. L. J. (B. & C.) 19.

S. 16—Undue influence—Mortgage—High rate of interest. 1924 Oudh 118 (2).

S. 16—Undue influence—Proof of—Distressed state of mind of vendor. 6 Lah. L. J. 446 : 1924 Lah. 337.

S. 16—Undue influence—Purdanashin lady—Fiduciary relationship.

The execution of a document is induced by undue influence in fact in a case where the mind of the person who executes the document is not free and unlettered, and where the execution of the document is proved to have been induced by some person possessing a personal ascendancy over the will of the person who executed the document; if one person, having a dominion over another person's will, induces that other person to execute a document, whether it be in his favour or in favour of the third person, then the doctrine of undue influence applies, and the Court will not allow that document to stand. Or again, where one person is in a fiduciary relationship to the person who executes the document, and the person, who is in this fiduciary relationship to the executant of the document benefits under that document, then the Court will assume, if the relationship is such that it may reasonably result in undue influence, that the execution of the document was induced by undue influence. The ordinary cases of fiduciary relationship are those of physician and patient, trustee and *cisui quae* trust, parent and child and in all such cases where the person in the fiduciary relation receives a benefit under the document, the Court will assume without proof that it is a document the execution of which was not fairly arrived at, and it will set that document aside, unless the person benefiting under it can satisfy the Court that the executant had independent legal advice. (*Sanderson, C.J. and Wainmsley, J.*) *BHOLA NATH SEAL v. BHUTHNATH SEN.* 40 C. L. J. 393.

S. 17—Fraud—Plea of—Allegation and proof—Particulars. 1924 A. 17.

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S. 19-A—Undue influence—Avoidance of deed—Transferee from person entitled—Rights of.

Where a transaction of mortgage is alleged to have been brought about by undue influence exercised on the mortgagor and the mortgagor himself did not at any time avoid the contract of mortgage and did not seek to avoid it as defendant in a suit on the mortgage, it is not open to a transferee from the mortgagor of a portion of the mortgaged property to avoid the contract on the ground of undue influence. (*Newbould and Ghose, JJ.*) *SHAILESH CHANDRA GUHA v. BECHAI GOPE.* 40 C. L. J. 67 : 1926 Cal 94.

S. 23—Bond for future adulterous intercourse—Validity. 19 L. W. 617 : 76 I. C. 306 : 1924 Mad. 159.

S. 23—Champerty—Maintenance—Legality of.

In India, champerty or maintenance is not illegal. (*Lord Atkinson.*) *SRI RAJA VATSAVAYA VENKATA SUBHADRAYAMMA v. SRI POOSAPATI VENKATAPATHI RAJU.* 20 L. W. 298 : 26 Bom. L. R. 786 : (1924) M. W. N. 607 : 80 I. C. 807 : 35 M. L. T. (P. C.) 210 : L. R. 5 P. C. 147 : 29 C. W. N. 67 : 47 M. L. J. 93.

Ss. 23 and 65—Chit fund—Lottery—Discontinuance in the middle—Subscriber is entitled to sue for a refund of subscriptions paid—Severance of legal from illegal part of the contract.

The defendant was carrying on a chit fund. There were 500 subscribers each paying one rupee per month. The chit was to go on for 50 months and every month 2 prizes of Rs. 25 each were to be drawn by lot; any subscriber who happened to win a prize would get Rs. 25 at once and had to pay thereafter only Rs. 8 a month while if he wins a second prize he would be given another Rs. 25 and thereafter his subscriptions would cease and his name would no longer be included in drawing the prize. At the end of 50 months all subscribers who had won no prize would be paid back the whole of the money they had subscribed. Held, that the arrangement was clearly a lottery. Where the stakeholder discontinued the chit after 27 months and thereupon a subscriber sued him for refund of the subscriptions he had paid, Held per *Krishnan, J.* (*Odgers, J.* dissenting) the main point was to pay back the total amount of subscriptions paid while the arrangement to give prizes was only a collateral one serving as an inducement to join the chit and hence the former was severable from the latter and the illegality of the latter did not necessarily attach to the former. The suit for refund was therefore maintainable. (1919) M. W. N. 570 not foll.

Per *Odgers, J.*—As a material part of the illegal purpose had been carried out, the subscriber was not entitled to recover the amounts paid, as both the plaintiff and defendant were in *pari delicto* and there was no ground for holding that they were not *potior est conditio possidentis*. Nor is the case one to which S. 65 of the Contract Act would apply as the contract was illegal from the beginning. (*Krishnan and Odgers, JJ.*) *NAGAPPA PILLAI v. ARUNACHALAM CHETTY.* 47 M. L. J. 876.

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—S. 23—*Documents forming part of one illegal transaction—Enforceability.*

Where a bond is executed as part and parcel of an illegal transaction the bond cannot be enforced. 32 B. 449, Ref. (*Baker, O. J. C.*) KASHI RAM v. BARKYA. 7 N. L. J. 13. 77 I. C. 46: 1924 Nag. 101.

—S. 23—Judgment-debtor—Transfer of decree—Object to defraud—if can be enforced. 1924 Mad. 189.

—S. 23—Money lent to effect divorce—Custom—Public policy.

Where a creditor lends money to another, knowing that it is to effect a divorce between a husband and wife and to pay for the marriage expenses of that marriage, the consideration is not unlawful, as there is a custom among the lower castes for divorce being granted on payment of expenses. In such a case the onus is on the debtor to prove that there was no such custom. (*Kinkhede, A. J. C.*) NARAYAN v. LAKSHMAN. 80 I. C. 885.

—S. 23—Surety bond—Bail—Agreement by principal to indemnify surety—Contract illegal and void. See Cr. P. CODE, S. 513. 20 N. L. E. 166.

—S. 23—Transfer of property—Illegal or immoral object—Rights of vendor to recover property—*In pari delicto*.

It is a well-established rule of equity that a person who has transferred a property to another for an illegal or immoral purpose cannot get it annulled if the intended purpose has been carried out. A gift of property to a female in respect of past and future cohabitation cannot be set aside at the instance of the donor when the object of the gift has been accomplished. 28 M. 413, Foll. (*Krishnan, J.*) IVATURI BRAHMAYYA LINGAM v. KAMISSETTI MALLAMMA. 20 L. W. 323: (1924) M. W. N. 600.

82 I. C. 14: 1924 Mad. 849: 47 M. L. J. 652.

—Ss. 23, 26 and 27—If exhaustive—Agreement to associate for life with one body of men and not another—If contrary to public policy.

Ss. 23, 26 and 27 of the Contract Act cannot be regarded as exhausting all the instances of agreements which are contrary to public policy. An agreement by which a man binds himself to associate for the whole of his life only with a certain body of his fellow men and to abstain completely from associating with another body is one which ought not to be enforced and for the breach of which no penalty can be claimed (*Neave, A. J. C.*) LAL KHAN v. KIMMAN KHAN. 10 O. & A. L. R. 111: 27 O. C. 100: 11 O. L. J. 408: 1924 Oudh 404 (2).

—S. 24—Covenant opposed to law—Legality. 1924 A. 80.

—S. 24—Part of the consideration illegal—Effect.

Under S. 24 if any part of a single consideration for one or more objects or any one or any part of several considerations for a single object is unlawful the agreement is void. This applies where the whole contract is one and the legal

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part cannot be separated from the illegal. Where the legal and illegal parts can be separated, the legal part can be enforced. (*Baker, J. C.*) CHOONI LAL v. NANI SINGH. 1924 Nag. 284.

—S. 25—Mablahkhandi—If a promise to pay.

Mablahkhandi is not a promise to pay under S. 25, Contract Act, so as to revive any debt which was barred at the date of it. (*Rankin and Mukherjee, JJ.*) KSHITISH CHANDRA DAS v. UMED MANDAL. 78 I. C. 139.

—S. 25 (3)—Scope of—If includes judgment debt.

28 C. W. N. 322: 79 I. C. 489 (2): 1924 Cal. 388.

—S. 28—Fire insurance policy—Limit of time for filing suit—Condition as to forfeiture.

A condition in a policy of fire insurance that if a claim is made and rejected and an action or suit be not commenced within three months after such rejection, all benefit under the policy shall be forfeited, is valid and enforceable. 28 B. 344, Foll. (*May Oung, J.*) G. RAINEY v. THE BURMA FIRE AND MARINE INSURANCE CO., LTD. 3 Bur. L. J. 104: 82 I. C. 814: 1924 B. 351.

—Ss. 29, 31 and 32—Contract for pre-emption—No time limit fixed—Enforceability of, See Cr. P. ACT, S. 40. 46 A. 514.

—S. 30—Contract to pay differences wagering. 75 I. C. 906.

—S. 30—Sale of goods—Contract to pay differences—Wagering transactions—*Tejmundi contracts*—Kaccha Adatia dealing with up-country constituents.

It cannot be disputed that a Kaccha Adatia in Bombay enters into transactions on behalf of his up-country constituent with third parties in Bombay and that when he enters into such transactions under instructions from his up-country constituent, the third party is responsible for the losses to the up-country constituent. To the third party in Bombay both the Kaccha Adatia and his constituent would be responsible. The name of the up-country constituent is not communicated to the third party in Bombay, but the name of the third party with whom the Kaccha Adatia transacts business on behalf of the up-country constituent is communicated to the up-country constituent. The Adatia enters into contracts with the third parties in Bombay on behalf of his up-country constituent as an agent, the name of the principal not being disclosed. Where the plaintiff is employed as a Kaccha Adatia by an up-country constituent, and where transactions are entered into by the Adatia with third parties in Bombay and where there is the circumstance that the intention of the third parties is not shown to be to deal in differences only, it is not enough for the defendant to prove an agreement between himself and his Adatia that the Adatia would so arrange business for him as not to require him to give or take delivery. In order that a transaction may be treated as a wager, it is essential that the common intention of the two parties should be to deal in differences only.

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The two parties to the contract in the case would be the defendant and his agent on the one hand and the third party with whom the Adahia enters into the contract on behalf of the defendant on the other. (*Shah, A. C. J. and Kincaid, JJ.*) *MUKUND CHAND v. SOBHAGMAL*, 26 Bom L. R. 1097 : 1925 Bom. 79.

— S. 30—Wagering contract—Suit on—What the defendant has to prove.

In a suit on a contract which defendant alleges to be by way of wager, it is not sufficient for the defendant to show that neither party intended or contemplated that there should be any delivery of goods. He has to show further that there was an agreement that neither party should make or demand delivery. Where both parties took pains to create evidence to clothe the transaction with the appearance of a valid contract, much stronger evidence than was created is necessary to rebut its effect. (*Hallifax, A. J. C.*) *KUNDAN LAL v. QUADIR AHMED ALI*, 1924 Nag. 290.

— S. 30—Wagering contract—Meaning of—Purchase of cotton—Provision for payment of difference if delivery not taken—Wager.

Defendant agreed to purchase from plaintiff twenty candies of cotton at Rs. 150 per candy and deposited certain ornaments as earnest money. The goods were to be delivered on 1-1-1917. The contract also provided if the price on the date fixed was over Rs. 150 the plaintiff was to give the defendant the profits. On the date fixed for delivery the price had fallen down to Rs. 130 and the defendant defaulted to take delivery. In a suit for damages by plaintiff *Held*, that the contract was not a wagering transaction and the plaintiff was entitled to recover. The mere fact that the parties had unnecessarily stipulated for the consequences of a breach by providing for the payment of difference in price between the contract rate and the price on the date of default did not make the contract a wagering one. (*Shah A. C. J. and Fawcett, J.*) *BALVANT VISHNU v. MISHRILAL SHIVNARAYAN*, 26 Bom L. R. 1194.

— S. 30—Wagering contract—Principal and agent—Burden of proof on plaintiff to establish that he was not himself acting as principal.

The plaintiff sued the defendant on a balance of account on a series of transactions of the sale and purchase of Khatis alleged to have been effected by the defendant through the plaintiff. It was urged that though the transactions were wagering ones, the plaintiff was an agent of the defendant and therefore the collateral liabilities as between plaintiff as agent and the defendant as principal were unaffected. *Held*, that the burden of proof was on the plaintiff to prove that he was not acting for himself as a principal, and with the defendant as the other principal, but was acting merely as agent between the plaintiff as one principal, and the defendant as agent and one or more other principals, third parties; that in the absence of a single instance to establish his dealings with any other party than the defendant, the lower

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Court's finding that the plaintiff was not an agent was justified. (*Boys, J.*) *FIRM HIRA LAL UMRAS SINGH v. FIRM SRI ROM BRIJ MOHAN LAL*, L. R. 5 All. 642.

— S. 30—Wagering contract—Sale of shares—Stock exchange—Payment of differences.

In a suit by plaintiff for recovery of money on account of shares sold by him to defendant upon the Madras stock Exchange of which they were both members, the defendant pleaded that the transaction in question was a dealing in differences and thus partaking of the nature of a wagering contract. *Held*, that the burden lay on the defendant to prove a mutual understanding between the parties that the shares should not be delivered but only the differences paid. The onus was all the greater in this case because both the parties were brokers. (*Spencer, O. C. J. and Beasley, J.*) *G. SIRUR v. BHAMIA*, 20 L. W. 971.

— S. 38—Applicability—Joint principals—Liability of agent to amount.

75 I. C. 1022.

— S. 39—Breach of contract—Anticipatory breach—Acquiescence by other party to the contract in the repudiation—Termination of the contract.

An anticipatory breach: that is to say, a breach of the contract before time has arrived for performance is a matter of intention. If one party to the contract, by words or by conduct, expresses to the other party an intention not to perform his obligation under the contract when the time arrives for its performance, the latter may take him at his word and accept the repudiation of the promise and sue him for breach. The legal position is this. The first party has, in fact, made an offer. This offer is "I am not going to perform the contract. I offer to end it here and now, and to accept the consequences of ending it, those consequences being you can sue me for damages for my refusal." The other party may or may not accept that offer. If he accepts, then by consensus the contract is determined but with a right to damages against the party who has refused to perform. But it is the intention of the contracting parties that can either tie or untie the bonds of a contract. It is open to the party guilty of a breach to retract before the other party acquiesces in it and thereby puts an end to the contract. (*Scott Smith and Fjorde, JJ.*) *JHANDOO MAL JAGAN NETH v. PHUL CHAND FATEH CHAND*, 5 Lah. 497.

— S. 43—Rent and cesses—Lessees—Liability of heirs of original lessee. *MOHENDRANATH BOSE v. ABINASH CHANDRA BOSE*, 77 I. C. 364.

— S. 43—Joint mortgagees—Subsequent undertaking to pay amount to one mortgagee—If a valid discharge.

An undertaking given by a mortgagor subsequent to the date of the mortgage to pay the amount due to one of two co-mortgagees at a future date is not equivalent to a discharge of the mortgage. To amount to a valid discharge there must either be payment to one of the joint mortgagees or the other mortgagee must consent to

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the mortgage being superseded by the subsequent undertaking. 20 M. 461; 36 Mad. 544 (F. B.) 41 Bom. 300 at 308 (P. C.) referred to, (*Devadoss, and Jackson, JJ.*) *PERI RAMASWAMI v. CHANDRA KOTTAYYA*. 47 M. L. J. 840.

—S. 45—*Joint promisees—Suit by each for his share—Maintainability.*

Under S. 45, Contract Act, in regard to a promise made to two or more persons jointly, proceedings to enforce the claim must be taken by all promisees and a suit brought by one of several creditors or partners is liable to be dismissed (*Prideaux, A. J. C.*) *KISENLAL v. CHENDRA*.

1924 Nag. 196.

—S. 46—*Mortgagee undertaking to pay debts of mortgagor—Failure—Effect.*

Where a mortgagor leaves part of the mortgage amount with the mortgagee, and the latter undertakes to pay off specific debts of the former, the same must be done in a reasonable time. If he fails to do so, it amounts to a breach on his part and he cannot get possession, but to the extent of the consideration passed, the mortgage will be valid. (*Kendall, A. J. C.*) *COLLECTOR SINGH v. MADARI LAL*, 78 I. C. 738.

—S. 50—*Payment of revenue—Revenue money order—Bengal Touji Manual, R. 61—Payment to post office—If different.*

Reading S. 50, Contract Act, along with R. 61 of the Bengal Touji Manual, where land revenue is sent to the Collector through the Post Office by means of a Revenue Money Order before the last day it is payable, it is a valid payment. (*Newbould and Ghose, JJ.*) *BILAST CHANDRA ROY v. RAJENDRA CHANDRA DAS ROY*, 78 I. C. 661; 51 Cal. 776; 1924 Cal. 839.

—S. 51—*Non-delivery by seller without payment.*

Unless a special contract to the contrary is definitely proved it must be presumed that the goods were to be paid for at delivery and that the buyer in refusing to make such payment is guilty of a default. The onus is upon the buyer to prove his assertion contrary to usual practice. Very strong and cogent evidence on the part of the buyer would be required to prove that the parties intended to depart from the general practice. (*Abdul Raouf and Motisagar, JJ.*) *VERMAN AND CO. v. FIRM OF GOPAL DAS RAM LAL*, 1923 Lah. 363.

—S. 53—*Performance made impossible—Damages—Suit for.*

If a person makes performance of a contract impossible, he cannot claim damages on the basis of a breach of contract. (*Baker, J. C.*) *NARSINGH v. NARAYAN*, 80 I. C. 949.

—S. 56—*Applicability—Impossibility due to default of contracting party.*

S. 56, Contract Act, has no application to a case where the impossibility is due to the default of the contracting party himself. (*Ross and Das, JJ.*) *BANARSI PRASAD v. MOHI-UD-DIN AHMED*

3 Pat 581; 1924 P. 586.

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—S. 59—*Appropriation of payment—Debtor appropriating payment on behalf of himself and others—Creditor holding payment in suspense account—Effect of.*

Where a debtor makes a payment with a direction that it should be appropriated in a particular way and for a particular debt, S. 59 of the Contract Act is specific and mandatory to the effect that it must be applied in that way. A failure to carry out that statutory provision for a single hour or a single day is a breach of duty. A creditor may refuse to receive a payment if he does not agree to the specific direction as to the appropriation thereof. But such election must be made at once and if he does not at once reject the payment it is too late for him to contend that he has not received a payment legally appropriated to the particular debt. (*Lentaigne and Carr, JJ.*) *FOSTER v. R. M. A. L. CHETTY FIRM*, 2 Rang. 204; 82 I. C. 660; 1925 Rang. 4.

—S. 61—*Appropriation of payments—Rule as to.*

Under S. 61, Contract Act, where neither party makes any appropriation, payments are to be applied in the discharge of debts in order of time. (*Ross, J.*) *FIRM AMRIT PAYAR BILAT MANDAL v. FIRM SUNDAR RAM RAMPHAL RAM*, 78 I. C. 910.

—S. 61—*Creditor can appropriate in absence of presumed or express intention of debtor.*

A creditor can appropriate a payment made by the debtor towards payment of his debts and accepted by the creditor as such in the absence of any express or presumed intentions of the debtor to the contrary; but *ex post facto* appropriation of payment by the creditor cannot prevail. (*Rupchand Bilaram and Kennedy, A. J. C.*) *FIRM OF BUDHURAM v. KIMATRAL BHOJRAJ*, 1924 S. 137.

—S. 62—*Settlement of damages is not novation.* 75 I. C. 440.

—S. 62—*Substitution of new contract—Effect on old one—Performance.*

When at the request of a creditor, the debtor promises to pay the debt to another the old debt is extinguished and cannot be enforced, its place having been taken by the new contract. (*Kinkhede, A. J. C.*) *GANPATI v. JAIRAM*, 81 I. C. 1019.

—S. 65—*Agreement in contravention of law—Money paid under—If recoverable.*

An agreement to transfer occupancy lands contravenes the provisions of law and hence is void. Money paid under such an agreement cannot be recovered by suit. (*Baker, J. C.*) *NARSINGH v. NARAYAN*, 80 I. C. 949.

—S. 65—*Agreement to transfer decree—Death of decree-holder—Recovery of earnest money.* *MT. RAMDULARI KUER v. JANG BAHADUR SINGH*, 77 I. C. 378.

—S. 65—*Applicability—Money paid under illegal contract—If can be recovered.*

S. 65, Contract Act, applies to a case where money is paid under a contract which is illegal.

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but neither of the parties knowing its illegality. Equity requires a refund of the money in such a case. (*Prideaux, A. J. C.*) *NARAYAN v. MOTISA*.
20 N. L. R. 87 : 78 I. C. 343 : 1924 Nag. 132.

—S. 65—Contract by disqualified proprietor—Right to recover money paid.

Where a person enters into a contract with a disqualified proprietor whose estate is in the management of the Court of Wards, the contract is void and no compensation can be allowed to the other party under S. 65 of the Contract Act (*Neave and Kendall, A. J. C.*) *HARI KISHUN DAS v. CHOUDHURI MAHOMED SAFI JAN.*

10 O. & A. L. R. 491 : 80 I. C. 800.
11 O. L. J. 502 : 1 O. W. N. 182 : 1924 Oudh. 182.

—S. 65—Void contract—Right to recover compensation.

Where a contract is void from the very inception, the promisee is not entitled to recover compensation under S. 65 of the Contract Act. (*Dalal, J.*) *RAM DAYAL v. NIMAR SINGH.*

11 O. L. J. 360.

—S. 68—Applicability.

S. 68 does not apply to a case of mortgage made by the father of certain minors, when there is nothing to show it was for supplying necessities to the minors. (*Mukerji and Dalal, JJ.*) *LALMAN v. KALKA PRASAD,*

81 I. C. 1041 : L. R. 5 A. 729.

—S. 69—"Interested"—Meaning of—Person benefitting by payment—Duty to reimburse.

The word "interested" in S. 69, Contract Act, should not be interpreted narrowly. If *bona fide* one believes that he has an interest in property and pays money for preserving the property, there is no reason why the person ultimately benefitting by the payment should not be liable to pay the money to that person. (*Jwala Prasad and Ross, JJ.*) *MT. DULHIN SONA KUER v. MT. BIBI ALE FATIMA.*

77 I. C. 157.

—S. 69—Minor—Necessaries—Payment of Government of revenue—Right of creditor to a decree against the estate of the minor.

Where money has been advanced for payment of land revenue due from a malguzari estate owned by the minor, the creditor is entitled to a decree against the minor's estate, such payment being considered as one for the necessities of the minor proprietor. (*Kinkhede, A. J. C.*) *LACHHI RAM v. PAHLAD SINGH.*

7 N. L. J. 199

—Ss. 69 and 70—Payment by plaintiff of municipal tax properly leviable from defendant—Right to reimbursement.

The plaintiff in order to save his goods from being distrained was obliged to pay a Municipal tax which was properly leviable from the defendant. *Held* he was a person "interested" in the payment of the money within the meaning of Section 69 of the Contract Act. It makes no difference in this respect that the tax was still wrongly demanded from the plaintiff, nor that the defendant had himself raised objections to the tax when it was demanded from him. As the defendant had enjoyed the benefit of the payment made

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by the plaintiff, the case may also fall within Section 70. (*Chandrasekara Aiyar, C. J. and Subbanna, J.*) *NARANIAH v. VENKATARAMIAH.*
2 Mys. L. J. 49.

—S. 69—Scope of—Co-mortgagor redeeming—Suit for contribution

S. 69, Contract Act, contemplates only those cases where payment is made by a person under no legal liability to make it and for another person who is bound in the law to pay it. It does not apply to a case where contribution is claimed by some of the mortgagors who have redeemed a mortgage against the purchaser of the title of one of the other mortgagors, as the latter is not a person from whom money is legally recoverable. (*Baker, O. J. C.*) *PARASHRAM v. BONDRUSA*

1924 Nag. 238.

—S. 70—Applicability—"Enjoy such benefit"—Meaning of.

In order to enable a party to recover money paid by him from another under S. 70 it is necessary that the party sought to be made liable must not only have been benefited by the payment but must also have had an opportunity of rejecting such benefit. Where no such option is left to him and the circumstances do not show he intended to take such benefit, he cannot be said to have "enjoyed such benefit" (*Baker, O. J. C.*) *PARASHRAM v. BONDRUSA.*

1924 Nag. 238.

—S. 70—Assets of a deceased person—Purchaser from an un-authorised person satisfying decree—Whether entitled to recover the decretal debt from the assets. 75 I. C. 624.

—S. 70—Hindu Widow—Payment of debts of deceased husband—Payment by third person—Right to indemnity.

The plaintiff, a relation of a Hindu widow in possession of her husband's estate paid off certain debts incurred by her husband at the request of the widow and thereby conferred a benefit on the estate. After the widow's death the plaintiff sued for recovery of the sums so paid from the estate in the hands of the reversioners. *Held* that the plaintiff's claim was maintainable under S. 70 of the Contract Act. (*Kinkhede, A. J. C.*) *MT. SUNDAR v. BHOPAT.*

82 I. C. 586 : 7 N. L. J. 167.

—S. 72—Money paid under mistake—Suit for refund.

Plaintiff authorized his broker to buy property X from A and paid him an advance. The broker paid the amount to B in respect of another property. *Held* the plaintiff could recover the amount paid from B. (*Raymond and Kennedy, A. J. C.*) *NARUMAL WATOOMAL v. YUSIFALLY NOORDIN.*

78 I. C. 794 (2).

—S. 73—Damages—Contract for sale of land—Breach—Damages—Measure of—Time if the essence of the contract.

Plaintiff contracted to buy a building in the city of Bombay for 18 Lakhs of rupees and paid one lakh of rupees as earnest money to the defendant. The contract was entered into in January 1920, and the sale was to be completed within six months. The building was erected on leasehold

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land which had been taken by the defendant for a term of 50 years from the year 1886. At the date of the sale a tenant was in possession of the building for a term expiring in March 1920. A few days after the contract for sale the plaintiff contracted to resell the building to a person who was desirous of opening a hotel. The tenant claimed that he was entitled to a renewal of a lease from the defendant for a period of six years under an oral contract. The tenant gave notice of his claim to the plaintiff and also sued the defendant in May 1920 for specific performance to grant a further lease. In April 1920 the solicitors of the defendant sent the title deeds of the properties to the plaintiff's solicitors for investigation. In August 1920 the person with whom the plaintiff had contracted to resell the house wrote to the plaintiff stating that if the sale to him was not completed by November 1920, he would cancel the contract. The plaintiff in his turn asked the defendant to complete the sale before November 1920 making time the essence of the contract. As the defendant failed to fulfil the contract within time the person with whom the plaintiff had contracted to resell the building cancelled his contract. In a suit by the plaintiff against the defendant for refund of the earnest money together with damages to the extent of 5 lakhs of rupees the defendant counter claimed for specific performance. *Held*, that the plaintiff was justified in making time the essence of the contract and that the time he gave was reasonable. The default therefore lay on the part of the defendant who was bound to return the earnest money and also pay to the plaintiff all the costs incurred in the investigation of title. The plaintiff however was not entitled to damages on the footing of the difference between the contract price and the market value of the property on the date of breach. (*Shah, A.C.J. and Fawcett, J.*) DHANRAJGIRJI NARSINGGIRJI v. TATA SONS, LTD. 26 Bom. L. R. 858 : 1924 Bom. 473.

———S. 73—Set off. 75 I. C. 7.

———S. 73—Awarding damages—Specific performance not granted for special reasons. 1924 Lah. 163.

———S. 73—Contract to sell land—Breach—Measure of damage—Date of breach—If can be postponed.

Where a contract to sell land is broken the measure of damages is the difference between the contract price and the market value on the date of breach. Where conveyance is demanded and refused, the plaintiff cannot postpone the date of breach in order to claim higher damages. (*Campbell and Moti Sagar, JJ.*) AKHTAR BEG v. HAQ NAWAZ. 1924 Lah. 709.

———S. 73—Damages contract for sale of goods—Breach—Measure of damages—Resale—Power of.

Plaintiff sued defendant for damages for breach of contract for purchase of yarn and cloth, the defendant having failed to take delivery of the goods within the stipulated period. *Held*, that the measure of damages was the difference between the contract rate and the market rate at the date of the breach. The property in the goods did not pass to the purchaser till delivery and the vendor

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could not resell the goods on the purchaser's account. Even though the plaintiff erroneously calculated the amount of damages by having regard to the difference between the contract price and the price realized on resale, it is open to the Court to award damages according to correct principles of law without insisting upon an amendment of the plaint. (*Macleod, C. J. and Shah, J.*) THE NARSINGGIRJI MANUFACTURING CO. v. BUDAN SAHEB ABDULSAHEB. 26 Bom. L. R. 523 : 80 I. C. 430 : 1924 Bom. 390.

———S. 73—Damages—Sale of goods—Installation delivery—Default—Breach—Damages—Right to sue for. NANJAN AHMAD HAJI ALI v. SALE MAHOMED PEER MAHOMED. 1923 Bom. 113.

———S. 73—Damages—Measure of—Breach of Contract for sale of goods.

Under a contract dated 23—11—1916 defendants sold to plaintiffs certain quantities of shirting cloth, the shipments to be made from April to June. The period for delivery of the May shipment was extended to 31—10—1917 but no cloth was delivered before that date. *Held*, that the market rate on the 1st of November 1917 could be taken into consideration in assessing damages for failure to deliver the May shipment. (*Sanderson, C. J. and Richardson, J.*) PANNALAL SAGORE v. MUKHRAM RADHA KISSEN. 39 C. L. J. 77 : 80 I. C. 87 : 1924 Cal. 637.

———S. 73—Damages for breach of contract with regard to immoveable property—Whether English Law applicable—Good faith.

The appellant gave a lease of some lands to the plaintiff under the belief that he was the lessee of it from his brother. He failed to give possession as his brother had leased the same to a third person. In a suit by the plaintiffs for damages for breach of contract which was decreed in the trial court it was pleaded on behalf of the appellants, that he had acted in good faith, that the respondent must prove fraud, collusion and misrepresentation before he could claim damages. It was further contended that the fraud of English decisions was that an action for breach of contract with regard to immoveable property could not lie, beyond actual expenses incurred. (*Bain v. Fothergill*, 1874 L. R. 7 H. L. 158) *Flucrean v. Thorn Hill* (1776) 2 W. B. L. 1078.)

Held on appeal, that the rule of English Law laid down in *Flucrean v. Thorn Hill* and *Bain v. Fothergill* was not law in this country. That in India S. 73 of the Indian Contract Act should govern an action for breach of contract with regard to immoveable property; that the question of the appellant's good faith was immaterial and he was liable to fulfil his absolute obligation to deliver possession. *A dikesavalu Naidu, v. Gurunatha Chetti* 40 M. 338; *Ranchood v. Manmohandas* 32 Bom. 165 followed. (*Campbell and Zafar Ali, JJ.*) MAHOMED ABDUL LAHTIF AHMAD UL. v. LADHA RAM AND MAHLA RAM. 5 Lah. 527.

———S. 73—Damages—Contract for sale of goods—Breach by buyer—Measure of damages—Delay in resale by vendors—Fall in market—Loss if recoverable.

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In assessing damages for breach of a contract for the sale of goods the fundamental basis is compensation for pecuniary loss naturally flowing from the breach, but this is qualified by the plaintiff's duty to mitigate the loss consequent on the breach, and he cannot claim any part of the damage which is due to his neglect to take such steps. If the seller elects to resell he must do so within a reasonable time from the date on which the contract was broken by the buyer. In such a case the resale price may be accepted as evidence of actual value of the goods at the date of the breach of contract. But the seller cannot delay the resale until the market has fallen and then resell the property and thereby cause to the buyer a loss which he might not have sustained had the resale taken place within a reasonable time from the date of the breach of contract. Where there is a clear breach of contract on a particular date subsequent negotiations between the parties do not affect their rights *inter se* under the contract and the seller if he wishes to resell must do so within a reasonable time after the breach. If he delays further he is thrown back on his remedy of damages on the ordinary basis of the difference between the contract rate and the market rate on the date of breach. (*Shah, A. C. J. and Fawcett, J.*) *HARICHANDRA v. GOSHO KASHIKI KARISHA, LTD.* 26 Bom. L.R. 921 : 1925 B. 28.

—S. 73—*Earnest money and part payment—Difference.*

An earnest is something paid or given at the time of bargain to evidence the fact that the negotiation had ended in an actual and binding contract, and as a pledge for its due performance by the depositor, to be forfeited in case of non-performance by his default. Though the plaintiffs owing to their default may not have any claim for damages, there is no justice or equity in allowing defendants to retain the sum paid to them in part-payment for the price of the goods which are admittedly never delivered, and which beyond doubt owing to rise in the prices and in consequence of the plaintiffs' default they were able to sell at such better rates than they would otherwise have done. (*Abdul Raof and Moti Sagar, JJ.*) *VERMAN & CO. v. FIRM GOPAL DAS RAM LAL.* 1923 Lah. 363.

—S. 73—*Non-payment of Surplus profits in the hands of the mortgagee—Interest by way of damages—Propriety of.*

Interest by way of damages can be awarded under S. 73 of the Indian Contract Act. In most of the cases for redemption it is not till an account has been taken, that it is discovered on what date there was a surplus in the hand of the mortgagee. In the case of surplus profits in the hands of the mortgagee, it cannot be said, that any contract has been broken. Interest should not be allowed by way of damages. (*Mukerji and Dalal, JJ.*) *SAIYED ISMAIL HASAN v. SAIYED MEHDI HASAN.* L. R. 5 All. 625.

—S. 73—*Sale of goods—Contract—Breach—Shipment delayed—Reasonable delay—Document sent to Bank against payment—Non-payment—Rights of Seller—Damages.*

On 17—12—1919 the defendant in Bombay ordered out from the plaintiffs at Manchester

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goods on C. I. F. terms June—July shipment. The plaintiffs in accepting the order added that in the then state of affairs they could not guarantee delivery in time and it was understood that in case the goods were late, there should be no claim for late delivery. The goods were shipped in different dates up to 26—8—1920 and reached Bombay in October. The first ten bales were taken delivery of by the defendant. But the drafts were sent through cliffs, which bank, 'or the remaining three shipments, when presented to the defendant were dishonoured. The plaintiffs thereupon sued the defendant for the price of the goods or in the alternative for damages. *Held*, that the defendant had no right to refuse to take delivery of the goods, he having agreed to extend the time therefor. The plaintiffs were entitled to and did send the goods within a reasonable period beyond the contract time. The property in the goods not having passed to the defendant, the plaintiffs were not entitled to sue for the price but only to claim damages represented by the market rates at the date of breach. (*MacLeod, C. J. and Crump, J.*) *BANK OF MORVI LTD. v. BAERBIN BROS.* 48 Bom. 374 . 26 Bom. L. R. 155 : 79 I. C. 1012 : 1924 Bom. 325.

—S. 73—*Explanation—Applicability—Commercial contracts.*

The explanation to S. 73, Contract Act, does not apply to commercial contracts and where the goods are intended to be re-sold, the inconvenience caused cannot be remedied by purchasing a substitute. (*Madgavkar, A. J. C.*) *GOVERDHANDAS v. ROWJI HIRJI & CO.* 76 I. C. 62.

—S. 73, Ill. (n)—*Interest—Right to—Contract—Interest Act, S. 1.*

The only grounds upon which interest can be claimed upon a sum of money when the liability for that sum is established are to be found either in S. 73, illustration (n) of the Contract Act or in the Interest Act. Interest depends on contract, express or implied, or on some rule of law allowing it. 40 A. 497 : 17 A. L. J. 177, Ref. (*Mookerjee and Dalal, JJ.*) *JWALA PRASAD v. HOTI LAL.* 22 A. L. J. 558 : 46 A. 625 : 79 I. C. 1049 : 1924 A. 711.

—S. 74—*Enhanced interest payable on default of payment of principal within specified time with or without interest—distinction in principal, if any.*

For the purpose of bringing a case within the purview of S. 74 of the Contract Act no valid distinction can be drawn between a case where the enhanced interest is stipulated for on default of payment of principal within specified time without interest and a case where interest is prescribed for the earlier period also 36 Mad. 229 relied upon. (*Wazir Hasan and Neave, A. J. C.*) *MAHABIR PRASAD v. MAHOMED MUSTAFA KHAN.* 10 O. & A. L. R. 866 : 1 O. W. N. 669.

—S. 74—*Enhanced interest—Running of interest from the date of default or from the date of the transaction—Distinction between the two cases, if valid for the purposes of invoking the aid S. 74.*

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The language of the explanation appended to S. 74 by Act VI of 1899 makes it clear that the intention of the Legislature was to abolish the distinction that the provisions of S. 74 of the Contract Act can be applicable only where the enhanced interest has been agreed upon to run from the date of the transaction and not from the date of the default. (*Wazir Hasan and Neave. A. J. C.*) MAHABIR PRASAD v. MAHOMED MASTAFA KHAN. 10 W. N. 669 : 10 O. & A. L. R. 866.

———S. 74—Damages—Assessment of—Breach of Contract—Basis. 80 I. C. 297.

———S. 74—Compound interest at higher rate—Penalty.

A provision in a deed for payment of compound interest at a higher rate in case of non-payment of interest regularly, is a penalty under S. 74 Contract Act. (*Neave, J.*) NIHORA KHAN v. MATHURA KHAN. 81 I. C. 758.

———S. 74—Compound interest at the same rate as simple interest—If penal.

A stipulation by a borrower to pay compound interest at the same rate on default of payment of interest is not penal under S. 74. (*Drvadoss and Madhavan Nair, JJ.*) ANANJAPERUMAL KONAR v. PITCHAMUTHU NADAR. 20 L. W. 968 : 47 M. L. J. 910.

———S. 74—Enhanced rate from the date of default. 26 O. C. 352 : 77 I. C. 768 : 10 O. L. J. 611.

———S. 74—Enhanced rate on default of payment—If penalty.

A provision in a bond for payment of a certain sum on a certain date and on default interest at a certain rate, the stipulation is by way of penalty. (*Dalal, J. C.*) FAQIR CHAND v. BAIJ NATH. 75 I. C. 888.

———S. 74—Higher rate of interest by oral agreement not allowed. 77 I. C. 523 : 5 Lah. L. J. 439.

———S. 74—Hindu Law—Partition—Annuity granted to one of the members in lieu of share—Provision for resumption of share in default of payment of annuity—Penalty—Relief against.

At a partition between three brothers forming a joint Hindu family, the properties were divided into three shares and the properties falling to the share of one of the brothers were added to the share of the other two brothers in equal moieties in consideration of his getting an annuity from them severally. There was a provision in the partition deed that if there was default in payment of the annuity, the annuitant should be entitled to resume that portion of his share which had gone to the defaulter. One of the brothers having made default in payment of his share of the annuity, annuitant sued for resumption of the properties allotted to him at the partition but the lower appellate court decreed the arrears of the annuity and relieved defendant against the resumption of the properties holding that the stipulation was by way of penalty. *Held*, that the stipulation in the partition deed for resumption of the

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share on default of payment of the annuity was not penal but merely amounted to a withdrawal of a privilege given to the other brothers at the partition and that the plaintiff was entitled to a decree for possession. (*Jackson, J.*) RAJA GOPALA PADAYACHI v. VARADHARAJA PADAYACHI.

(1924) M. W. N. 861 : 82 I. C. 751 : 1925 Mad. 84 : 47 M. L. J. 605.

———S. 74—Interest.

Penalty—Compromise decree—High rate of interest—Executing Court not entitled to relieve against. *See* EXECUTING COURT. 22 A. L. J. 464.

———S. 74—Mortgage—Liability to pay 12 per cent. interest in case of default to pay regularly at lower rate—If penalty.

A mortgage deed provided for interest at 9 per cent and in case of default in payment of interest for 3 months, the mortgagor was to pay at 12 per cent. *Held*, it did not amount to penalty. (*Bilaram, A. J. C.*) TULSIDAS KESHOWDAS v. HASHIM. 78 I. C. 868.

———S. 74—Penalty—Meaning of lease—Stipulation for payment of royalty in four kists—Interest payable on default—Power of Court to relieve against.

Interest is payable by way of damage for the loss sustained to the party who advances money to another. This damage may be the subject of an agreement between the parties and at the time when the contract of loan was entered into, the parties may fix a consolidated sum or merely a certain percentage on the amount advanced to be paid by the debtor as compensation to the lender on account of his being out of pocket with respect to the sum advanced by him as a loan. The latter way of fixing compensation is commonly known as interest on the loan. This is enforceable in law as an agreement between the parties : but over and above this in order to ensure payment of the loan at an appointed time the parties may further agree that an additional sum by way of penalty or an increased rate of interest over and above that originally fixed would be payable by the defaulting debtor in case of breach of the contract to pay at the appointed time. The enhanced rate of interest may be chargeable either from the time the breach is committed or from any prior period. This kind of stipulation is said to be penal, and the creditor cannot, as a matter of right, enforce it in law. Section 74 in such a case gives power to the Court to interfere with the contract entered into, between the parties by empowering the court, to vary the amount fixed or the increased rate of interest by allowing only reasonable compensation. A mining lease provided *inter alia* for the payment of a royalty of Rs. 1,750 every year in four instalments, for interest at one per cent in case of default of the payment of the kist at the due date and for interest at Rs. 3-2-0 per mensem in case of default in payment of four consecutive kists. In a suit by the lessor for recovery of the royalty with increased interest as provided in the deed, *held*, that the stipulation for increased interest on default of the payment of the four kists was a stipulation by way of penalty but that the

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Court could allow the claim for interest at enhanced rate as reasonable compensation for breach of contract committed by the lessor. The explanation to S. 74 of the Contract Act and the illustration (d) to the Section added by the amending Act of 1899 did not make any change in the law but merely explained and removed the doubt as to the right interpretation of the section as originally enacted. (*Jwala Prasad and Kulwant Sahay, JJ.*) *DEVENDRA NATH GHOSH v. SHAMBOH NATH PANDEY.* 3 Pat 657 : 1925 P. 64.

—S. 74—Penalty—Chit Fund—Subscriptions payable monthly—Provision for payment of whole of the arrears in case of default in payment of instalment.

Plaintiff was the stake-holder of a chit fund and the defendants were the holders of one chit. The chit holders were 10 in number and each chit was of Rs. 400 per year. The defendants bid for the first chit and became entitled thereto as they offered to pay the highest amount of premium. The total amount pooled being Rs. 4,000 the defendants agreed to a deduction of Rs. 1,500 as premium and out of the balance of Rs. 2,500 deducting a sum of Rs. 400 payable for that chit and a further sum of Rs. 100 retained by stake-holder as advance towards the second chit payable by the defendants, the actual amount received by the defendant was Rs. 2,000. The defendants executed a bond for Rs. 3,500 in favour of the plaintiff containing the following among other provisions:—

"Out of this sum of Rs. 3,500 we shall pay you Rs. 300 for the second chit which is due on 15th December, 1918. From the third chit forward we shall pay you on 30th Kurthigai of each year at the rate of Rs. 400 per instalment. If we fail to pay in this way we shall pay the amount due for the instalment for which we have failed to pay within six months, together with interest thereon at the rate of 2 per cent. per mensem from the date of default. If we fail to pay even in this way, we shall pay you on demand the whole of the remaining amount together with interest thereon at the aforesaid rate in a lump sum without reference to future instalments."

Held, that the provision with regard to the whole of the unpaid balance becoming due on default being made for six months after the date fixed for payment of any instalment, was penal and could be relieved against.

Where on a proper construction of the contract between the parties the debt itself arises or becomes due and payable by the debtors on the respective dates fixed for the instalments, the stipulation that on default being made in the payment of any instalments, the whole of the balance should become due and payable, would be in the nature of a penalty. If the real agreement between the parties was to the effect that the whole amount was on the date of the bond a debt due, but the creditor for the convenience of the debtor allowed to be paid by instalments intimating that if default should be made in the payment of any instalment he would withdraw the concession, then the stipulation as to the whole amount of the balance becoming payable would not be penal.

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5 A. C. 685 ; 14 M. L. J. 136 ; 36 M. 229 (F B.) and 42 M. L. J. 551 referred to. (*Srinavasa Aiyangar, J.*) *RAMALINGA ADAVIAR v. MEENAKSHI-SUNDARAM PILLAI.* 21 L. W. 54 : 47 M. L. J. 833.

—S. 74—Penalty—Compound interest—Relief against penalty. *NADERSHAW v. SHIRINBAI.* 1924 Bom. 264.

—S. 74—Penalty in decree—It can be relieved against.

The doctrine of relieving against a penalty applies equally to compromise decrees containing a contract between the parties. (*Venkatasubba Rao, J.*) *JAYA RAO v. VENKATANARAYANA CHETTY.* 80 I C. 925.

—S. 74—Provision in the mortgage document for compound interest at a higher rate on default—Whether penal.

Where the interest provided for in a mortgage deed was sought to be relieved against, held that the conditions in the deed were unusual; that the provision for the payment of one instalment of principal together with interest thereon every year and in default for payment of a higher interest cannot be held to be by way of penalty. (*Phillips, J.*) *VISHNU CHOTLA VENKATASUBBIAH v. T. LAKSHMIPATHI.* 20 L. W. 801.

—S. 74—Stipulation for enhanced interest on default—Penalty. *P. C. PAL v. K. A. L. R. FIRM.* 76 I. C. 835.

—S. 74—Principal repayable within specified time without interest—Stipulation for exorbitant interest on default—Penalty—Power of Court to reduce interest—Reasonable compensation, measure of.

Where a mortgage deed provided that no interest was to be charged if the principal was repaid within a specified time from the date of the mortgage and if there was a default interest at the rate of 37½ per cent. per annum compoundable with six monthly rests, shall be charged.

Held, that the stipulation for payment of compound interest at 37½ per cent. per annum was a stipulation by way of penalty within the meaning of S. 74 of the Contract Act and the creditor was entitled by way of reasonable compensation only to 12½ per cent. per annum compoundable with 6 monthly rests, 6 O. L. J. 666 followed. (*Wazir Hasan and Neave A. J. Cs.*) *MAHABIR PRASAD v. MAHOMED MUSTAFA KHAN.*

10 O. & A. L. R. 866 : 1 O. W. N. 669.

—S. 78—Applicability—Ascertained goods.

S. 78, Contract Act applies only to ascertained goods. (*Baker, J C.*) *HAFI KARIM v. DOMA.* 1924 Nag. 416.

—Ss. 78 and 114—Contract for purchase of motor-car—Price agreed to be paid in instalments—Default—Breach of warranty—Damages. 1924 Bom. 41.

—Ss. 78 and 107—Sale of goods—Forfeiture of earnest money—Omission to take delivery of goods—Resale—Damages.

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§ S. 78 of the Contract Act governs a case where the contract of sale is complete by the payment of earnest money. Plaintiff purchased a certain quantity of rice from the defendant and paid a sum of money as earnest money. The defendant delivered the goods on the railway but the plaintiff omitted to take delivery of them. The defendant thereupon resold the goods at a profit without notice to the plaintiff. In a suit by plaintiff for recovery of the earnest money and damages, *Held*, that both parties were in the wrong and that the profits made by the defendant on resale was not claimable by the plaintiff. The defendant too was not entitled to retain the earnest money under S. 107 of the Contract Act. A claim for damages is not the same thing as a claim for profits. (*Pullan, A. J. C.*) *FIRM OF JHANDOO SINGH HARANS SINGH v. FIRM OF KAMIL BEHARI LAL BPIJ NATH.*

10 O. & A. L. R. 815 : 1 O. W. N. 405.

—§§ 78, 83, 107, 113 and 118—Contract to buy does not immediately transfer ownership but only when goods are found by buyer to be in good condition or when he has accepted them. (*Jwala Prasad and Ross, JJ.*) *RAM DAYAL NARAIN v. BHAIRO BUX GOURIDUTTA*

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—§ 91—Applicability—Commission agent and principal—Despatch of goods by rail—Absence of insurance—Usual course of business—Loss—Liability for—Legal position of parties—Interest—Act if exhaustive—Award of interest—Discretion.

A commission agent and his principal do not stand in the relation of vendor and vendee when goods have been purchased in the ordinary course of business by the former for the latter and despatched to him by rail. (*Ireland v Livingstone.* L. R. 5 H. L. 395 : *Cassaboglow v. Gibb*, (1883) 11 Q. B. D. 797 referred to.) The agency contract is in some respects analogous to that of a contract of purchase and sale, as for example in the commission agent having the right of stoppage in transitu : but the property in the goods passes to the principal immediately on purchase and does not depend on the manner of delivery. S. 91, Indian Contract Act, does not in terms apply to such a case. Where the customary method of doing business as between a principal and his commission agent was to despatch goods by rail uninsured and on a particular consignment of goods being lost, the principal could not hold the carrier responsible for safe delivery on account of the absence of insurance, the agent is not guilty of negligence and hence cannot be charged for the loss. (*Wallace, J.*) *VENKATACHALAM CHETTIAR v. PONNUSWAMI IYENGAR.*

20 L. W. 195 :
(1924) M. W. N. 499 : 82 I. C. 536 :
1925 Mad. 46 : 47 M. L. J. 312.

—§ 92—Vendor's lien—When exists.

Vendor's lien exists only when the goods remain in his possession, the price is wholly or partially unpaid and a contrary intention does not appear. (*Baker, J.*) *Haji Karim v. DAVA.*

1924 Nag. 418.

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—§§ 95 and 96—Sale of goods on credit—Omission to take delivery—Buyer repudiating contract.

Where on sale of goods on credit the buyer makes default in taking delivery and repudiates the contract, the general provisions of S. 95 of the Contract Act giving the seller a lien on goods remaining in his possession after sale has effect. (*Reilly, J.*) *MULIK NARAYANAKAMMATHI v. K. KUNI MOYI.* 20 L. W. 486 : (1924) M. W. N. 748 : 82 I. C. 850 : 1924 Mad. 866 : 35 M. L. J. 72 (H. C.).

—§§ 96 and 97—Sale of goods on credit—Variance from the original terms on account of special circumstances—Insolvency of buyer before delivery whether the vendee can cancel contract.

The defendants sold picegoods to plaintiffs on condition that the plffs. were to have two months time for payment after delivery. The defendants having understood that the plaintiffs were in embarrassed circumstances, varied the terms by insisting on cash payment. The plaintiffs filed a suit for breach of contract on the grounds (1) that the defendants had broken an important part of the contract by refusal of credit and (2) that under S. 96 of the Indian Contract Act, the seller had a right to retain the goods in case of the buyer becoming insolvent.

Held, dismissing the plaintiffs' claim, that S. 96 of the Contract Act entitled a buyer to take delivery of goods where the payment is to be made at a future day and no time is fixed for delivery : but it gives the seller a right to retain the goods of the buyer who becomes an insolvent before delivery. That till the bales were appropriated towards the contract, the property in the bales did not pass to the buyer and that S. 96 cannot apply.

Held further that the insolvency of the plaintiff was a special circumstance which would justify the defendants in asking for cash against delivery. (*Devadoss, J.*) *ABDUL RAHMAN SAHIB v. SHAW, WALLACE & Co.* 20 L. W. 725e

—§ 107—Refusal to take delivery—Resale—Appropriation—Absence of.

The defendants refused to take delivery of goods contracted to be purchased on the ground the contents were not complete. The plaintiffs thereupon resold the goods and claimed the loss. *Held* in the absence of evidence of appropriation, there was no right of re-sale. (*Shadi Lal, C. J. and Lamsdun, J.*) *THE FIRM MAHAN LAL—HAZARI LAL v. THE FIRM SURAJ BHAN BAKHTIWAR MAL.* 76 I. C. 77.

—§ 107—Resale—Notice—Burden of proof

The giving of a notice is a condition precedent to exercising the right of resale and the person who resells must plead and prove notice. He cannot get over the statutory obligation by saying the purchaser did not suffer any loss by the resale. (*Kotwal, A. J. C.*) *NARAINDAS v. KUNJILAL.* 1924 Nag. 162 (2).

—§ 107—Sale of goods—Rights of vendor—Reasonable time for resale of goods

1924 Lah. 319:

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—S. 108—*Exception 1—Attachment of moveable property in the possession of the judgment debtor—Property hired by him—Sale by bailiff without knowledge of the owner—Rights of purchaser.*

In execution of a decree for money certain moveable property in the hands of the judgment debtor was attached and sold by the bailiff. It was found that the property had been hired by the judgment-debtor and not his own. *Held* that the purchaser at the court sale did not get a better title than the judgment-debtor and he was liable to return the property or its value to the owner. (*Carr, J.*) MAHOMED KARA v. RANGOON ELECTRIC TRAMWAY AND SUPPLY CO., LTD.

3 Bur. L. J. 164 : 1924 Rang. 379 (1).

—Ss. 109 and 118—*Contract for sale of goods—Numbers on packages not material or of the essence of the Contract unless descriptive of the quality of the contents—Mistake.*

A contract note for the sale of bales of Long Cloth in course of manufacture described some of them as bearing numbers "139" and "141", whereas from previous contracts in respect of the sale of the identical bales beginning from that of the original vendor who, in ordering them from the Mills, had required his numbers "739" "741" respectively to be printed not "139" or "141". *Held*, (affirming the decision of the High Court of Bombay in its appellate jurisdiction) that, as the numbers in the contract had no specific meaning in the market, and were merely reference numbers the figures "139" and "141" being mere clerical errors for "739" and "741" respectively did not constitute a warranty of the goods or, indicate their quality or description. (*Lord Atkinson.*) MARWADI RAMJIVAN NEVATIA v. BHUKARI & CO.

26 Bom. L. R. 442 : 1924 P. C. 143 :

10 O. & A.L.R. 601 : 1924 M.W.N. 430 :

L. R. 5 P. C. 135 : 20 L. W. 424 : 80 I. C. 381 :

35 M. L. T. (P. C.) 140 : 48 Bom. 519 :

1 O. W. N. 304 : (P. C.) 46 M. L. J. 655.

—S. 110—*Quality of goods—Breach of warranty—Rejection to be in reasonable time.*

Where there is a breach of warranty regarding the quality of goods sold, the right of rejection should be exercised within a reasonable time. In the case of sale of yarn, 3 months is too long a period for exercising the right. But the buyer can claim compensation for damage caused. (*Phillips and Venkatasubba Rao, JJ.*) RAMUDU AYYAR v. RAMAYYAR.

78 I. C. 1051.

—S. 128—*Surety for payment of interest—Liability—Extent of.*

A mortgage deed provided for redemption in one year and a certain person stood surety for the payment of interest. *Held*, though a surety's liability cannot be extended beyond the precise terms of his engagement it comprises all transactions which naturally and reasonably are entered into on the faith of the guarantee and hence he was liable for interest up to date of redemption and not merely for the period of one year. (*Bilaram, A. J. C.*) TULSIDAS KESHOWDAS v. HASHIM.

78 I. C. 868.

—S. 129—*Continuing guarantee—Amount payable by instalments.*

CONTRACT ACT, S. 160.

A continuing guarantee must refer to a series of transactions of which, when the guarantee is given some are unknown and indefinite or not certain to come into existence. The fact that the amount was payable by instalments does not make it a continuing guarantee (*Hallifax and Kotwal, A. J. C.*) KANTICHAND v. UDAYABANSHA.

1925 Nag. 7.

—S. 133—*Discharge of surety—Variance in contract, what amounts to.*

1924 Lah. 211.

—S. 134—*Omission of creditor to sue principal debtor—Effect on surety.*

The omission of a creditor to sue the principal debtor within the statutory period will not discharge the surety under S. 134 of the Contract Act. 33 M. 308 Fol. (*Prideaux, A. J. C.*) SETH ABDE ALI v. ASKARAN.

20 N. L. R. 140 : 1924 Nag. 411.

—S. 137—*Forbearance to sue—Effect on surety—Preliminary decree—Effect of.*

The mere forbearance on the part of the creditor to sue his debtor does not discharge the surety. Nor is there any obligation on the part of the creditor to notify to the surety of the fact of default being made.

In the case of a surety for payment of interest under a mortgage, the passing of a preliminary decree releases the surety as the liability to pay interest is merged in the decree. (*Bilaram, A. J. C.*) TULSIDAS KESHOWDAS v. HASHIM.

78 I. C. 868.

—S. 145—*Payment—Meaning of—Liability of principal—When arises.*

Payment in S. 145 means a payment in money or by transfer of property and not merely the incurring of a pecuniary obligation in shape of a bond, promissory note or acknowledgment of liability. (*Moti Sagar, J.*) NUR SAMAND KHAN v. FAJIA.

1924 Lah. 657 (2).

—Ss. 160 and 161—*Bailment—Loss or injury to goods—Liability of bailee—Negligence—Presumption.*

Under S. 160 of the Contract Act it is the duty of the bailee to return or deliver according to the bailor's directions the goods bailed without demand as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished. If, by the default of the bailee the goods are not returned, delivered, or tendered at the proper time, he is responsible to the bailor for loss, destruction or deterioration of the goods from the time. An action in trespass lies where the bailee has destroyed the bailed property, or lost it, while where the bailee has been guilty of a conversion of the bailed property either by a user of it in a different manner or for a different purpose from that agreed upon or by failure to redeliver it or deliver it over in accordance to the terms of the contract, the bailor may sue him in trover. Proof of loss or injury to the goods establishes a sufficient *prima facie* case against the bailee to put him upon the defence. Where chattels are delivered to a bailee in good condition and are lost or not returned or are returned in a damaged state, the law presumes negligence to be the

CONTRACT ACT, S. 190.

cause, and casts upon the bailee the burden to show that the loss is due to causes consistent with due care on his part. (*Mookerjee and Suhrawardy, JJ*) KUSH KANTA PARKAKATI v. CHANDRA KANTA KAKATI.

28 C. W. N. 1041 : 1924 Cal. 1056

—S. 190—Agent for sale—Appointment of sub-agent—Contract—Right to implement—Lien of agent—Retainer.

77 I. C. 920

—S. 213—Suit for accounts—Maintainability—Duty to keep account.

Under S. 213, Contract Act, an agent is under a statutory obligation to render accounts to his principal but not *vice versa*. The mere fact that the principal has kept accounts does not entitle the agent to ask for accounts. The proper relief is to claim a specific sum and therein ask the principal to produce the account books. (*Moti Sagar, J.*) GHULAM QUTAB-UD-DIN KHAN v. FAIZ BAKSH.

78 I. C. 959.

—Ss. 231 and 251—Partnership—Money borrowed by partner and spent by him for partnership purposes—Liability of the other partners—Dormant partner—Extent of liability.

Where one member of a partnership borrows money on his own credit by giving his own promissory note for the sum so borrowed and he afterwards uses the proceeds of the note in the partnership business, of his own free will, without being under any obligation to or contract with the lender so to do, the partnership is not liable for the loan. The ultimate use by a firm of money borrowed by a partner individually on his own credit does not make the firm liable for the loan. The circumstance that the firm obtains the benefit of a transaction entered into by one of its members may show that he entered into the contract as agent of the firm. But the fact is no more than evidence that this was the case and the question upon which the liability or non-liability of the firm depends is, not whether the firm obtained the benefit of the contract, but did the firm by one of its partners or otherwise enter into the contract. (*Mookerjee and Rankin, JJ.*) RAM CHANDRA SAHU v. KASEM KHAN.

28 C. W. N. 824 : 81 I. C. 513 : 1925 Cal. 29.

—S. 236—Broker—Undisclosed principal—Broker acting for—Liability of—Custom—Stock and share market.

The defendant entered into a contract with the plaintiff who was a dealer and broker in stocks and shares for sale of certain shares. The relevant portion of the contract was as follows:—"Sold this day by order and for account of B. G. H. to selves for principals, etc." The contract was signed by the plaintiff over the word "brokers". The defendant having failed to deliver the shares, the plaintiff sued for damages. The plaintiff also alleged a custom of the Calcutta share market whereby the broker is treated as principal and entitled as principal to enforce contracts. *Held* that the plaintiff having entered into the contract on behalf of undisclosed principal as broker or agent, he could not enforce the same. Further the plaintiff's suit must fail under S. 236 of the Contract Act as he was not acting as agent but on his own account. 17 Cal. 449 ; 42 Cal. 1050 ; L.R.

CONTRACT ACT, S. 251.

18 Q. B. D. 708 referred to. Though evidence of a usage augmenting the responsibility of a broker is admissible as consistent with the contract, evidence of a usage inconsistent with the terms of the contract is inadmissible. There is no usage in the Calcutta Stock and Share market that a broker should be treated as principal both by buyer and seller whom he could hold liable under the contract (*Buckland, J.*) NANDA LAL ROY v. GURUPADA HALDAR.

51 Cal. 588 : 81 I. C. 721 : 1924 Cal. 733.

—S. 239—Partnership—Company promoters—Relationship between—Agreement of partners.

Persons who are working together to form a company, although they may intend to become members of the company, after its formation are not partners if this be the only relation between them: they are, it is true, engaged in a common object, and that object is ultimately to acquire profit, but their immediate object is the formation of a company, and even if the company is not to be incorporated they are only in the position of persons who intend to become partners after the company is formed.

Per *mookerjee, J.* Promoters may become partners in fact, by actually carrying on as incidental to the work of forming a corporation, a business enterprise; in such an event it is the carrying on of such business, not the combination to effect an incorporation that makes them partners. (*Mookerjee and Rankin, JJ.*) WILLIAM ROWE RAE v. LEWIS PUGH.

39 C. L. J. 537 : 1924 Cal. 940.

—S. 251—Power of one partner to compromise suit.

In the absence of fraud one partner can bind the firm by compromising a suit on its behalf. (*Kinkaid, J. C. on a difference between Kennedy and Aston, A. J. C.*) MANGALSON v. FIRM OF BHAGWANDAS PARMANAND.

80 I. C. 583.

—S. 251—One partner can join in submission to arbitration.

One partner has no power in the absence of special authority to bind the firm by submission to arbitration, but each partner who does any act necessary for, or usually done in, carrying on business of such a partnership as that of which he is a member, binds his co-partners to the same extent as if he were their agent duly appointed for that purpose and S. 188, Contract Act, gives an agent, having authority to carry on a business, power to do anything necessary for the purpose or usually done in the course of conducting such business. (*Kennedy, J. C. and Raymond, A. J. C.*) FIRM OF KHALSA BROS. v. HARIRAM SRIRAM & Co.

1924 S. 29.

—S. 251—Partner—Power to compromise suit—Consideration—Withdrawal of counterclaim.

Where a suit has been instituted on behalf of a firm, one partner alone has power to compromise the suit, provided he does not act in fraud of the other partners. The withdrawal by the defendants of their counterclaim is sufficient consideration for the compromise. (*Raymond, A. J. C.*) MAYADAS LAKHMIDAS v. BHAGWANDAS PARMANAND.

1924 S. 41.

CONTRACT ACT, S. 253.

—S. 253—*Partnership—Suit for accounts—Dissolution—How far continues.*

Where a partnership is dissolved by the death of a partner, and a suit is filed for accounts the business is to be regarded as a continuing business up to the date of final decree. (*Lord Porter*). *Haji Hedayatulla v. Mahomed Kamil*. 19 L.W. 425 : 34 M.L.T. (P.C.) 69 : 22 A. L. J. 382 : 81 I. C. 525 (2) : 1924 M. W. N. 660 : 29 C. W. N. 161 : L. R. 5 (P.C.) 109 : 1924 P. C. 93.

—S. 254—*Suit before the termination of partnership term—If premature.*

By a partnership deed the partnership was to last from 1st January 1915 till 31st December, 1919. The plaintiff's suit for dissolution and accounts was filed on the 20th November, 1919. Various allegations and counter allegations had been made in the pleadings and in the evidence and from these it was perfectly obvious that there was a state of feeling existing between the partners which rendered it impossible for the partnership to be continued with any advantage.

Held, that the Court could infer from that that the business of the partnership could not be carried on at a profit and that it would only be carried on at a loss, and therefore the suit was not premature. (*Macleod, C. J. and Crump, J.*) *Hasham Ismayal v. Nariman Rustumji Mehta*. 1924 Bom. 57.

—S. 264—*Dissolution of partnership—Notice—Publication.* 1924 Rang. 133.

CONTRIBUTION—*Costs—Expenses of litigation—Right to be indemnified.*

Where a person institutes a suit, obtains a decree and puts it in execution and purchases the property finally, there is a *prima facie* ground for holding that he has incurred the necessary expenditure relating to those proceedings. A plaintiff claiming against him under a better title must contribute in respect of the said expenditure, unless he shows he has contributed more than his share. (*Wazir Hasan and Neave, A. J. C.*) *Thakur Jai Indar Bahadur Singh v. Thakur Sheo Indar Bahadur Singh*. 10 O. L. J. 481 : 78 I. C. 393 : 1924 Oudh 218.

—*Costs—Partition suit—Co-defendants.*

A suit for partition was equally contested by all the defendants. The defence failed and the suit was decreed with costs against all the contesting defendants jointly and severally. The decree was executed and costs were recovered against one of the defendants who sued the others for contribution. Held the plaintiff was entitled to contribution from his other co-defendants unless facts could be proved which would be considered sufficient to defeat the equity. 26 M. 373 : 32 A. 485 : 18 Ch. D. 236 Ref. (*Macleod, C. J. and Crump, J.*) *Keshav Vittal v. Hari Ram Krishna*. 48 B. 351 : 80 I. C. 526 : 1924 Bom. 318.

—*Co-sureties—Counter Security taken by one of several sureties—Benefit of.*

Where the defendant, a surety, has received from the principal debtor a counter security for the liability, which he undertook jointly with the plaintiff, he is liable to bring in for the benefit of the plaintiff and his co-sureties whatever he has

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received from that source. (*Phillips, J.*) *Muthu-Sami Naidu v. Kavalu Naidu*. 20 L. W. 385 : 82 I. C. 395 : 1924 Mad. 848.

—*Joint tort-feasors—Who are—Failure to prove common defence set up—Effect of.*

Where a number of defendants in a suit fail to convince the Court that the defence set up is true, they cannot be treated as joint tort-feasors and a suit for contribution as between them is maintainable.

Quare : If there can be no decree for contribution among the joint tort-feasors. (*Jackson, J.*) *Rajagopala Iyer v. Thatayya Arunachala Aiyar*. 20 L. W. 200 : 1924 M. W. N. 676 : 1924 Mad. 829 : 47 M. L. J. 305.

—*Mesne profits—Joint decree—Liability of each judgment debtor to contribute.*

The doctrine that no suit for contribution lies between tort-feasors does not apply in its full extent to India. If it does apply, it applies only where it must be presumed that the party in default knew that he was committing an unlawful act or the act is one of an obviously illegal character. It is obviously equitable in the case of a decree for mesne profits against parties who were in joint possession that a person who had to satisfy the entire decree should be able to recover his share from his co-defendants, unless there has been something in his conduct to deprive him of this right. (*Daniels and Neave, JJ.*) *Shro Ratana Singh v. Karan Singh*. 22 A. L. J. 788 : L. R. 5 A. 571 : 1924 A. 857.

—*Tort—Joint tort-feasors—No contribution—Scope of the rule.* 7 N. L. J. 30.

CO-OPERATIVE SOCIETIES ACT (II of 1912), Ss. 24 and 42—*Scope of—Execution of decree—Defence to.*

The provisions of S. 24 of the Co-operative Societies Act are only operative if there has been liquidation of the registered society under S. 42 of the Act. It is not open to a judgment-debtor to call in aid the provisions of S. 24 as an answer to the claim of the decree holder to execute the decree. (*Graves and Graham, JJ.*) *Kudratulla Sarkar v. Upendra Kumar Sanya*. 40 C. L. J. 254.

CO-OWNERS — *Agreement restricting alienations inter se—Effect of.*

A covenant among co-owners restricting alienation of shares by sale or mortgage to themselves does not extend to an involuntary transfer. (*Suhrawardy, J.*) *Satish Chandra Dey v. Gagan Chandra Rudra*. 78 I. C. 802 (2).

—*Ejectment suit—If all necessary parties.*

In a suit in ejectment by one co-owner against a third party, the other co-owners are not necessary parties. (*Rupchand Bilaram, A. J. C.*) *Mahomed Farug v. Sidik*. 79 I. C. 59.

—*Exclusive possession—Arrangement as to—Disturbance Remedy.*

Where joint owners have agreed to a mode of enjoyment of joint property, it is not open to one of them to disturb that arrangement without the consent of the others. 27 C.L.J. 441 Rel. This is not inconsistent with the fundamental principle

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that in law each joint owner of an estate is regarded as having a proprietary right in the whole estate. That however is merely a right and must not be confounded with the manner of enjoying that right; it operates in strict law to prevent a co-owner from setting up a claim to any parcel as his exclusive property during the continuance of the joint ownership. But where co-owners, by arrangement, either tacit or express, take up exclusive possession and enjoyment of different parcels of the joint property, without such definition on severance of interest as would amount to partition, the Court will not interfere with the arrangement at the instance of one co-owner during the tenure in common and will do so only on partition so far as may be necessary to make an equitable division of the property. 28 C. 223, 11 C. W. N. 143; 19 C. W. N. 872; 27 A 88; 34 A 113 Rel. (*Mookerjee and Rankin, JJ.*) *KAMESWARI DASIA v. SISHURAM DEKA.*

39 C. L. J. 414 : 1924 Cal. 792.

————Interest—Appropriation of entire profits by one Co-owner—Liability for interest. See INTEREST. 3 Pat. 311.

————Joint property—Registered mortgages by one co-owner—Effect on other co-owners.

77 I. C. 516.

————Liability for negligence in repair.

All co-sharers are equally liable for repairs and when on the failure of other sharers in their duty, one of them does it negligently he is not exclusively liable for it. (*Kinkhede, A. J. C.*) *CHANDRA-SEKHAR v. ABIDALLI.*

80 I. C. 920

————Ouster—Joint property—Notice to co-sharer of mortgage redeemed.

77 I. C. 521.

————Ouster—What is—Exclusive possession—When to be disturbed.

When one co-owner assumes actual occupancy of a portion of joint property, he should not be disturbed in such exclusive possession except on strong grounds. Such occupation does not imply ouster nor is the construction of a substantial building conclusive evidence of ouster. The granting of a decree for joint possession is discretionary and an exercise of discretion by the court below will not generally be interfered with in appeal. (*Kinkhede, A. J. C.*) *KUVERJEE v. RAMA.*

83 I. C. 432.

————Right to sue trespasser—If other co-owners necessary parties.

One co-owner can sue to eject a trespasser without joining the other co-owners parties to the action, provided the title of the others is not denied. (*Krishnan and Ramesan, JJ.*) *PENDEKALLU THIMMAYYA v. SIDDAPPA.*

1925 Mad. 63.

COPY RIGHT ACT (1911)—Abridgment—Merely selecting passages and knitting them together does not constitute—Raw material or the original works are open for consultation for all—Use of another's labour and skill only is prohibited.

An abridgment of an author's work means a statement designed to be complete and accurate exposition of the thoughts, opinions and ideas by him expressed therein, but set forth much more

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concisely in the compressed language of the abridger. A publication the text of which consists of a number of detached passages selected from author's work, often not contiguous, but separated from those which precede and follow them by considerable bodies of print, knit together by a few words so as to give these passages, when reprinted, the appearance, as far as possible, of a continuous narrative, is not an abridgment at all. It only expresses, in the original author's own words, some of the ideas, thoughts and opinions set forth in his work. And it is obvious that the learning, judgment, literary taste and skill requisite to compile properly and effectively, an abridgment deserving that name would not be at all needed merely to select scraps taken from an author and to print them in a narrative form.

To constitute a true and equitable abridgment, the entire work must be preserved in its precise import and exact meaning, and then the act of abridgment is an exertion of the individuality employed in moulding and transmuting a large work into a small compass, thus rendering it less expensive and more convenient both to the time and use of the reader. Independent labour must be apparent, and the reduction of the size and work by copying some of its parts and omitting others confers no title to authorship, and the result will not be an abridgment entitled to protection. To abridge in the legal sense of the word is to preserve the substance, the essence of the work in language suited to such a purpose, language substantially different from that of the original. To make such an abridgment requires the exercise of mind and labour, skill and judgment brought into play, and the result is not merely copying.

To constitute a proper abridgment the arrangement of the book abridged must be preserved, the ideas must also be taken and expressed in language not copied but condensed. To copy certain passages and omit others so as to reduce the volume in bulk is not such an abridgment as the Court would recognise as sufficiently original to protect the author.

The mere process of selecting passages from works readily accessible to the public is not, but difficulty in obtaining access to the originals or skill manifested in making or arranging the selection is sufficient to give the character of an "original literary work" to the selection. (1893) 1 Ch. 218; Appr.

A publication, the text of which consists merely of a reprint of passages selected from the work of an author can be entitled to copy-right. For instance, it may very well be that in selecting and combining for the use of schools or universities passages of scientific works in which the lines of reasoning are so closely knit and proceed with such unbroken continuity that each later proposition depends in a great degree for its proof or possible appreciation upon what has been laid down or established much earlier in the book, labour, accurate scientific knowledge, sound judgment touching the purpose for which the selection is made, and literary skill would all be needed to effect the object in view. In such a case copyright might well be acquired for the print of the selected passages.

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It is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material, if one may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.

Any new and original plan, arrangement or combination of material will entitle the author to copyright therein, whether the materials themselves be old or new. Whosoever by his own skill, labour and judgment writes a new work may have a copyright therein unless it be directly copied or evasively imitated from another's work. To constitute piracy of a copyright it must be shown that the original has been either substantially copied or to be so imitated as to be a mere evasion of the copyright.

In the case of works not original in the proper sense of the term, but composed of or compiled or prepared from materials open to all, the fact that one man has produced such a work does not take away from any one else the right to produce another work of the same kind and in doing so to use all the materials open to him. The true principle in all these cases is that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at, for the purpose of producing his work; that is, in fact, merely to take away the result of man's labour or in other words, his property.

This principle applies to maps, guide books, street directories, dictionaries, to compilation of scientific work and other subjects, and applies to a selection of poems.

What is the precise amount of the knowledge labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree.

It will not create copyright in a new edition of a work of which the copyright has expired merely to make a few emendations of the text or to add a few important notes. To create a copyright by alterations of the text these must be extensive and substantial practically making a new book. With regard to notes, in like manner they must exhibit an addition to the work which is not superficial or colourable, but imparts to the book a true and real value over and above that belonging to the text. This value may perhaps be rightly expressed by saying that the book will procure purchasers in the market on special account of these notes. When notes to this extent and of this value are added they attach to the edition the privilege of copyright. The principle of the law of copyright directly applies. There is involved in such annotation and often in a very eminent degree, an exercise of intellect and an application of learning which place the annotator in the position and character of author in the most proper

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sense of the word. (*Lord Atkinson*), *MACMILLAN & Co., LTD. v. K. & J. COOPER.* 48 Bom. 308 : 19 L. W. 299 : 26 Bom. L. R. 292 : (1924) M.W.N. 308 : L. R. 5 P. C. 57 : 28 C.W.N. 613 : 2 Pat. L. R. 137 : 22 A.L.J. 473 : 51 I. A. 109 : 1924 P. C. 75 : 46 M. L. J. 637.

—S. 1, Sub-section (1)—'Original' does not relate to ideas but to their expression.

The word "original" does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas, but with the expression of thought; and in the case of "literary work" with the expression of thought in print or writing. The originality which is required relates to the expression of the thought; but the Act does not require that the expression must be in an original or novel form but that the work must not be copied from another work—that it should not originate from another. (*Lord Atkinson*) *MACMILLAN & Co., LTD. v. K. & J. COOPER.* 48 Bom. 308 : 19 L. W. 299 : 26 Bom. L. R. 292 : (1924) M.W.N. 308 : L. R. 5 P. C. 57 : 28 C.W.N. 613 : 2 Pat. L. R. 137 : 22 A.L.J. 473 : 51 I. A. 109 : 1924 P. C. 75 : 46 M. L. J. 637.

—S. 3—Copyright—Infringement—Presumption of Copyright—Infringement—Expert evidence—Duty to take.

Where the defendants in an action for damages for infringement of copyright in respect of a work do not put in issue the existence of the copyright in the work, there is an irrebuttable presumption that the alleged work was a work in which copyright existed and that the plaintiff was the owner of the copyright. In this class of cases, the Court should be reluctant to sit as experts and to decide the question of infringement of copyright without the aid of expert evidence. The proper course, in such cases, is to get the opinion of experts who might be appointed Commissioners to investigate and report on the matters in issue. The opinion and findings of the experts are not conclusive on the Court, but may be reviewed on exceptions. (*Mookerjee and Chatterjee, JJ.*) *SITA NATH BASAK v. MOHINI MOHAN SINGH.* 39 C. L. J. 134 : 81 I. C. 754 : 1924 Cal. 505.

CORPORATION—Contract by—Formalities.

Contracts made by a public body should be strictly in conformity with mode of making such contracts as prescribed by statute. (*Baker, J. C.*) *ABDUL AZIZ KHAN v. MUNICIPAL COMMITTEE, KHANDWA.* 1924 Nag. 227.

CO-SHARERS—Adverse possession—Mahomedan heirs.

The heirs of a deceased Mahomedan being co-sharers the possession of one is not adverse to the others except where there is an express denial and repudiation of title and subsequent possession for more than 12 years. (*Lindsay and Kanhaiya Lal, JJ.*) *MUBARAK-UN-NISSA v. MAHOMED RAZA KHAN.* L. R. 5 A. 257 : 22 A. L. J. 307 : 79 I. C. 174 : 46 A. 377 : 1924 A. 384.

—Contribution—Rebuilding joint property by one. 76 I. C. 1017.

CO SHARERS.

Dispossession of one—Remedies—Equity.

The equitable principle of law as between co sharers is that one cannot disturb the possession of another without a suit for partition. But this cannot apply unless it is found that the co-sharers are in possession of separate portions by mutual arrangement for sake of convenience. Unless such mutual arrangement is proved a co sharer who is dispossessed cannot recover possession without a suit for partition. (*Mukerji, J.*) *BRABBAR ALI SHAH v. KAN ALI*.

82 I. C. 31.

Ejectment—Co-sharers remaining in separate possession of items of common property—Private arrangement—Transferee from co-sharer—Rights of.

Where a co-sharer has been in separate possession of a piece of joint land for a long time without any let or hindrance by the other co-sharers, the latter have no right to eject him or his transferee or to disturb his possession or enjoyment otherwise than by seeking partition. Where for facility of cultivation the co sharers of a khata had under private arrangement been in long possession of separate lands and one of the shares transferred his plots under an invalid transfer who took formal possession of the plots and subsequently the other co-sharers dispossessed him under a decree for ejectment for arrears of rent, held that their possession was not that of trespassers but of proprietors. (*Neave, J.*) *BABU RAM v. YASIN*. L. R. 5 A. 526 : 1924 All. 880.

Ejectment—Excessive—Occupation by one sharer—Remedy—Partition.

Where a plaintiff co-sharer, sued for joint possession with the defendant another co-sharer, on the ground that the latter was in occupation of an excess area and it was found that the defendant had been in possession for a very long time. Held, that the plaintiff could have sued for partition or profits and that he need not be put in joint possession. (*Neave, J.*) *AMBIKA PRASAD SINGH v. RAM KISHAN*. L. R. 5 A. 185 (Rev.) : 1924 All. 923.

Improvements made by one—If confers a right to exclude others.

Where one of two co-sharers effects improvements at his own expense, he is not thereby entitled to exclude the others from joint possession. (*Newbould and Ghose, JJ.*) *MAHAMMAD SAFAR JAMA KHAN v. SATYA NIRANJAN CHAKRAVARTI*. 82 I. C. 290.

Joint possession—Suit for—When lies—Setting up of rival claim in written statement—Effect of.

If one co-owner seeks to defeat the claim of another to joint possession, special circumstances must be alleged and proved to justify exclusive occupation. In a case of total denial of title and setting up *jus tertii*, a decree for joint possession must follow. Mere setting up of a rival claim or a hostile title in the written statement does not amount to ouster. (*Walmsley and Mukerji, JJ.*) *RAJENDRA NARAIN RAI v. BHAIKABENDRA NARAYAN ROY*. 82 I. C. 235.

Lambardar—Liability for profits—Burden of proof.

L. R. 5 O. 5.

CO-SHARERS.

Default in payment of rent—Purchase by one—If enures to the benefit of all.

Where all co-sharers made default in payment of rent due and in consequence the tenure is sold and is purchased by one of them the purchase does not enure for the benefit of all. (*Jwala Prasad and Kulwant Sahay, JJ.*) *MADUSUDANLAL v. RAM GULAM SAHU*. 3 Pat. 458 75 I. C. 807 : 5 Pat. L. T. 447.

Lambardar—Power of—To confer occupancy rights.

Neither a lambardar nor a cosharer who collects rent by some agreement could confer occupancy rights on persons not entitled to it under the law. (*Fremantle, S.M. and Burn J.M.*) *KUNWAR BAHADUR v. SHAMBHU DAYAL*. L. R. 5 A. 165 (Rev.).

Partition—Disagreement as to management—Co-sharer cannot deal with common land to the detriment of another co sharer

Partition is the remedy which a co owner has if he and the other co owners cannot agree as to how the lands which they hold in common should be managed. 17 I. A. 110 Ref. Where lands in India are held in common by co-sharers each co-sharer is entitled to cultivate in his own interests in a proper and husbandlike manner any part of the lands which is not being cultivated by another or his co-sharers but he is liable to pay compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co sharer is not an ouster of his co-sharers from their proprietary rights as co-sharers in the lands. No co-sharer can, as against his co-sharer, obtain any joint right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy in them. 17 I. A. 120-121 Ref. Where a co-sharer alleged that he purchased joint rights in lands held in common by the co-sharer. Held, such a purchase would in law be held to have been a purchase for the benefit of all the co-shares, and the joint rights so purchased would by the purchase be extinguished. (*Sir John Edge*) *MIDNAPORE ZAMINDARY CO., LTD. v. KUMAR NARESH NARAYAN ROY*.

L. R. 5 (P. C.) 137 : 51 Cal. 631 : 80 I. C. 827 : 85 M. L. T. (P. C.) 169 : (1924) M. W. N. 723 : 20 L. W. 770 : 29 C. W. N. 34 : 51 I. A. 293 : 26 Bom. L. R. 651 : 1924 P. C. 144 : 47 M. L. J. 23.

Suit for possession of land in exclusive possession of another co-sharer does not lie—Plff. may sue for partition.

Where a co-sharer takes and retains possession of a portion of the *shamilat* (for as long as 20 years in this case), he cannot be dispossessed therefrom until partition takes place. The plffs. Co-sharers in such a case have no right to oust deft. or even to get joint possession with him so long as there has been no partition of the *shamilat*. (*Scott Smith, J.*) *MAHOMED AMIN v. KARM DAD*. 1924 Lah. 293.

One co-sharer in peaceful possession—Whether other co-sharers are entitled to a decree for a joint possession.

CO-SHARERS.

On the death of a tenant, a co-sharer entered an occupancy holding, after an agreement of compromise with the tenant's widow and was in continuous possession. The plaintiffs as co-sharers of the mahal, brought a suit for joint possession, without bringing a suit for partition and profits:

Held, though the Civil Procedure Code of 1908, did provide for the execution of a decree for joint possession, it was not the duty of the court to grant (1) a decree for joint possession in every case where there were joint owners and joint claimants. (2) That the other co-sharers (Plaintiffs) were not entitled to a decree for joint possession, but were entitled to a declaratory decree. (*Mukerjee, J.*) *GAIRAJ SINGH v. RAM ANJOE SINGH.* L. R. 5 A. 286 (Rev.).

———Power of—Lease of joint property by one—Effect. 1924 Ouda 60.

———Power to confer occupancy rights—Bengal.

In Bengal a co-sharer has no more power to confer a right of occupancy on a raiyat than a middleman would have, and in Bengal a middleman cannot obtain as a middleman a right of occupancy in himself, much less can he create in his tenant a right of occupancy in lands held by him as a middleman. (*Sir John Edge.*) *MIDNAPORE ZAMINDARY CO., LTD. v. KUMAR NARAYAN ROY.* 26 Bom. L. R. 651;

L. R. 5 P. C. 137; 51 Cal. 631;

35 M. L. T. P. C. 169; 1924 M. W. N. 723;

80 I. C. 827; 20 L. W. 770; 29 C. W. N. 34;

51 I. A. 293; 1924 P. C. 144; 47 M. L. J. 23.

———Rent—Suit for—Parties —Apportionment of rent.

It is not open to one of the co-sharers to sue for his own share of the rent without making the other co-sharers parties to the suit, or without proving previous separate collection. The simple suit for rent cannot be converted into one for apportionment of rent. The suit for apportionment of rent should be properly framed so as to implead all the co-sharers and the tenants. A co-sharer cannot as a matter of right, claim from the tenant what he estimates to be his proportionate share of the rent. (*Suhrawardy and Cholzner, JJ.*) *KAMALESH RAY v. DWARIKA NATH KOTAL.* 28 C. W. N. 967.

———Who is—Proprietor—Distinction between.

A person may be proprietor in a mahal without being a co-sharer. To be ranked as a co-sharer, he must have a specific fractional share in the mahal. (*Sulaiman and Kanhaiya Lal, JJ.*) *IMDAD HUSAIN v. HAIDER BEG.* 82 I. C. 196.

COSTS—Contribution—Partition suit—Decree for costs against all contesting defendants—Payment by one—Right to Contribution. See CONTRIBUTION, COSTS. 48 B. 351.

———Damages—Suit for—Amount of damages intentionally exaggerated—Proper order as to costs. See DAMAGES. 46 M. L. J. 366.

———Different sets—Several respondents—Practice.

COSTS.

Where there is no necessity for separate appearances on behalf of the several respondents only one set of costs is usually allowed for all. When such parties appear separately an application should be made at the time when judgment is delivered in their favour with costs for separate sets of costs. Unless such an application is made and ordered a mere general order for payment of costs means that the losing party should only pay one set of costs to be divided among the successful parties. (*Macleod, C. J. and Shah, J.*) *RUSTOMJI HEERJI BHAI v. COWASHI.*

48 Bom. 348; 79 I. C. 704;

26 Bom. L. R. 209; 1924 Bom. 317.

———Discretion as to—Successful party when deprived of costs.

The discretion vested in a Court as regard costs should be exercised according to the rules of reason and justice and not according to private opinion, according to law and not humour. When the court has not exercised the discretion in a legal and regular manner the higher courts have the jurisdiction to set the order right. It is an established principle that costs should follow the event, and in a case where one party should fail on the objections raised by the opposite party it does not appear to be in accordance with any principle to dismiss the case on a ground not taken and deprive the opposite party of their costs. The appellate Court has jurisdiction to interfere in such cases. 14 M.C.C.R. 258; 15 A 333; 16 B, 241; 16 B. 676 Ref. (*Subbanna, J.*) *BHUTAI KUSHALCHAND v. OMEDMAL KAPURCHAND.*

2 Mys. L. J. 11.

———Point regarding costs not taken in Lower Court—Effect. 75 I. C. 527.

———Order as to—Interlocutory application —Costs to be costs in the cause—Power of Court to deal with costs.

The words "costs in the cause" in an order made in an interlocutory proceeding do not mean that the costs would inevitably follow the event, but that those costs remain to be dealt with by the Court at the hearing, the judge at the trial having still power to deal with such costs. If a decree is passed in favour of one side or the other for costs then those costs must be taken as being included in the final orders unless the Judge expressly excludes them. (*Macleod, C. J. and Shah, J.*) *JIVABAI PITAMBERDAS v. TEJA SAMA,*

26 Bom. L. R. 282; 80 I. C. 263; 1924 Bom. 398.

———Respondent—Unnecessary party—Right to costs.

A respondent who is unnecessarily made a party to an appeal and against whom no relief is granted is entitled to his costs of the appeal. (*Krishnan and Waller, JJ.*) *GANGABATTULA KANTHAMMA v. MANCHIRAJU REDDI PANTULU.*

19 L. W. 197; (1924) M. W. N. 122;

34 M. L. T. (H.C.) 358; 78 I. C. 296;

1924 Mad. 476; 46 M. L. J. 134.

———Whether defendant entitled to separate costs—Where defence is substantially the same.

Held, that where defendants produce substantially the same defence separate costs should not be allowed except for special reasons to be given

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by the Judge trying the case. (*Pullan and Kendall, A. J. Cs.*) *ABADI BEGAM AND OTHERS v. AHMAD MIRZA BEG.* 1 O. W. N. 433 : 82 I. C. 691; 11 O. L. J. 757.

COURT FEE—Alternative reliefs—Calculation of fee payable

Where a plaintiff sues in the alternative for one of two reliefs, court-fee is payable on the relief carrying the higher Court-fee. (*Dos and Ross, JJ.*) *DASARATE MESHV v. JAY CHAND SUTRADHAR.* 78 I. C. 530.

Appeal—Declaratory decree that mortgages did not affect plaintiff's reversionary rights—Condition of payment of a certain sum.

The suit was one for a declaration that a certain alienation made by the plaintiff's father should not be binding upon their reversionary interest. The plaint was rightly stamped with a court-fee of Rs. 10. The suit was decreed subject to a reservation that a sum of Rs. 2,365 had been borrowed for necessary purposes. On appeal by the plaintiffs for the same relief held that the memorandum of appeal need not be stamped with more than 10 rupees. From the mere fact that the suit had been decreed on payment of a certain sum to the defendant—mortgagee, its nature was not in any way altered. It was not contemplated by the legislature that the court-fee payable on a part of a whole claim in appeal is, in the absence of express direction to the contrary, to exceed the court-fee payable on the whole claim. 92 P. R. 1900 Ref. (*Abdul Raoof v. Motisagar, JJ.*) *HARBHAGWAN v. AMAR SINGH.* 5 Lah. 137 : 1924 Lah. 530.

Crown debt—Priority.

Court-fees form a Crown debt and the Crown is entitled to precedence in payment of this debt over all creditors. (*Jackson, J.*) *THE COLLECTOR OF KRISHNA v. GAJJALA SREERAMAMOORTHY.* 80 I. C. 935 (1).

Determination of—Allegations in plaint.

The question of court-fee should be determined on the basis of the plaint and where the relief claimed is a declaration, it is not open to a court to say he should have asked for consequential relief and paid a fee on that basis though it may be he ultimately fails unless he asks for the consequential relief also. (*Dass and Ross, JJ.*) *TIKERT THAKUR NARAYAN SINGH v. DILDAR ALI KHAN.* 80 I. C. 544; 3 Pat. 915.

Mesne profits—Appeal against decree bearing full court-fee—Dismissal—Subsequent ascertainment of mesne profits—Appeal—Fresh Court-fee if payable.

Plaintiff brought a suit for possession and mesne profits, the claim for mesne profits being valued at Rs. 4,696-8-3. The suit was decreed for possession and it was directed that the amount of mesne profits should be ascertained. An appeal to the High Court bearing full Court-fee was filed but the appeal was dismissed. Then the mesne profits were ascertained to be Rs. 1,604-10-3. The defendant appealed to the District Court and preferred a second appeal in the High Court. Held that the Court fee on the mesne profits had in fact been paid already by the

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Court-fee on the original memorandum of appeal and that it need not be paid again a second time. 16 C. L. J. 564 Ref. (*Das and Ross, JJ.*) *BABU RAM MANDER v. MAHARANI NAWLAKEBHATI.* 1924 P. H. C. C. 206.

———— Mortgage suit—Interest between date of suit and decree—Court-fee, if payable on interest. 77 I. C. 1039.

———— Mortgage—Decree for sale—Suit for declaration that the property belonged to plaintiff and was not liable to be sold—Plaintiff not a party to the decree—Consequential relief—Court-fee payable on plaint.

A decree for sale was passed on the basis of a mortgage. The mortgagee took steps to bring the property to sale but the plaintiff who was no party to the mortgage-decree sued for a declaration that the property belonged to him and was not liable to be sold in execution of the aforesaid decree. A court-fee of Rs. 10 was paid on the declaration sought.

Held, that the plaintiff being no party to the mortgage-decree, the suit did not involve a consequential relief and the court-fee paid was sufficient. 24 O. C. 361 distinguished. (*Wazir Hasan and Neave, A. J. Cs.*) *SRI RAM v. MATHURA PRASAD.* 1 O. W. N. 582. 10 O. & A. L. R. 996.

Valuation—Appeal—Decision of trial Court on the question of market value of the property and jurisdiction—Appeal.

Plaintiff valued his suit for purposes of court-fee and jurisdiction at five thousand and five hundred rupees. The defendant objected that the value of the land was only Rs. 1,100, and that the plaintiff had purposely exaggerated his claim. The question of the market value of the property was put in issue and decided in favour of the defendant. The suit having been dismissed, plaintiff preferred an appeal to the High Court. Defendant objected that the appeal lay to the District Court and not to the High Court. Held, that the valuation of the suit must be taken to be that decided by the trial Court and that the appeal lay to the District Court. For the purpose of determining the course of appeal in the present case the value of appeal is to be taken to be the actual value of the property as determined by the trial Court. (*Martineau, Zafar Ali and Moti-Sagar, JJ.*) *SUNDAR DAS v. MUSAMMAT UMDA JAN.* 6 Lah. L. J. 355; 82 I. C. 614; 5 Lah. 481; 1925 Lah. 1.

Suit for possession and mesne profits—Appeal with full court-fee—Subsequent ascertainment of mesne profits—Second appeal against mesne profits—Whether court-fee to be paid a second time.

The plaintiff valued his suit for possession at Rs. 775 and mesne profits at Rs. 4,676. A decree for possession was ordered but mesne profits were ascertained subsequently at Rs. 1,604. The defts. appealed to the High Court paying stamps on the original Memorandum of Appeal *ad valorem*, before mesne profits were ascertained. In a second appeal, against the assessment of mesne profits. Held, that S. 6 of the Court Fees Act cannot be applied, and that when once the full court-fee

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had been paid by the defendant on the original valuation of the Plaintiffs, the defendant should not be called upon to pay a second time. *Kanchan Mandar v. Kamini Prasad*. 16 C. relied upon. (*Das and Ross, JJ.*) *RAM MANDAR v. MOTHARAM NAWALAKHBATI*. 3 Pat. 875: 1924 P. 694: 1924 P. H. C. C. 206.

—S. 5—Taxing Judge if can refer to Bench. 3 Pat. 146: 75 I. C. 871: 1924 Pat. 161.

—S. 5—Taxing Officer—Extent of powers.

The power of the Taxing Officer under S. 5 is not confined merely to memoranda of appeal filed in the High Court, but extends to deficiencies in stamp on a plaint or memorandum of appeal in the Courts below, when the fact of detriment to the revenue is brought to his notice. (*Daniels, J.*) *BAHAL KUAR v. NARAIN SINGH*. 22 A. L. J. 1038

—S. 7 (IV)—Joint family property—Possession in the name of various members—Court-fee payable.

Court-fee is payable on the footing of the plaint and not on what is afterwards decided by the court. In a suit for partition of joint family property standing in the possession and names of various members, no *ad valorem* court-fee is payable. (*Das and Ross, JJ.*) *BASUKI BEHARY PANDEY v. CHATTER PANDEY*. 79 I. C. 913: 5 Pat. L. T. 655.

—S. 7 (IV)—Valuation—Nature of—Binding on appeal.

The valuation which a plaintiff is allowed to put under S. 7 (iv) of the Court Fees Act should not be arbitrary or fanciful, and is binding on all parties including the plaintiff when an appeal is preferred. (*Kennedy, J. C. and Aston, A. J. C.*) *DIPCHAND DOWLATRAM v. FIRM OF PERMANAND CHIMANDAS*. 70 I. C. 582

—S. 7 (iv) (a) and (x) (a)—Specific performance of contract—Suit by plaintiff for return of a sale deed or for execution of a fresh sale-deed and its registration—Court-fee payable.

In pursuance of a contract for sale of a shop defendant executed a sale-deed and gave it to the Sub-Registrar for registration. The document was returned to the defendant and in the absence of the plaintiff (the vendee) the defendant sold the shop to a third person. Subsequently plaintiff brought a suit for return of the original sale deed or in the alternative for the execution of a fresh sale-deed and for its registration. Plff. valued the suit under S. 7 (iv) (a) of the Court Fees Act and on the relief for registration paid a court-fee of Rs. 10 under Sch. II, Art. 17 (vi) of the Act. *Held*, that the suit was one for specific performance of a contract of sale and court-fee was payable under S. 7 (a) (b) of the Court Fees Act according to the amount of consideration. The absence of a prayer for possession was immaterial. (*Scott-Smith and Fforde, JJ.*) *FAKIR CHAND v. RAM DATT*. 5 Lah. 75: 80 I. C. 953: 1924 Lah. 439.

—S. 7 (iv) (b)—Suit for partition—Allegation that family is joint—Court-fee payable.

Where the plaintiffs sued for partition alleging that the properties stood in the names of different members of the family and were in their posses-

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sion on behalf of the family. *Held*, that the possession of one member of the family was the possession of all the members of the family, that the Court should decide the question of court-fee by reference to the allegations in the plaint and not by what is afterwards found by the Court and that the suit was properly stamped as a simple suit for partition. (*Das and Ross, JJ.*) *BANKU BEHARY PANDE v. CHATUR PANDEY*. 1924 P. H. C. C. 210: 1924 P. 640.

—S. 7 (iv) (b)—Suit for partition—Right to share disputed right—Court-fee payable on.

The valuation for the computation of court-fees in a suit for partition depends upon whether the relief sought is merely a change in the mode of enjoyment of the property or the enforcement of a disputed right. In the present case the plaintiffs alleged a partial partition and they claimed partition of that part of the family property, including certain moveables, which was kept joint at the partition.

The defendants' case is that the plaintiffs have already separated and have been given their full shares and have no rights whatever in the property in suit, which is not available for partition. *Held*, this is a clear denial of the plaintiffs' right to share, and the present suit is a suit to enforce the right to share in the property on the ground that it is joint family property falling under section 7, cl. (iv) (b) of the Court Fees Act. (*Baker, J. C.*) *BIHADDU v. SADDU*. 20 N. L. R. 43: 81 I. C. 766: 1924 Nag. 86.

—S. 7 (iv) (c) and Sch. II, Art. 17 (ii)—Suit for declaration that a deed to which plff. is not a party is not binding—Suit for cancellation—Valuation for purposes of Court-fees and jurisdiction—Suit for removal of eight trustees and declaration of plaintiff's right.

Where a plaintiff who is not a party to a deed wants a declaration that the deed is not binding on him or on the devaswom of which he is a trustee, the suit is one for declaration and not one for cancellation. 14 M. 26; 32 M. L. J. 447; 37 M. 420 Ref.

Where a plaintiff sues for such a declaration and for an injunction and accounts as reliefs consequential on this declaration, the plff. is entitled to place his own valuation on these reliefs, but the relief for purposes of jurisdiction and court-fees must be the same. A claim for further relief, *viz.*, that the 8 defendants should be removed from the office of trustee comes under Art. 17 (ii) of Sch. II of the Court Fees Act and a separate fee of Rs. 10 need not be paid for each of the 8 trustees especially where the ground for removal is the same. (*Phillips and Venkatasubba Rao, JJ.*) *VELLORA KARUPPAN V. C. CHATHU KUTTY NAIR v. K. V. CHATHU KUTTY NAIR*. 19 L. W. 249: 34 M. L. T. (H. C.) 22: (1924) M. W. N. 210: 78 I. C. 118 (2): 1924 Mad. 611 (2).

—S. 7 (iv) (c)—Declaration—Suit for—Consequential relief—Court-fee.

The plaintiff alleging herself to be a certified guardian for the management of the estate of her husband, who she alleged, was a lunatic and

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who had executed a deed of gift in favour of the defendant asked for the following reliefs.

(a) To declare that the gift deed executed by her husband in favour of the defendant was void and that the defendant had acquired no interest in the property. (b) That actual possession of the lands specified in the gift be awarded to the plaintiff as manager on behalf of her lunatic husband; and (c) that a sum of money realised by defendant under the gift be handed over to the plaintiff. *Held*, that the suit fell under S. 7 (iv) (c) of the Court Fees Act and court-fee was payable as in a suit for declaration with consequential relief. (*Daniels, J.*) *MT. GANGA DEI v. SUKH-DEO PRASAD.* L. R. 5 A. 618 : 22 A. L. J. 945 : 1924 A. 612.

—S. 7 (iv) (c)—Declaration to avoid an award—Valuation.

In a suit for a declaration that a certain award is invalid there being no contract at all between the parties, and for an injunction by way of consequential relief, the plaintiff has the right to value his claim for the purposes of court-fees and the value for the purposes of the jurisdiction is the same. 44 Bom. 331, Foll. (*Raymond, A. J. C.*) *TYEBALLY ABDUL HUSSAIN v. MESSRS. JAMES FINLAY & CO.* 17 S. L. R. 15 : 80 I. C. 969 : 1924 S. 105 (2).

—S. 7 (iv) (c)—Suit for declaration that decree was fraudulent and injunction—Court-fee payable thereon.

In order to determine whether a suit is properly valued or not it is necessary to confine attention to the plaint itself and not to look to other circumstances which may subsequently influence the judgment of the Court as to the true value of the relief sought. A suit for a declaration that the decree obtained by the defendant is fraudulent, for an injunction against the defendant restraining him from interfering with the plaintiff's possession of the property in suit and for consequential relief confirming plaintiff's possession, comes within S. 7 (iv) (c) of the Court Fees Act and the valuation of the suit is the valuation of the decree which the plaintiff seeks to set aside. 6 C. L. J. 427 Ref. In such cases the value put by the plaintiff should be taken as the proper value unless it appears that the value so put is arbitrary and inconsistent with the value of the reliefs sought. (*Suhrawardy and Chotzner, JJ.*) *RAJABALA DASI v. RADHIKA CHARAN ROY.* 40 C. L. J. 150 : 79 I. C. 982 : 1924 Cal. 969.

—S. 7 (iv) (c)—Suit for a declaration that deed of adoption by a Hindu widow is invalid and inoperative to affect reversionary interests of plaintiff—Valuation—Jurisdiction—Appeal.

Where a suit for a declaration by a reversioner that a deed of adoption executed by a Hindu widow was inoperative beyond her life-time was valued for purposes of jurisdiction at Rs. 6,895 and odd, an appeal from the decree lies to the

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High Court and not to the District Court. (*Campbell and Moti Sagar, JJ.*) *GANGA SINGH v. SHER SINGH.* 5 Lah. 440.

—S. 7 (iv) (c)—Valuation—If arbitrary Power of Court.

The valuation put by a plaintiff in a suit falling under S. 7 (iv) (c) Court Fees Act, is not to be an arbitrary valuation, but is to accord with the value of the subject-matter of the suit and, in case of dispute, is to be determined by the Court. (*Prideaux, A. J. C.*) *KALICHARAN LAL v. SHIVSHANKAR SAHAI.* 1924 Nag. 295.

—S. 7 (iv) (c) and Sch. II, Art. 17—Suit for declaration and consequential relief—Memorandum of appeal—Court-fee.

Where the plaint prays for a declaration and consequential relief, the value of the consequential relief determines the court-fee payable on the plaint. 4 Pat. L. J. 297 : 46 I. A. 24 : 5 P. L. J. 394, Foll.

Where however an appeal is preferred only against the declaration it may be valued under Sch. II, Art. 17 of the Court Fees Act. The nature of the relief sought may vary at the stage when the appeal is preferred and the Court-fee leviable will be upon the altered relief on appeal. (*Jwala Prasad, J.*) *NEKO TEWARI v. KISHUN PRASAD PANDEY.* 2 Pat. L. R. 193 : 3 Pat. 640 : 80 I. C. 563 : 1924 P. 582.

—S. 7 (iv) (c)—Valuation of suit—Valuation of subject-matter—Option to plaintiff to put his valuation.

In suits coming under S. 7 (iv) (c) of the Court Fees Act the plaintiff is at liberty to put his own valuation whatever be the real value of the subject-matter. (*Young, J.*) *SIT SOE v. MA THIN.* 3 Bur. L. J. 128 : 1924 Rang. 378 (2).

—S. 7 (iv) (c) and (d)—Valuation fixed by plaintiff—Finality of—Suit for declaration, injunction and appointment of Receiver.

A suit for declaration and injunction and for the appointment of a Receiver falls within S. 7 (iv), clauses (c) and (d) of the Court Fees Act and the plaintiff can put his own valuation for the reliefs claimed. (*Baker, J. C. and Prideaux, A. J. C.*) *KRISHNA RAO v. MT. CHANDRABHAGABAI.* 1924 Nag. 316.

—S. 7 (v) (a)—Claim for Khudkhasht lands—Addition of milkiat shares—Effect.

A suit for khudkhasht lands falls under S. 7 (v) (d) and not S. 7 (v) (a) of the Court Fees Act and court-fee on the market value is to be paid. But when the plaintiff claims for milkiat shares within which the khudkhasht lands lie and for khudkhasht lands, separate court-fees should be paid. (*Das and Foster, JJ.*) *RAGHUBANS NARAYAN SINGH v. KHUB LAL SINGH.* 80 I. C. 439.

—Ss. 7 (1), 4 (e) and 11 (b)—Suit for declaration of plaintiffs' liability to make a small periodical payment than that claimed by deft.—Valuation for purposes of court-fees and jurisdiction.

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A suit for a declaration that the plaintiff is liable to pay *achu palasha* (a kind of royalty payable to a bill owner) only at the rate of 150 seers of paddy per annum and not at the rate of 459 and odd seers as claimed by the defendant, does not fall under S. 7, cl. (1) or S. 4, cl. (c), or S. 11, cl. (b) of the Court Fees Act. The suit is one for a declaratory decree without any consequential relief, and its jurisdictional value cannot be higher than the value of the subject-matter in dispute between the parties. The subject-matter in dispute is the difference between what the plaintiff admits to be the proper rate and the rate alleged to be claimed by the defendant. The declaration which the plaintiff seeks, if allowed, would relieve him from the liability to pay the difference between these two sums for all time, and therefore in estimating the value of the subject-matter in dispute the Court must take the capitalised value of that right. (*Krishnan and Waller, JJ.*) KARAKKATTIDATHIL RYRAPPA NAMBIYAR v. CHATHU KUTTI NAMBIYAR. 19 L. W. 668 : 79 I. C. 343 : 1924 Mad. 621 : 46 M. L. J. 377.

—S. 7 (iv) (c)—Suit for declaration that there was no contract—Injunction against arbitration proceedings.

In a suit for a declaration that there was no valid contract between the parties or a valid reference to arbitration and an injunction restraining arbitration proceedings going on, plaintiff can put his own value as the case falls under S. 7 (iv) (c) Court Fees Act. (*Raymond, A. J. C.*) TAYABULLY ABDUL HUSSAIN v. JAMES FINLAY & Co. 80 I. C. 969.

—S. 7 (iv) (f)—Suit for accounts—Plaint valuation—Binding on defendant for purposes of appeal.

The valuation given by the plaintiff in a suit for accounts is the value on which the defendant should pay court-fee if he feels aggrieved by the order directing the taking of accounts and prefers an appeal against the preliminary decree. (*Kennedy and Raymond, A. J. Cs.*) MOTIOMAL v. MOLAP BAI. 79 I. C. 923.

—S. 7 (iv) (f)—Suit for accounts—Valuation by defendant in appeal—Right to give own value. 1924 P. 211.

—S. 7 (v)—Suit to avoid sale of family property and for possession—Decree on payment of fixed amount—Appeal by alienee—Court-fee.

A suit for setting aside a sale of joint family properties was decreed on condition the plaintiff paid a certain sum to the alienee. The latter appealed against the decree and contended the suit should have been dismissed *in toto*. Held the memorandum of appeal should be stamped under S. 7 (v) of the Court Fees Act. (*Krishnan, J.*) GARAPATI BUTCHI SEETHAYAMMA, *In re*. 21 L. W. 15 : 47 M. L. J. 919.

—S. 7 (v) (a) and (d)—Suit for possession of specific plot of land in permanently settled estate—Court-fee—Deficiency—Procedure.

A suit for the recovery of a specific plot of land situated within a permanently settled estate but not constituting a definite share thereof or separately assessed to revenue, falls within cl. (v) (d)

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and not under cl. (v) (a) or (b) of S. 7 of the Court Fees Act. Court-fee should therefore be paid on the market-value of the property in suit.

The plaintiff in the above suit having valued his plaint at ten times the share of the Government revenue due on the land, the Court directed him to pay court-fees on its market value. The plaintiff did not pay and the Court holding that the subject-matter of the suit exceeded its jurisdiction directed the return of the plaint for presentation to a superior Court. *Held*, that the procedure of the Court below was illegal. The Court should have first called upon the plaintiff to state the market value and then directed him to pay the proper court-fee on his plaint and on his failure to do so rejected the plaint. If the plaintiff paid the requisite court-fee and it was then found that the valuation of the suit went beyond the jurisdiction of the Court, the plaint should have been returned for presentation to the proper Court. (*Krishnan, J.*) KANDASAMI GOUNDAN v. SUBBAI GOUNDAN. 34 M. L. T. (H. C.) 92 : (1924) M. W. N. 338 : 77 I. C. 781 : 1924 Mad. 646 : 46 M. L. J. 345.

—S. 7 (v) (b) and (d)—Suit for fraction of holding—Court-fee payable. MA SHA MA v. SOMASUNDRAM CHETTY. 75 I. C. 217

—S. 7 (1) (v) (c) and Sch. II, Art. 17 (iii) and vi)—Suit for commutation of grain rent into money rent—Appeal—Valuation—Court-fee payable—Revision—Interference by High Court.—C. P. Code, S. 115.

An appeal by a landlord from the decree in a suit for commutation of grain rents into money rents on the ground that the rate fixed by the Lower Court is too low, falls either under Sch II, Art. 17, cl. (vi) of the Court Fees Act or under cl. (iii) and must bear Court-fees accordingly. Neither S. 7, cl. (i) nor cl. (iv) (c) of the Act has any application to the case.

Quære—Whether the High Court should interfere in revision with an order of the Lower Court deciding the proper amount of Court-fee payable in a case pending in that Court. (*Phillips and Oigors, JJ.*) SENDATTIKALAI PANDIA CHINNA THAMBIAR v. VEERAPPA NAIDU. 34 M. L. T. (H. C.) 216 : 19 L. W. 629 : 78 I. C. 928 : 1924 Mad. 623 : 46 M. L. J. 450.

—S. 7 (ix)—Redemption suit—Claim of surplus—Court-fee.

Where in a suit for redemption surplus profits also are claimed, court-fee need be paid only on the principal amount due and not on the profits claimed. (*Baker, O. J. C.*) DAULATRAM v. GULAB CHAND. 1924 Nag. 346.

—S. 7 (ix)—Suit for redemption—Valuation for purposes of Court-fees and jurisdiction not the same. See SUITS VALUATION ACT, S. 78. 28 C. W. N. 710.

—S. 7 (ix)—Mortgage suit—Appeal—Valuation—Interest *pendente lite*. 77 I. C. 1054.

—S. 7 (xi) (cc)—Suits Valuation Act (Act VII of 1877)—Suit by landlord against tenant for possession after determination of tenancy—Proper valuation.

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When a suit is brought for possession of leased property on the ground that the tenancy has terminated by forfeiture the proper valuation is not the value of the immoveable property, but the amount of the rent payable for the year next before the date of presentation of the plaint.

Under S. 8 of the Suits Valuation Act in suits other than those referred to in the Court fees Act in S. 7 paras 5, 6, 9 and 10, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same. (*Walsh, A. C. J. and Ryves, J.*) MOHAN LAL v. BRUTESWAR. L. R. 5 All. 709.

— S. 7 (xi) (cc) — *Landlord and tenant—Tenant in possession after notice to quit.*

The tenancy of a tenant holding over is created by occupation under an implied demise or agreement. In a case where notice to quit has been given no demise or consent to continuance of occupation can be implied. The person continuing in possession after a notice to quit and demand for possession is liable to ejectment as a trespasser and the suit does not fall under S. 7 (xi) (cc) of the Court Fees Act. (*Kolwal, A. J. C.*) CHAMPAT v. BALAKDAS. 20 N. L. R. 124.

— S. 8, Sch. I, Art. 1 and Sch. II, Art. 17, cl. (II) — *Applicability of—Appeal by Government against award of compensation in a land acquisition case—Award by Chief Judge of Small Cause Court—Court-fees payable on appeal.*

Where the Crown appeals against award of compensation in a land acquisition case, on the ground that the award is excessive, S. 8 of the Court Fees Act does not govern the appeal.

On appeal by the Crown against an award of compensation by the Chief Judge of the Presidency Small Cause Court in a land acquisition case the court-fees payable is that prescribed by Art. I, Sch. I of the Court Fees Act. (*Schwabe, C. J.*) ASSISTANT LABOUR COMMISSIONER OF LABOUR, *In re*. 19 L.W. 207 : (1924) M.W.N. 108 : 34 M. L. T. (H. C.) 357 : 78 I. C. 435 : 1924 Mad. 469 (2) : 46 M. L. J. 150.

— S. 12—*Construction of—Strict construction.*

The provisions of S. 12 of the Court Fees Act should be strictly construed and the additional fee should be levied from a party litigant only in exact conformity with the precise words of the statute. But the provisions in fiscal statutes should not be so construed as to furnish a chance of escape and a means of evasion (*Mookerjee and Chotzner, JJ.*) RAJ RAJESWARI JIU v. GATI KRISHNA CHAKRAVARTI.

39 C. L. J. 217 : 82 I. C. 292 (2) : 1924 Cal. 933.

— S. 12—*Court-fee—Order for payment of—Appeal—When competent.*

If the case is not one of appraisalment or of fixation of the value with a view to determine the amount of fee chargeable, but the dispute involves root questions of principles as to the nature of the suit and the retrospective operation of statutes an appeal against an order for payment of Court-fee is maintainable. (*Mookerjee and Chotzner, JJ.*) TARAPRASANNA CHONGDAR v. NARISINHA MURARI PAL. 51 Cal. 216 : 28 C. W. N. 683 : 39 C. L. J. 212 : 81 I. C. 763 : 1924 Cal. 731.

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— S. 12—*Decision about amount is final but as to category of suit or applicability of a section is not final.*

The question whether an order directing additional Court-fee to be paid is an interlocutory order which will be revised depends on the circumstances of each case. If it is an order merely assessing valuation of the property and the only question involved is as to the amount upon which the Court-fee has to be paid, the decision of the Court of first instance would appear to be final under S. 12 of the Courts Fees Act. That section has been enacted in the interests of revenue and is final so far as that Court is concerned. There will be no appeal or revision from that order. But the question may under certain circumstances be raised on appeal from the final decree made in the suit. Where, however, the question is, under what provision of the Court Fees Act the relief sought for in the plaint comes or under which category the suit falls, the decision of the first Court is not final. Where it involves the jurisdiction of the Court to try the suit the decision is liable to be revised. (23 Bom. 436 ; 23 Cal. 334 ; 14 Mad. 169 ; 1 All. 360, Foll. [P. 675, C. 2] (*Jwala Parsad and Foster, JJ.*) MANI LAL v. DURGA PRASAD. 5 Pat. L. T. 425 : 3 Pat. 930 : 1924 P. H. C. C. 254 : 80 I. C. 667 (2) : 1924 P. 673.

— S. 14, Sch. 1, Arts. 4 and 5 *Application for review—Presentation to stamp Reporter—Sufficiency of—Delay.*

The judgment in an appeal was delivered by the High Court on the 7th June 1922. The application for review was signed on the 21st July 1922. The application for review was presented to the stamp Reporter on the 6th Sep. 1922. The court-fee paid on the application was one half of the Court-fee paid on the Memorandum of Appeal. The application was returned by the Stamp Reporter on the day it was presented, when the High Court had been closed for the vacation. Thereupon the application was presented to the senior Judge on the 13th of Nov. 1922, when the Court re-opened after the long vacation. Held, that the presentation to the Stamp Reporter was proper presentation within the meaning of Arts. 4 and 5 of Sch. 1 to the Court Fees Act. As the decree in the appeal was not in existence till the 21st of July 1922 the delay in presentation could not be a ground for penalising the applicant. The Court accordingly directed that the application should be heard as if the full court-fee had been paid and one half had been returned under S. 14 of the Court Fees Act. (*Mookerjee and Chotzner, JJ.*) NOWRANG SINGH v. JANARDAN. 39 C. L. J. 344 : 80 I. C. 794 : 1924 Cal. 994.

— S. 15—*Review—Refund of Court-fee—Inherent power.*

Where an application for review was filed under S. 151 and Order 47, Rule 1, C. P. Code, and the Court allowed the application with reference to S. 151, C. P. Code, held that the applicant for review was entitled to a refund of the court-fee under S. 15 of the Court Fees Act. (*Mookerjee, J.*) PROBHAS KUMAR GANGULI v. NITHARLAL GANGULI. 28 C. W. N. 928 : 1924 Cal. 1054.

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—Ss. 17 and 19 I (1)—*Bengal Amendment Act (IV of 1922)—Application for probate—Court fee payable on—Introduction of new Act—Effect of.*

An application for probate was made on the 19th March 1922, the estate was valued and court-fees to the extent of Rs. 18,000 were paid. Thereafter, the will was proved on the 8th April 1922, and an order for probate was made. On the 8th April, 1922, it was brought to the notice of the Court that in the interval between the payment of court-fees on the application for probate and the order for Probate, the Bengal Court Fees (Amendment) Act, 1922 came into force on the 1st April 1922, and that the court-fees if calculated on the basis of the amended statute, would exceed the amount already paid by Rs. 10,370. *Held*, that the petitioner was not bound to pay the excess amount and that the Court-fee already paid under the old Act was sufficient.

S. 19 I (1) of the Court Fees Act provides that no order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant, until the petitioner has filed in Court a valuation of the property in the form set forth in the first Schedule and the Court is satisfied that the fees mentioned in paragraph II of the Schedule have been paid on such valuation. The third Schedule shows that the petitioner for probate or letters of administration is required to set out in detail the valuation of the moveable and immoveable properties left by the deceased. The law consequently, requires that such valuation should be made and the Court-fees paid on the basis thereof before an order entitling the petitioner to the grant of probate or letters of administration is made upon the application. As soon as he complied with requirements of the statute, his application was presented, and he became entitled to an order for the grant of probate or letters of administration if he could establish the genuineness of the testamentary instrument propounded by him. The subsequent amendment of the Act did not affect the petitioner. (*Mookerjee and Chotzner, JJ.*) *THADDEUS NAHAPIET v. SECRETARY OF STATE FOR INDIA.* 39 C. L. J. 209 : 81 I. C. 751 : 1924 Cal. 987.

—S. 17—*Decree for pre-emption—Appeal by vendee—Alternative Reliefs—Valuation—Court-fee.*

Plaintiff claimed a right of pre-emption alleging that the property had been sold ostensibly for Rs. 10,000 while its real price was Rs. 5,100. The vendor and vendee denied his right to pre-emption on the grounds of dominance and contiguity. The trial Court granted a decree for possession to plaintiff on payment of the market value which was fixed at Rs. 6,800. The vendee valued his appeal at Rs. 6,800 and asked for a decree restoring that property to him or else requiring the successful pre-emptor to pay him an additional sum of Rs. 3,200. *Held* that they were two alternative relief based on exactly the same cause of action and only one of them could be granted. They were not two distinct subjects within the meaning of S. 17 of the Court Fees Act, and the correct Court fee is one calculated not on the aggregate of the two values but on the higher of the two. The fact that the appellant himself asserts the value of

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the property to be Rs. 10,000 does not affect the question. (*Abdul Raoof and Campbell, J.*) *TEK CHAND v. TARA CHAND.*

5 Lah. 114 : 1924 Lah. 494.

—S. 17—*Subject—Meaning of—Railway Company—Loss in respect of several consignments—Suit for—Court fee.*

The word "subject" in S. 17, Court Fees Act means "cause of action" and where in respect of loss of several consignments of various dates the consignor has issued one consolidated notice to the Railway Company under S. 77, Railways Act, he has only one cause of action in respect of the total loss and the Court-fee payable on the plaint is to be calculated on the aggregate claim. Whether a suit embraces only one cause of action or more depends on the terms of the plaint. (*Das and Ross, JJ.*) *EAST INDIAN RAILWAY CO. v. AHMADI KHAN.* 1924 P. H. C. C. 175 : 78 I. C. 415 : 1924 P. 596

—S. 17—*Suit for land or for refund of consideration—If separate Court-fee payable.*

When the plaintiffs in whose favour the first defendant had surrendered the suit lands for consideration, finding the land to belong to another person file a suit against both, asking for possession against the latter or in the alternative claim refund from the former of the consideration paid the suit embraces two distinct reliefs in respect of each of which separate Court-fees must be paid. (*Baker, J.C.*) *HIRDERAM v. RAMCHARAN.* 1924 Nag. 169.

—S. 17—*Suit for partition—Joint possession—Court-fee payable.*

The plaintiffs on their own allegations, were not in possession of any portion of the properties sought to be partitioned and they prayed for joint possession and partition. *Held*, that the plaintiffs were bound to pay court-fee on two subject matters within the meaning of S. 17 of the Court Fees Act. The plaintiffs must pay the fixed fee for partition in addition to the *ad valorem* fee as in a suit for possession. (*Das and Ross, JJ.*) *SITBARAN JHA PANDEY v. LOKANATH MISHRA.*

3 Pat. 618 : 5 Pat. L. T. 618 : 81 I. C. 1052 : 1924 P. 558.

—S. 19 (b)—*Joint family—Letters of Administration—Application by son.*

48 Bom. 75 : 77 I. C. 749 (2) : 1924 Bom. 228.

—S. 19 H—*Application for probate—Valuation on objection by Collector—Finality of—Appeal.*

In an application for probate the Collector objected to the valuation given by the applicant and the District Judge after causing an enquiry under S. 19 H, Court Fees Act, fixed a certain value. *Held*, the valuation was final and no appeal lay therefrom. But if in arriving at a value the court refused to adjudicate whether certain properties were debutter the order would be revisable. (*Rankin and Mukerjee, JJ.*) *CHINMATHA NATH PAL CHOUDHURI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.* 78 I. C. 901.

—S. 19 I—*Provident Fund—Probate duty—If payable on.*

COURT FEE, S. 31.

No Court-fee need be paid on provident fund money when probate is applied for. (*Hallifax, A. J. C.*) *AGNES v. JAMES WILLIAM.*

82 I. C. 128.

—S. 31—Order for payment of court-fee by accused—Order by appellate court—Enhancement of sentence.

An appellate court hearing a criminal appeal ordered accused to pay the complainant's court-fees under S. 31 of the Court Fees Act. *Held*, that the making of an order under S. 31 of the Court Fees Act does not ordinarily amount to an enhancement of sentence but may be made as an incidental order to bring the judgments into conformity with the law. Though S. 31 of the Court Fees Act provides that all fees ordered to be repaid under the section shall be recoverable "as if they were fines" it does not thereby make them part of the sentence. 22 M. 153 Ref. (*Spencer, J.*) *EDIGA THIMMAH v. EMPEROR.*

20 L. W. 293 : 35 M. L. T. (H. C.) 39 :
(1924) M. W. N. 489 : 25 Cr. L. J. 1213 :
82 I. C. 141 : 47 Mad. 914 : 47 M. L. J. 355.

—Sch. I, Art. 1—Appeal against order under S. 144, C. P. Code—Court-fee.

An appeal against an order passed under S. 144, C. P. Code, is an appeal against a decree and an *ad valorem* stamp duty is payable thereon. (*Daniels, J.*) *BAJUNATH DAS v. BALMUKUND.*

82 I. C. 321 : 22 A. L. J. 881.

—Sch. I, Art. 1—Cross objections—Possession of land—Court fee.

In the case of cross objections relating to possession of land, *ad valorem* fee is payable on its value and not on the basis calculated under S. 7 (v) of the Court Fees Act. (*Daniels, J.*) *BIHSHEN SAHAI v. CHHOTY LAL.*

L. R. 5 A. 712 : 22 A. L. J. 911.

—Sch. I, Art. 1—Cross objections—Costs—Court-fee.

A memorandum of cross objections which relates to costs only should be stamped *ad valorem* on its value and is not to be treated as a mere application. (*Robinson, C. J. and Baguley, J.*) *MA SHIN v. MAUNG SHWE HUIT.*

2 Rang. 687 : 3 Bur. L. J. 279.

—Sch. I, Art. 1—Cross-objections—Sale-deed—Suit to set aside—No legal necessity as to part. 1924 A. 175

—Sch. I, Arts. 4 and 5—Review—Presentation to Stamp Reporter during vacation—Valid presentation—Half Court-fees—Payment if sufficient. See COURT FEES ACT, S. 14.

39 C. L. J. 344.

—Sch. I, Art. 5—Application for review—Court-fee payable on. *NAGESHAR SAHAI v. SHIAW BAHADUR.*

1924 Oudh 108.

—Sch. I, Art. 5—Court-fee payable on review application—Appeal filed before the new Court Fees Act—Receiver application filed afterwards—Proper Court-fee, Beng. Court Fees Act, Amendment Act.

COURT FEE, S. SCH. I, ART. 5.

The subject-matter of an appeal was valued at Rs. 7,750 and on the 20th December 1919, a court-fee of Rs. 385 was paid on the memorandum in accordance with the table rates of *ad valorem* fees embodied in Sch. I of the Court Fees Act, 1870. The appeal was thereupon registered and was heard in due course. Judgment was pronounced on the 29th August 1922, when the appeal was dismissed with costs. On the 21st November 1922, the appellant presented the application for review of judgment. The application bore a court-fee of Rs. 192-8-0 that is, one half of Rs. 385, the amount payable and paid on the memorandum of appeal, when it was lodged in this Court. After the 20th December 1919 when the memorandum of appeal was filed and before the 21st November 1922, when the application for review was lodged, the Bengal Court Fees Amendment Act, 1922 (Act IV of 1922, B. C.) had come into force on the 1st April 1922. Sec. 5 of this amending statute modified Art. 1 of Sch. I of the Court Fees Act, 1870, by enhancement of rate of fee payable on plaints, written statements and memorandum of appeal. Sec. 9 as a corollary altered the table of rates of *ad valorem* fees appended to the same Schedule. The consequence was that from the 1st April 1922, the amount of Court-fee payable on a memorandum of appeal valued at Rs. 7,750 was raised from Rs. 385 to Rs. 615. *Held*, that neither under the Court Fees Act as originally framed in 1870 nor under the Court Fees Act amended in 1922, can a petitioner for review of judgment be called upon to pay Court Fees on the basis of the fee which would be payable on the plaint or memorandum of appeal if it were to be filed on the date of the application for review. The amount must be calculated on the basis of the fee leviable (which, in the normal course of events, is the fee actually levied,) on the plaint or memorandum of appeal according to the law in force when the plaint or memorandum is filed in Court. Tested in the light of this principle the application in the present case must be deemed to bear the correct Court-fee and must accordingly be heard on the merits. (*Mookerjee and Cuming, JJ.*) *NANDI LAL AGRANI v. JOGENDRA CHANDRA DUTTA.*

28 C. W. N. 403 : 39 C. L. J. 222 :
82 I. C. 297 : 1924 Cal. 881.

—Sch. I, Art. 5—Application for Review—Court-fee payable on—Whether the same as on appeal.

An application for review of the decision of a Court on an appeal must pay full court-fee on the valuation of the appeal and not merely on the subject of the review application. Had the legislature intended that an *ad valorem* fee should be levied only on the value of the subject-matter in respect of which relief was sought by the application for review, it could have said so in clear and definite terms. The words "Plaint" or "Memorandum of appeal" mean the plaint or memorandum of appeal in which the judgment review of which is asked for, was passed. 31 All. 294 ; 3 C. W. N. 292 followed. (*Daniels and Lytle, JJ.*) *KUAR NAGESHAR SAHAI v. SHIAM BAHADUR.*

11 O. L. J. 339.

COURT FEES ACT (VII OF 1870), SCH. II, ART. 17.

—Sch. II, Art. 17—*Suit for reversal of patni sale—Court-fee payable on—Amending Act (IV of 1922)—Effect of.*

A suit for the reversal of a patni sale is not solely for a declaration that the sale is a nullity. It is on the other hand a suit for the reversal or cancellation of sale, on the assumption that if the validity of the sale is not challenged the sale would remain operative between the parties.

Prayers for injunction and for confirmation of possession are prayers for consequential relief. Where the suit had been instituted on the 16th June 1920, the amount of Court-fee leviable on the plaint must be determined by a reference to the law as it stood on that date, irrespective of the amendment under Bengal Act (IV of 1922). (*Mookerjee and Chotzner, JJ.*) TARAPRASANNA CHAUDHAR V. NRISINGHA MURARI.

51 Cal. 216 : 81 I. C. 731 : 28 C. W. N. 683 : 39 C. L. J. 212 : 1924 Cal. 731.

—Sch. II, Art. 17, S. 7 (4) (c)—*Applicability—Execution of mortgage decree against joint family—Resistance by some members—Declaratory suit that the mortgagee be entitled to attach and sell the joint family estate—Whether consequential relief.*

In a suit for enforcement of the mortgage against a joint family of defendants 1–6, and a personal decree was passed against defendant 1 only, as no necessity was proved, and the decree-holder applied for execution against 1st defendant, defendants 3, 7 and 8 and resisted the application on the strength of a prior partition, and deft. 10, on a prior sale to him by the judgment-debtor for consideration and the 1st deft.'s share was diminished. The decree holder filed a declaratory suit for holding that the sale to the 10th defendant was nominal, and that the prior partition suit filed on behalf of defendant 3, did not take place, with a specific relief, that it may be declared that the plaintiffs are entitled to realise their decree from the joint properties by attachment and sale. It was contended that the Court-fee paid was insufficient, for, besides the declaration claimed, consequential relief is claimed for, in the last prayer, and *ad valorem* fee under S. 7, cl. 4 (c) should be paid.

Held, that the last mentioned relief is a mere surplusage and the relief sought is merely declaratory and the Court-fee charged should be under Sch. II, Art. 17 of the Court Fees Act, (*Jwala Prasad, J.*) MAHABIR PRASAD V. SHYAM BEHARI SINGH. 3 Pat. 795 : 80 I. C. 655 : 1925 P. 44.

—Sch. II, Art. 17 (iii)—*Scheme suit—Prayer for temporary mandatory injunction to compel defendant to deposit amount in Court—Ad valorem Court-fee if payable thereon.*

Where in a suit under S. 92, Civil Procedure Code, the plaintiff claims among other reliefs a temporary mandatory injunction to compel the defendant to deposit in Court immediately a sum of Rs. 1,24,000 due from him to the trust, it is in effect only a prayer for an account falling clearly within the express words of S. 92. The character of the suit is not altered and a Court-fee of Rs. 50 as fixed in Sch. II, Art. 17 (iii) of the Court Fees

COURT FEES ACT (VII OF 1870), SCH. II, ART. 17 (6).

Act is sufficient. (*Venkatasubba Rao, J.*) RAMA-NUJA NAIDU V. ALAGAPPA CHETTY.

20 L. W. 716 : 35 M. L. T. 124 (H. C.) : 1924 Mad. 882 : 47 M. L. J. 656.

—Sch. II, Art. 17 (3)—*Joint family property—Mortgage of—Suit for declaration of invalidity—Court-fee.*

A suit by a member of a joint Hindu family for a declaration that a mortgage by his coparcener of family property is not binding on the same falls under Sch. II, Art. 17 (iii) of the Court Fees Act. The declaration asked for does not involve a cancellation of the mortgage deed and *ad valorem* duty is not payable. (*Broadway and Campbell, JJ.*) SHAM DAS V. CHARN DAS.

78 I. C. 782.

—Sch. II, Art. 17 (3) and (vi)—*Appeal—Valuation—Suit for commutation of grain rents into money rents—Court-fee payable. See C. P. CODE, S. 115.*

46 M. L. J. 450.

—Sch. II, Art. 17 (4)—*Suit for declaration that money is jointly due. MT. UTTAM DEVI V. DINA NATH.*

75 I. C. 774.

—Sch. II, Art. 17 (6)—*Mahomedan co-sharer—Suit for separate possession.*

1924 Mad. 207.

—Sch. II, Art. 17 (6)—*Suit for declaration of title and for partition—Court-fee.*

A person alleging he was in possession of certain property asked for a declaration of title as a cloud had been cast on it. He also asked for partition on the basis of title. *Held*, Art. 17 (vi) applied. (*Greaves and Chakravarti, JJ.*) RAJANI KANTA BAG V. RAJABALA DAS.

29 C. W. N. 76.

—Sch. II, Art. 17 (6)—*Suit for cancellation of decree—Effect on defendant—Value of subject-matter.*

In a suit for cancellation of a mortgage decree which would still leave the defendant free to institute another suit on the mortgage, the subject-matter of the suit is the amount of the decree minus the value of the chance which the defendant has of obtaining another decree. The latter not being ascertainable, the value of the claim in the suit cannot be ascertained and the case falls under Sch. II, Art. 17 (vi). (*Hallifax, A. J. C.*) MAHADEO GANESH SOHNI V. SADASHIV.

78 I. C. 437.

—Sch. II, Art. 17 (6)—*Suit for partition—Declaration of right to partition and possession—Ejectment suit—Court-fee payable on.*

Ordinarily, where the plaintiff in the case, as laid by him in the plaint, affirms that he is in possession of a portion of the joint estate and claims a change in the mode of enjoyment of the property and prays for separate possession of his share as the result of redistribution of the property under the separate management of the parties, his suit is one for partition and separate possession of his share in the entire property, and as such the claim falls under Article 17 clause (6) of Schedule II of the Court Fees Act, and a fixed fee of Rs. 10 only is payable thereon. Where, however, the plaintiff admits that his

COURT FEES ACT (IV OF 1922), SCH. II, CR. PRO. CODE (V OF 1898), S. 4 (h).
ART. 17 (iii).

title is disputed and that he is out of possession and enjoyment of the property sought to be partitioned, and he does not hold or possess or occupy any portion or item of the divisible property, and asks for partition, his suit must be treated practically as an ejectment suit, and an *ad valorem* Court-fee is leviable on a plaint in such suit.

The Court will have to see whether the plaintiff claims anything more than a change in the mode of enjoyment of the property by partition or, in other words, whether it is a part of his cause of action as disclosed in the plaint that the defendants have denied his right for partition, or his right to joint possession in the property, or the nature of the property in the suit involved either in whole or in part. If he seeks a declaration of his right to partition on the ground that it is disputed it may safely be said that he claims something more than a change in the mode of enjoyment. This must be determined with reference to the tenor of plaintiff's claim as laid in the plaint, *i.e.*, on the cause of action as disclosed in the plaint. If the plaintiff alleges that each party is in possession of what he says is joint family property, then, on the principle that possession of one co-owner is possession of another the plaint cannot be treated as one instituted by person who is admittedly out of possession or whose right to partition is admittedly disputed, or the quantum of whose interest in the joint property is admittedly a matter on which he himself seeks an adjudication of the Court. Such a suit is one for partition of joint family property and must be distinguishable from a suit for declaration of his right to partition and possession, or for possession of his share on partition, or for ejectment by a person who admits that he is wrongfully excluded from enjoyment of joint family property. In the latter class of suits what the plaintiff himself seeks is an establishment of his own title or right to partition of the property which is already in dispute. (*Kinkhede A. J. C.*) *MINAH v. SITARAM*.

7 N. L. J. 91 : 81 I. C. 643 : 1924 Nag. 105.

COURT FEES (AMENDMENT) ACT (IV OF 1922) BENGAL ACT, Sch. II, Art. 17 (iii)—Suit for mere declaration—Appeal—Court fee—Basis of calculation—What appellant ought to have claimed—It to be considered. 1924 Cal. 183.

COURT OF WARDS—Manager—Powers of—Leases—Minor—Suit against for specific performance.

The manager of an estate under the Court of Wards can enter into an agreement to grant a lease, and a suit to enforce such agreement can be filed against the minor owner of the estate. (*Jwala Prasad and Kulant Sahay, JJ.*) *RUDRA DAS CHAKRAVARTY v. KUMAR KAMAHYA NARAYAN SINGH*. 3 Pat. 968.

CRIMINAL LAW AMENDMENT ACT (XIV OF 1908), Ss. 15 and 17—Instigating formation of unlawful assembly—Contribution of funds—Abetment of offence—I. P. C., Ss. 107, 108 and 117.

A man who instigates the formation of an association, the purposes of which are such as to render that association unlawful and contributes to and solicits contributions for that association may, broadly speaking, be considered to have contributed to and solicited contributions for the

purpose of such association. But a penal statute has to be construed strictly and before an association can have a purpose it must be in existence and any contribution to or solicitation for such an association prior to its formation cannot render a person amenable to S. 17 (1) of the Cr. Law Amendment Act. The intention of the legislature was to render punishable only such contributors, etc. who contributed or solicited contributions for the purpose of an *existing* association. But such acts amount to "instigation" of the formation of an association which is unlawful under S. 15 (2) (b) of the Criminal Law Amendment Act. The conduct of the accused amounting to abetment of the commission of an offence by a class of persons exceeding 10 is liable to the penalty provided by S. 117, I. P. C.

A person is said to "instigate" another to an act when he actively suggests or stimulates him to the act, by any means or language direct or indirect whether it takes the form of express solicitation or of hints, insinuation or encouragement. 22 M. L. T. 373 Ref. (*Broadway and Motisagar, JJ.*) *EMPEROR v. MIHAN SINGH*. 5 Lah. 1 : 1924 Lah. 440.

CRIMINAL PROCEDURE CODE—Police officer—If can take surety bond.

A Police officer is not authorized under the Criminal Procedure Code to take a surety bond for the production of any person before the Police. Such a bond is *ab initio* void. (*Martineau, JJ.*) *HAMID ALI v. EMPEROR*.

81 I. C. 200 : 25 Cr. L. J. 712.

—S. 1—Village Magistrates—Applicability of the Code.

S. 1 of the Cr. P. Code should not be read as meaning that Village Magistrate could not complain or be tried under the Code but only that in his official capacity as Village Magistrate that is in the proceedings he takes as Village Magistrate, he is not governed by the Cr. P. Code. (*Krishnan, J.*) *PUBLIC PROSECUTOR v. MARI MUDALI*. 19 L. W. 30 : (1924) M. W. N. 145 : 76 I. C. 653 : 25 Cr. L. J. 221 : 1924 Mad 730.

—S. 4 (h)—Application under S. 107. If a complaint.

An application under S. 107, Criminal Procedure Code, does not fall within the definition of complaint and as such S. 203 does not apply to it. (*Jafar Ali, J.*) *SHAMASUDDIN v. RAM DYAL SINGH*. 76 I. C. 25 (1) : 25 Cr. L. J. 89 (1) : 1924 Lah. 630.

—S. 4 (h)—Complaint—Petition to Deputy Commissioner—Enquiry not undertaken by.

An application to the Police not being enquired into, the applicant petitioned the Deputy Commissioner for an enquiry. *Held*, there was no complaint. (*Kotwal, A. J. C.*) *MAHADU v. EMPEROR*. 75 I. C. 543 : 24 Cr. L. J. 959 : 1924 Nag. 115 (1).

—S. 4 (h)—Complaint—Application under S. 107, Cr. P. Code.

A "Complaint" is an allegation that some person has committed an offence and "an offence" is an act or omission made punishable by any law for the time being in force. An application under S. 107, Cr. P. Code, is not a complaint where

CR. PRO. CODE (V OF 1898), S. 4.

there is merely an allegation that a breach of the peace is likely. (*Kendall, A.J.C.*) *RAM LAL v. BANKATESHAR RAWAN BAHADUR PAL SINGH*.
10 O. & A. L. R. 630 : 1 O.W.N. 359; 81 I. C. 973 :
11 O.L.J. 732 : 25 Cr. L. J. 1149.

—Ss. 4 (h) & 190 (c)—*Complaint—Letter written to District Magistrate—Cognizance.*

Where a letter is written to the District Magistrate conveying the information of an offence and requesting action to be taken it is a complaint within the meaning of S. 4 (h) Cr. P. Code on which a magistrate can take action under S. 190 (c). (*Neave, A. J. C.*) *CHHOTE MAHARAJ v. EMPEROR*,
10 O. & A. L. R. 605.
1 O.W.N. 108 : 25 Cr. L. J. 1147 : 81 I. C. 971.

—S. 4 (h)—Application to court Inspector—If a complaint. *MEHR CHIRAGH DIN v. EMPEROR*.
25 Cr. L. J. 125 : 76 I. C. 189 :
1924 Lah. 258.

—S. 4 (j)—High Court—What is—European British Subject—Plea of. (1924) *M. W. N.* 231.
76 I. C. 695 : 1924 Mad. 373.

—S. 16—*Honorary Magistrate—Trial of cases outside jurisdiction—Legality.*

The Cr. P. Code does not prescribe that any particular class of cases alone should be tried by Honorary Magistrates. The fact that for administrative purposes, the District Magistrate has allotted particular areas to particular Honorary Magistrates does not render proceedings invalid if one of them tries a case falling outside the area allotted to him. (*Baker, J. C.*) *YAKUB v. APPASWAMI*.
81 I. C. 44 (2) : 25 Cr. L. J. 556 (2).

—S. 17—Power of Dt. Magistrate to direct a stay. 76 I. C. 869 (2) : 25 Cr. L. J. 277 (2).

—S. 30—*Offence under Ss. 302 and 120 B—Magistrate if can try.*

A magistrate specially empowered under S. 30 can try a person for offences under Ss. 302 and 120 B as murder was not committed in pursuance of the conspiracy, so that the offence was not punishable with death. (*Marlineau, J.*) *HUSSAIN v. EMPEROR*,
82 I. C. 169 : 25 Cr. L. J. 1241.

—S. 32—Sentence—Enhancement in appeal—Powers of. 1924 A. 130:
76 I. C. 1032 : 25 Cr. L. J. 312.

—S. 35—*Manufacture and possession of excisable article.*

The offence of manufacture of an excisable article necessarily includes that of possession and the two offences cannot be called "distinct" for the purposes of S. 35 of the Criminal Procedure Code. 1 Bom. L. R. 344 Foll. (*Hallifax, A. J. C.*) *SHEIKH MUNIR v. EMPEROR*.

76 I. C. 19 : 25 Cr. L. J. 83 : 1924 Nag. 32.

—S. 45—*Chaukidar—Duty to give information—Mere rumours need not be communicated to police.*

S. 45 of the Cr. P. Code does not make it incumbent on the village chaukidar to communicate to the officer in charge of the Police station any rumour of any occurrence prevailing in the village. It is only an information which he may himself possess that is to be communicated to the

CR. PRO. CODE (V OF 1898), S. 54.

officer-in-charge of the police station. It is noteworthy that the Amending Act XVIII of 1923 has substituted the word "possess" in place of the word "obtain" in S. 45 making thereby only such information which the informant may possess to his own knowledge fit to be communicated to the officer-in-charge of the police station. (*Kulwani Sahay, J.*) *LACHMI SINGH v. EMPEROR*,
(1924) P. H. C. C. 181 : 5 Pat. L. T. 505 :
81 I. C. 620 : 25 Cr. L. J. 972 :
1924 Pat. 691.

—S. 54—Attempt to arrest by police—Absence of warrant—Effect. 1924 A. 201.

—Ss. 54 and 55—*Penal Code, S. 225 B—Arrest by Police Constable without warrant—Resistance—Offence.*

Where a police constable arrests a person and tells him expressly that he is doing so under a particular authority which he claims to have to arrest him, and such arrest is resisted, it will be for the prosecution on a charge under S. 225 B. Indian Penal Code, to establish that the constable who arrested the person had power to act under the authority he claimed to have. It is not sufficient for the prosecution afterwards to say that the constable had authority to arrest under some other provision of law (*Krishnan, J.*) *APPASAMI MUDALI in re*,
47 Mad. 442 :
19 L. W. 504 : 34 M. L. T. (H. C.) 95 : 81 I. C. 51 :
25 Cr. L. J. 563 : 1924 Mad. 555 : 46 M. L. J. 447.

—Ss. 54, 60 & 61—*Object of—Arrest by police without warrant—Production before magistrate—Necessity for.*

Though under S. 54 of the Cr. P. Code a Police Officer may arrest without warrant in the case of a cognizable offence under S. 60 he is bound without unnecessary delay to take or send the person arrested before the Magistrate and under S. 61 this must be done within 24 hours. The precautions laid down in these sections seem designed to secure that within not more than 24 hours some Magistrate shall have Seisin of what is going on and some knowledge of the nature of the charges against the accused, however incomplete the information may be. (*Grieves and Duval, J.J.*) *DWARKADAS HARIDAS v. AMBALAL GANPATRAM*.
28 C.W.N. 850 :
82 I. C. 131 : 25 Cr. L. J. 1203 : 1924 Cal. 893.

—S. 54 (7)—*Arrest without warrant—where can be made—Foreign offence.*

A bare assertion of the commission of an offence does not amount to reasonable suspicion or credible information on the basis of which an arrest can be made without warrant. If there is credible information of the issue of a warrant, that would justify action under the section. The act for which the arrest is made must be one for which there is a present liability to apprehension or detention in custody in British India under the Extradition Laws.

In case of such arrests, the Police must forthwith produce the person arrested before a Magistrate. (*Walmsley and Mukerji, J.J.*) *SUBODH CHANDRA RAY CHOUDHURY v. EMPEROR*.
29 C. W. N. 98 : 40 C. L. J. 489.

CR. PRO. CODE (V OF 1898), S. 61.

—Ss. 61, 167—Production before Court.
NAGENDRA NATH CHAKRABARTI v. EMPEROR
51 Cal. 402 : 1924 Cal. 476.

—Ss. 54 and 497—Arrest without warrant
—Bombay City Police Act, Ss. 33 (g)—Detention
by Magistrate—Extradition Act, Ss. 23 and 10
(4)—Bail.

Where the police arrest a person without warrant either under S. 54 (g) of the Cr. P. Code or S. 33 (g) of the Bombay City Police Act 1902 and the person so arrested is detained by a magistrate under S. 23 of the Extradition Act 1903, it is open to the Magistrate to release the arrested person on bail under S. 10 (4) of the Extradition Act. (*Marien and Fawcett, JJ.*) *In re SHIVRAM SHAMBUDAYAL*.
26 Bom. L. R. 984.

—Ss. 61, 167 and 190—Investigation not completed in 24 hours—Procedure—Cognizance upon report of police—Powers of Magistrate.

The law as laid down in Ss. 61, 167 and 169, Criminal Procedure Code, is that at the expiration of the maximum period of 15 days' detention of an accused person and the additional time necessary to bring him before a Magistrate allowed under Secs. 67 and 167, an accused must either be released by the Police under Sec. 169 security for his appearance if and when required being taken or the Magistrate, empowered in that behalf must either take cognizance if he has before him a police report which ordinarily would be a report in the form laid down in S. 173 which he thinks, makes out a *prima facie* case or he must release him. The provisions of Sec. 190 extend to any offence and notwithstanding the use of the words "Police Report" in Sec. 173, that Sec. 190 (1) (b) cannot be restricted merely to non-cognizable offences and a Magistrate is empowered by Sec. 190 (1) (b) to take cognizance both of cognizable and non-cognizable offences upon a report such as is mentioned in sec. 190 (1) (b). (*Greaves and Panton, JJ.*) *BHOLANATH DAS v. EMPEROR*.
28 C. W. N. 490 : 1924 Cal. 614.

—S. 77—Warrant—Search warrant issued to Thana—Legality of search.

A search warrant was directed to a certain police thana without specifying the name of any officer in the station. The station officer endorsed the warrant to a police constable who was obstructed in executing it. The accused was tried and convicted by the Magistrate and the conviction was confirmed on appeal. *Held*, in revision that the objection to the legality of the warrant not having been taken either at the time of the search or in the court below and as the accused had not shown that they had suffered any prejudice from what at the most was a clerical error, there was no ground for setting aside the conviction. (*Baguley, J.*) *MA KIN v. EMPEROR*.
3 Bur. L. J. 182 : 1924 Rang. 383.

—S. 88—Order refusing to release property from attachment—If revisable.

The High Court can interfere in revision with an order passed by a Magistrate refusing to release property from attachment. (*Shadi Lal, C.J.*) *SANTA SINGH v. EMPEROR*.
25 Cr. L. J. 82 : 76 I. C. 18 : 1924 Lah. 617.

CR. PRO. CODE (V OF 1898), S. 106.

—Ss 90 and 537—Issue of warrant—Statutory form—Omission to record reasons—Effect of—Provisions if mandatory.
51 Cal. 1 : 75 I. C. 129 : 1924 Cal. 1.

—S. 94—Whether accused entitled to get copies of statements made by witnesses at the inquest inquiry.

Held, that the accused may be granted a copy of statement made by witnesses at the inquest inquiry and if the inquest was in the custody of court, magistrates should give certified copies on application. If it was not in Court, the magistrate has the power under S. 94, Cr. Pro. Code to call for it to be produced by police. (*Spencer, C.J.*) *CHANLET In re*.
20 L. W. 745.

—Chap. VIII—Object of.

The object of Chapter VIII is partially served even when an accused is on bail for a long time. (*Kennedy, J. C. and Aston, A. J. C.*) *ALLAHADAD v. EMPEROR*.
1924 S. 120 : 17 S. L. R. 160.

—Chap. VIII—Object of.

The primary object of Ch VIII of the Cr. P. Code is not the punishment of suspect for past unproved crimes but to prevent him from committing offences and to afford him an opportunity of reforming himself. (*Kennedy and Bilaram, A. J. C.*) *EMPEROR v. MANU WALED ISMAIL*.
82 I. C. 154 (2) : 25 Cr. L. J. 1226 (2).

—Ss. 106, 126—Demanding security having a certain pecuniary status is not unreasonable.

The provisions of Chapter VIII are not intended to punish but to prevent crime and it is not permissible to limit the security or the amount of security to such descriptions that it is perfectly impossible for the accused to furnish them, thus rendering it certain that they will be committed to jail. The conditions that the security should be given to the extent of Rs. 500 in the case of the first accused, Rs. 250 in the case of the other accused and that securities asked for should be zamindars owning a certain amount of land or paying certain amount of incometax and living in the neighbourhood were held in this case not to be so severe that the accused would have such difficulty in obtaining them. Such conditions are common in Sind and they are not unreasonable. (*Kennedy, J. C. and Aston, A. J. C.*) *ALLAHADAD v. EMPEROR*.
17 S. L. R. 160 : 1924 S. 120.

—S. 106 (as amended by Act XVIII OF 1923)

—Conviction under S. 325 and 149, I. P. C.
—Legality of Security Proceedings.

The Amendment to S. 106 by the new code has made an order under that section impossible where the only section under which the accused are convicted is a section of the Penal Code read with S. 149. The amendment speaks of an offence under S. 149, and no offence is punishable under that section. There must be some substantive offence charged to be read with S. 149. (*Adami and Bucknill, JJ.*) *CHHEDE SINGH v. EMPEROR*.
3 Pat 870.

—S. 106—Order for security for keeping the peace—Conviction for wrongful confinement.
1924 Lah. 311.

CR. PRO. CODE (V OF 1898), S. 106.

—S. 106—Security for good behaviour—Rejection of sureties—Grounds for—Right of appeal. 25 Cr. L. J. 796 : 81 I. C. 316 : 1924 Oudh 80

—S. 106—Involve—Meaning of—Order under—When proper.

The word "involve" in S. 106, Cr. P. C. denotes the inclusion not only of a necessary but also of a probable feature, circumstance, antecedent condition or consequence. To justify an order for security there must be an express finding that the act committed involved a breach of the peace or an evident intention of committing the same or the evidence must be so clear as to satisfy the court (without an express finding) that such was the case. (*Baker, O. J. C.*) *NANHA v. KANHAYALAL*. 75 I. C. 983 : 25 Cr. L. J. 71 : 1924 Nag. 118.

—S. 106—Security to keep the peace—Offence involving a breach of the peace—Meaning of—Conviction under Section 342, I. P. C.—Order under S. 107, Cr. P. Code if legal.

The expression "other offence" in S. 106, Cr. P. Code, refers to offence *ejusdem generis* with the offences against public tranquility and of assault mentioned in the section. To attract the operation of S. 106, Cr. P. Code, it is enough if the offence brought home to the accused necessarily includes or implies a breach of the peace. It is not necessary that apart from the offence, there must have ensued a breach of the peace. The facts constituting an offence must be looked at, for determining whether the case comes within S. 106 or not. Wrongful confinement *per se* is not an offence involving a breach of the peace but if the accused is found to have violently seized another person, tied his hands and wrongfully confined in an open garden, security can be ordered under S. 106, Cr. P. Code. (*Venkatasubba Rao, J.*) *KUPPA REDDIAR In re*.

20 L. W. 481 : 47 Mad. 846 : 81 I. C. 920 : 25 Cr. L. J. 1096 : 1924 Mad. 808 : 47 M. L. J. 232.

—S. 106 (3)—Appellate court—Powers of—If limited by powers of trial Court. 1924 Nag. 49.

—S. 107—Application under—Dismissal without taking evidence—Propriety.

S. 203 does not apply to applications under S. 107 but every Magistrate possesses inherent power of refusing an application which he finds groundless and if he is satisfied that the apprehension of breach of the peace does not exist, he can dismiss the application without taking evidence. (*Zafar Ali, J.*) *SHAMASUDDIN v. RAM DAYAL SINGH*. 76 I. C. 25 (1) :

25 Cr. L. J. 89 (1) : 1924 Lah. 630.

—Ss. 107 and 112—Allegations not specific—Effect. 2 Pat. L. R. 159 (Cr.) :

5 Pat. L. T. 352 : 25 Cr. L. J. 369.

—S. 107—Consent to be bound over—Effect. 10 O. and A. L. R. 11 :

L. R. 5 A. 21 (Cr.) : 1924 A. 269.

—Ss. 107 and 239—Conspiracy to boycott—Joint trial—Legality Preliminary order not served on absent accused, but explained in Court—Effect.

CR. PRO. CODE (V OF 1898), S. 107.

Were a number of persons have joined together to boycott a class of people, joint action can be taken against all of them under S. 107, Criminal Procedure Code, and the proceedings are not vitiated by such joint trial.

Where the preliminary order could not be served on a person as he was absent, but it was read to him in court when he appeared the requirements of law are satisfied. (*Prideaux, A. J. C.*) *BAHRAO v. EMPEROR*. 76 I. C. 228 : 25 Cr. L. J. 132 : 1924 Nag. 166.

—S. 107—Joint Trial—Contending parties. 76 I. C. 568 : 25 Cr. L. J. 200.

—Ss. 107, 110—Joint trial of members of gang—Propriety of. 25 Cr. L. J. 952 : 81 I. C. 600 : 1924 A. 195.

—S. 107—No objection to furnish security—Order if competent.

A person against whom proceedings under S. 107 are initiated cannot be asked to furnish security merely because he stated he had no objection to doing so. There must be some evidence to show an apprehension of a breach of the peace by acts on his part. (*Broadway, J.*) *JOTI MALIK v. EMPEROR*. 81 I. C. 198 : 25 Cr. L. J. 710.

—S. 107—Order of attachment—If legal.

In proceedings under S. 107, Cr. P. C. attachment of property cannot be ordered. (*Neave, A. J. C.*) *RAM SARUP v. EMPEROR*. 77 I. C. 238 : 25 Cr. L. J. 350 : 1924 Oudh 345.

—S. 107—Refusal to take action—If revisable.

An order of a magistrate refusing to take proceedings under S. 107, Cr. P. Code cannot be set aside by a Sessions Judge in revision. (*Greaves and Panton, JJ.*) *PHANI BHUSAN ROY v. KUNJA BEHARI BISWAS*. 81 I. C. 167 : 25 Cr. L. J. 679.

—S. 107—Scope of—Breach of the peace—Discretion of Magistrate.

The object of S. 107, Cr. P. Code, appears to be rather administrative than judicial. If the Magistrate who is responsible for the administration of a district or subdivision is not satisfied that there is any need to take proceedings under that chapter it may be questioned whether any superior judicial authority can be called in to interfere with the exercise of his discretion, though there is no doubt that judicial authority can properly be exercised to check the magistrate's proceedings if he exceeds the powers given him by law for the prevention of offences. S. 107, Cr. P. Code, was not intended by the legislature to give any redress to the person making an application under that section, for there can clearly be no redress unless there has first been an injury, (*Kendall, A. J. C.*) *RAM LAL v. BANKATESHAR RAWAN BAHADUR PAL SINGH*.

10 O. & A. L. R. 630 : 1 O. W. N. 359 :

11 O. L. J. 732 : 81 I. C. 973 : 25 Cr. L. J. 1149.

—Ss. 107, 436 and 438—Proceedings under S. 107—Enquiry and order by Sub-Divisional Magistrate—Order for further enquiry by District Magistrate.

CR. PRO. CODE (V OF 1898), S. 107.

The District Magistrate set aside the order of a Sub-Divisional Magistrate on an enquiry under S. 107, Cr. P. Code, and directed a further enquiry to be made. *Held* that though the District Magistrate had power to set aside an order, he had no power to send the matter back for further enquiry. (*Mears, C. J.*) *ROSHAN SINGH v. EMPEROR*. 46 A. 235 : 22 A. L. J. 129 : L. R. 5 A. 64 (Cr.) : 77 I. C. 819 (1) : 25 Cr. L. J. 467 (1) : 1924 A. 592.

—Ss. 107, 112 and 117—*Proceedings under Mode of trial—Penalty for failure to furnish security.*

The provisions of Sec. 112, Criminal Procedure Code, ought to be complied with strictly. In proceedings started under Sec. 107 of the Criminal Procedure Code, the enquiry should, as nearly as practicable, be in the manner prescribed for conducting a charge and recording evidence in summons cases. The case should not be treated as a warrant case.

A final order directing that in default of furnishing the required security the accused should undergo rigorous imprisonment for one year is also altogether illegal. (*Sulaiman, J.*) *UTTAM CHAND SINGH v. EMPEROR*. L. R. 5 A. 24 (Cr.) : 1924 All. 695.

—Ss. 107 and 545—*Security proceedings—Order for payment of costs*

S. 545 of the Code of Criminal Procedure cannot possibly apply to a case under S. 107 and an order directing the accused persons to pay the costs of the complainant is therefore, *ultra vires*. (*Sulaiman, J.*) *SHEO PRASAD SINGH v. MAHANGU NONIA*. L. R. 5 A. 12 (Cr.) : 77 I. C. 828 : 25 Cr. L. J. 76 : 1924 All. 694 (2).

—Ss. 108 and 397—*Applicability of—Sentence of imprisonment—Withdrawal of security.* 10 O. L. J. 593.

—S. 110—*Action taken on police diary—Binding over accused—Evidence.* 25 Cr. L. J. 45 (1) : 75 I. C. 733 (1) : 1924 A. 142.

—S. 110—*Evidence of suspicion.* 77 I. C. 886 : 25 Cr. L. J. 486.

—Ss. 110, 117 (4)—*Good behaviour—Security proceedings—Magistrate's duty in joint enquiry—Extent of discretion.*

In an application for taking security proceedings under Ch. VIII of the Code, the magistrate acted on the evidence of certain informants which was vague and of a shadowy nature. It was contended on appeal that the Magistrate had not exercised a wise discretion and had not followed the provisions of S. 110 of the Code. *Held* setting aside the order of the magistrate.

(1) That it entailed a heavy duty on the magistrate to exercise the powers under S. 110 of the Code with much discretion, and that he must have acted only when the information was precise and supported at the subsequent enquiry by satisfactory evidence.

(2) Though S. 117, cl. 4 permitted the magistrate to hold a joint enquiry against several suspects, associated together in the matter under enquiry it was incumbent on him to consider the case of

CR. PRO. CODE (V OF 1898), S. 110.

each suspect individually on its own merits and to come to a separate finding in respect of each of them. (*Bilaram, A. J. C.*) *KHAIRO v. REX*. 25 C. L. J. 1377.

—S. 110—*'Habit' and 'habitually' imply only repetition not inclination by nature.*

The word "habit" means persistence in doing an act, a fact which is capable of proof by adducing evidence of the commission of a number of similar acts "Habitually" must be taken to mean repeatedly or persistently. (*Kotwal, A. J. C.*) *THE LOCAL GOVERNMENT v. HANMANTRAO*. 75 I. C. 764 : 25 Cr. L. J. 60 : 1924 Nag. 19.

—Ss. 110 and 439—*Order under—Revision Powers of High Court.*

Though the High Court finds it difficult to interfere with orders under S. 110, Cr. P. C. still it has to be satisfied that the evidence is of a character which will reasonably support the inference that it is necessary in the interest of public security to send the man to prison or to bind him down. (*Ryves, J.*) *ALIM-UD-DIN v. EMPEROR*. 22 A. L. J. 678 : L. R. 5 A. 97 (Cr.) : 25 Cr. L. J. 1172 : 1924 A. 569.

—S. 110—*Proceeding under S. 112—Notice under—Validity—Conditions—Defects in notice—If cured by explanation given by prosecuting Inspector at commencement of trial—Object of notice under S. 112—Joint trial in proceedings under S. 110—When bad.*

The issue of a preliminary notice under S. 112, Criminal Procedure Code is not a formal matter ; it is a judicial act to be exercised after due consideration of the materials placed before Magistrate.

Held, that the notice served upon the petitioners under S. 112, Cr. P. Code did not comply with the provisions of the Code as it was very meagre and did not contain sufficient details regarding the charge brought against them.

Held, further that the object of the notice under S. 112, Cr. P. C. being to enable the accused to prepare for his defence and to summon witnesses on his side before the actual trial commences, the defects in the notice could not in any way be remedied by explanations given by the Prosecuting Inspector at the commencement of the trial.

In a case in which proceedings were taken against the two petitioners not only for their conduct coming within clauses (d) and (e) of S. 110, Cr. P. Code but also under Clause (f) thereof for the reason that they were so desperate and dangerous as to render their being at large without security hazardous to the community, both the petitioners were tried jointly, and evidence relating exclusively to the nefarious acts of each of the petitioners was let in, in addition to the evidence regarding the events in which it was alleged that they were associated together, and the Magistrate passed an order against them on a consideration of the entire evidence thus introduced into the record against both the petitioners.

Held, that the petitioners should not have been jointly tried and had been prejudiced by such joint trial. (*Madhavan Nair, J.*) *KUTTI GOUNDAN In re*. 47 M. L. J. 689.

CR. PRO. CODE (V OF 1898), S. 110.

—S. 110—*Proceedings under—Substantive offence not proved—Propriety of taking action under section.*

Where a man has been arrested on a substantive charge but released because that charge could not be sustained, a prosecution under S. 110 on the same evidence is not desirable. (*Wazir Hasan, A. J. C.*) SITAL DIN v. EMPEROR.

77 I. C. 302 : 25 Cr. L. J. 366.

—S. 110—*Proceedings under—Prosecution and defence evidence—Both reliable—Effect of.*

In an enquiry under S. 110, Cr. P. C., a magistrate took the quality of the witnesses and dismissing on both sides those whose evidence he considered faulty considered 15 witnesses to be reliable on the side of the prosecution and 10 equally reliable on the side of the defence. Then he went by the vote of the majority and decided against the defence. Held that the order of the magistrate was illegal. The fact that ten witnesses who were considered to be respectable and reliable had deposed that the petitioners were men of good character entitled them to an acquittal. (*Dalai, J.C.*) BAHADUR v. EMPEROR.

10 O. and A. L. R. 1014.

—S. 110—*Proof of general repute—Evidence of enemy—Personal knowledge of Magistrate.*

A person cannot be bound down under S. 110, Cr. P. C. upon evidence of repute unless such evidence is very strong and almost universal. The evidence of an enemy or the personal knowledge of the magistrate cannot be the basis of an order. (*Scott Smith, J.*) WALI MUHAMMAD KHAN v. EMPEROR.

25 Cr. L. J. 808 : 81 I. C. 344.

—S. 110—*Suspicion—If sufficient—Evidence as to good character—Powers under to be exercised cautiously.*

Mere suspicion is not sufficient to bind a man down to be of good behaviour under S. 110, Cr. P. C. The evidence ought to be of such a nature as to lead to a reasonable and definite ground for concluding that the petitioner is a habitual offender. Where the person is able to produce witnesses on his behalf to speak of his good character, the court should not disbelieve the same unless there are substantial reasons for doing so. The powers under the section should be exercised with extreme caution and with very great discretion. (*Kulwant Sahay, J.*) AMJAD ALI v. EMPEROR.

5 Pat. L. T. 129 :
2 Pat. L. R. 79 (Cr.) : 25 Cr. L. J. 35 :
75 I. C. 723 : 1924 P. 498.

—Ss. 110 (a) and (f), 117 and 118—*Charge under—Nature of evidence—Evidence of repute—Evidence of good character adduced by accused—Duty of Court.*

To prove a charge under Sec. 110, Clause (a) of the Code of Criminal Procedure, with which the petitioners were charged in the present case, it is necessary to keep in mind that such evidence must be specific and must relate to particular instances within the knowledge of the witnesses. Mere belief and information without reference to acts and instances which have induced the witnesses to form the opinion can hardly be regarded

CR. PRO. CODE (V OF 1898), S. 118.

as evidence of repute within the meaning of Sec. 117 (3) of the Code. The evidence must be of persons who are acquainted with the accused and live in the neighbourhood and are themselves aware of the accused's reputation. It must be an opinion formed by the witnesses from specific cases coming to their knowledge and not merely from reports or rumours received from others. For instance, where a witness says that to his knowledge a certain person is a thief or a house breaker by habit and on being pressed to give the source of his knowledge he merely says that there is a rumour to such effect or that he heard it from the villagers generally without being able to name any one of them, such evidence is not admissible in law. Where in a proceeding under Sec. 110, Criminal Procedure Code, the accused person is able to produce witnesses on his behalf to speak of his good character the Court ought to pay particular attention to such evidence and to give substantial reason for not believing such evidence before it makes an order under S. 118. (*Kulwant Sahay, J.*) RAMLAGAN AHIR v. EMPEROR.

5 Pat. L. T. 166 : 2 Pat. L. R. 98 (Cr.) :
25 Cr. L. J. 985 : 81 I. C. 633 : 1924 P. 500.

—Ss. 112 and 118—*Bond—Forfeiture—Discharge.*

The bond contemplated by Ss. 112 and 118, Cr. P. Code is one bond for one amount, and is discharged on forfeiture by the payment of the amount due by either the principal or the surety. In no case can an amount in excess of the amount secured by the bond be demanded or recovered from the person bound his sureties individually or collectively. (*Scott Smith, O.C.J.*) HARNAM v. EMPEROR.

5 Lah. 448.

—Ss. 112, 118—*Sureties—Rejection—Subsequent imposition of conditions—Control—Test of.*

It is not open to a Magistrate to reject sureties as unfit because they do not comply with certain arbitrary conditions which were not included in the order under S. 112. In the case of a notorious thief, the sureties cannot be asked to show their good faith and influence over him by first producing in court his father who was also absconding. (*Kennedy and Bilaram, A.J.C.*) EMPEROR v. MANU WALAD ISMAIL.

82 I. C. 154 (2) : 25 Cr. L. J. 1226 (2).

—S. 114—*Arrest when justified—Order—what to contain.* MANIRUDDIN v. EMPEROR.

2 Pat. L. R. 45 (Cr.) : 5 Pat. L. T. 95 :
1924 P. 320.

—S. 117 (3)—*General repute—Evidence of—Suspicion—If amounts to.*

The evidence of a mere suspicion of a person having taken part in certain criminal offences is not evidence of general repute within the meaning of S. 117 (3). (*Kulwant Sahay, J.*) AMJAD ALI v. EMPEROR.

5 Pat. L. T. 129 :
2 Pat. L. R. 79 (Cr.) : 25 Cr. L. J. 35 :
75 I. C. 723 : 1924 P. 498.

—S. 118—*Sureties—Fitness of—Enquiry into—If can be delegated.*

CR. PRO. CODE (V OF 1898), S. 122.

It is not competent to a magistrate who has passed an order under S. 118, Cr. P. C., to delegate to another the duty of inquiring into the sufficiency of the security tendered, but should make such enquiry himself. (*Moti Sagar, J.*) KANWAL NABH v. EMPEROR.

25 Cr. L. J. 91 : 76 I. C. 27 : 1924 Lab. 672.

—S. 122—Surety for good behaviour—Rejection of—Grounds for. 1924 Oudh 132 (2).

—S. 123—*Nature and scope*—Sessions Judge required to pass definite order binding over and not to confirm Magistrate's order.

Proceedings under S. 123 are not proceedings in confirmation but for orders and a Sessions Judge has to pass a definite order binding over and not to confirm an order passed by a Magistrate. (*Datal, J.C.*) BAHADUR v. EMPEROR.

1 O. W. N. 773.

—S. 123 (2)—*Period should ordinarily begin from date of Magistrate's Order.*

Where a Sessions Judge to whom a case was submitted under S. 123 (2) Cr. P. C. directed that the period for which the accused were to be bound, should begin from the date of his order and not from the Magistrate's order.

Held, that the order in fact amounted to an enhancement of sentence, and that it was undesirable that the Court should do that even if it has the power, without special reasons. (*Kennedy, J.C. and Aston, A.J.C.*) ALLAHADAD v. EMPEROR.

17 S. L. R. 160 : 1924 S. 120.

—S. 123 (2)—Sessions Judge need not write full judgment in a case under S. 123 (2).

Section 123 (2) seems to contemplate more of administrative than judicial functions to be exercised by the Sessions Judge when a case is submitted to him under the section. He should however hear both the accused persons and the Crown and see at any rate whether there are substantial grounds for demanding security. It is not however necessary to deal with such matter as if it were an appeal nor is it necessary to write a judgment as if it were an appeal. (*Kennedy, J.C. and Aston, A.J.C.*) ALLAHADAD v. EMPEROR.

1924 S. 120 : 17 S. L. R. 160.

—S. 123 (2)—*Powers of Sessions Judge—If can order re-hearing.*

S. 123 (2) does not authorise a Sessions Judge to order the re-hearing of a case. He can call for further information if he desires it or he can consider the evidence on the record and pass such order as he thinks fit. (*Newbould and B. B. Ghose, JJ.*) NARAYAN SINGH v. EMPEROR.

81 I. C. 936 : 25 Cr. L. J. 1112.

—S. 132—Police officer in charge of patrol—Boat—Firing on crowd—Prosecution—Sanction if necessary.

77 I. C. 819 (2) : 25 Cr. L. J. 467 (2).

—Ss. 133 and 137—Complaint—Notice—Enquiry—Order absolute.

76 I. C. 826 : 25 Cr. L. J. 266

—S. 133—*Nuisance—Dispute about pathway—Criminal Court—Jurisdiction.*

CR. PRO. CODE (V OF 1898), S. 144.

Where the dispute between the parties is as regards a private pathway and has nothing to do with a public nuisance, the order of the magistrate under S. 133, Cr. P. Code is without jurisdiction and the parties must be referred to a civil court. (*Kendall, A.J.C.*) BHAIYA GAURI SHANKER v. BHAGALU PANDEY.

10 O. & A. L. R. 780 : 11 O. L. J. 659 : 1 O. W. N. 356 : 81 I. C. 942 : 25 Cr. L. J. 1118.

—S. 133—*Removal and reconstruction of bund—Order for—Verdict of jury.*

It is open to a magistrate under S. 133, Cr. P. Code, to order the removal of a bund but he cannot order its reconstruction after its removal. Where in a proceeding under S. 133, Cr. P. Code the verdict of the jury provided firstly for the removal of the bund and secondly for its reconstruction, the magistrate could not split up the verdict so as to give him jurisdiction to deal with the matter under S. 133, Cr. P. Code. (*Sanderson, C.J. and Chotzner, J.*) RAHIMADDI JAMADAR v. SHER ALI.

40 C. L. J. 597.

—S. 133—*Unlawful obstruction—Overhanging branch of a tree—Branch likely to fall at some future time—Danger to public.*

S. 133 of Cr. P. Code deals with the condition of things at the time when the enquiry is held. If at such a time a house or branch of a tree is likely to fall and thereby endanger the life of passersby, no doubt action might be taken under the section. But it is not meant to apply to what may happen at some indefinite time in the future or under quite abnormal circumstances. Where a solid and vigorous branch of a tamarind tree is 15 ft. above the level of a country-road, it cannot be said that an obstruction at the height, having regard to the normal traffic is an unlawful obstruction within the meaning of S. 133, Cr. P. Code. Even if it could be held that the branch was likely at some time or other and under abnormal circumstances, to prove an obstruction it is not necessary for the magistrate to go to the extreme length of ordering it to be cut down. A tamarind tree is an object of veneration to many Hindus and the safety of the public, which after all is what is contemplated by the section would have been adequately secured if the magistrate had ordered proper support to be given so as to prevent the branch from falling. (*Ryves, J.*) GOKUL v. EMPEROR.

22 A. L. J. 436 : L. R. 5 A. 84 (Cr.) : 1924 All. 667.

—S. 139 A.—*Obstruction of public drain—Settlement record in favour of accused—Duty of Court.*

In proceedings under S. 133 for encroaching on and obstructing a public drain the accused produced a Settlement Record showing the land in dispute belonged to him. *Held* the Criminal Court should stay proceedings and leave the parties to have their rights decided in a Civil Court. (*Greaves and Panton, JJ.*) DEBENDRA NATH CHOUDHURY v. CHAIRMAN, LOCAL BOARD, ASANSOL.

81 I. C. 904 : 25 Cr. L. J. 1080.

—Ss. 144, 145 and 439—*Dispute as to possession of land—Action of magistrate—Expiry of time fixed for order under S. 144, Cr. P. Code—Revision.*

Cr. P. CODE (1898), S. 144.

Proceedings had been drawn up under S. 144, Cr. P. Code, between petitioners and one H. and others regarding a plot of about 24 bighas of raiyati land which had newly formed on a *diara*. These proceedings under S. 144 were converted into proceedings under S. 145 and the parties gave the Court to understand that all they wanted was a demarcation of the plots they respectively claimed. The opposite party in those proceedings stated that they did not claim the 24 bighas which was the subject of the proceedings. An amin was directed to go and demarcate the *diara* lands and eventually submitted a report which was not agreed to by one of the parties. A petition was put in by the opposite party that the present petitioners were interfering with their possession. The Sub-Divisional Officer thereupon passed an order under S. 144 directing the petitioners not to interfere with the possession of the opposite party with regard to the plots. The petitioners applied to the High Court for revision of the order under S. 144, Cr. P. C. but the order had expired by lapse of time. *Held*, that notwithstanding that the order had lapsed the case was one for interference by the High Court in revision. The opposite party were not parties to the proceedings under S. 145 nor had any report been received from the police as to their possession of the plots or of a likelihood of a breach of the peace. The procedure of the Sub-Divisional officer in passing the final order under S. 144, Cr. P. C. without issuing any preliminary notice to the present petitioners and without hearing them was totally wrong. (*Adam, J.*) DHANRAJ BHAGAT v. BHARAT NARAIN SINGH.

2 Pat L. R. 198 (Cr.) : 1924 P. 703.

—Ss. 144 and 147—*Ex parte order declaring road to belong to respondent—Legality.*

Where a petition was put in under S. 144, Cr. P. C., claiming a right of easement over a road and asking for an order under the section on the opposite party on the ground a breach of the peace was imminent, but the Magistrate went over to the opposite party and after some *ex parte* enquiry passed an order declaring the road to belong to the opposite party the order is illegal and contrary to S. 147, Cr. P. Code. (*Kulwant Sahay, J.*) NARENDRA NATH SARKAR v. EAST INDIAN RAILWAY CO. 5 Pat. L. T. 419 : 77 I. C. 807 : 2 Pat. L. R. 209 (Cr.) : 25 Cr. L. J. 455 : 1924 P. 717.

—S. 144—*Order under—Value of as evidence—Rioting—Penal Code, S. 147.*

Undue importance should not be attached to a temporary injunction under S. 144, Cr. P. C., and in a case of rioting an order under S. 144, Cr. P. C., should not be treated as substantive evidence of possession. (*Mullick and Bucknill, JJ.*) GITA PRASAD SINGH v. EMPEROR. 1924 P. H. C. 29 : 5 Pat. L. T. 656 : 81 I. C. 535 : 25 Cr. L. J. 919 : 1925 P. 17.

—Ss. 144 and 439—*Time-expired order—Revision—No interference.*

Where an order passed by a Magistrate under S. 144, Cr. P. Code, has expired by effluxion of time the High Court would not adjudicate on the merits of the order or annul it in revision. 28 I.

Cr. P. CODE (1898), S. 145.

C. 160 foll. 42 M. L. J. 352 not followed. (*Spencer, J.*) KUPPU ODAYAR v. POOMALAI GOUNDAN.

(1924) M. W. N. 675 : 82 I. C. 472 : 25 Cr. L. J. 1304 : 47 M. L. J. 439 : 1924 Mad. 896.

—S. 144 (1) and (2)—*Object of—Statement of material facts—Restriction on liberty of individual—Vague order improper.*

Under S. 144, Cr. P. Code, something more is necessary to be done than a mere recital of the fact that in the opinion of the District Magistrate there was sufficient ground for proceeding under S. 144. When a Magistrate is of opinion that there is a sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by S. 134 direct any person to abstain from a certain act. An order as it stands which does not state any facts relating to the case in order to show that there was any justification for making the order under S. 144 is bad in law.

S. 144, Cr. P. C., is not intended to restrict the liberty of an individual if there is no apprehension of a breach of the peace on account of any act to be done by him. Nor does it relieve the Magistrate of the duty of making a proper enquiry into the circumstances which show a likelihood of a breach of the peace. If it is found that a man is doing that which he is legally entitled to do and his neighbour chooses to take offence thereat and to create disturbance in consequence the duty of the Magistrate is not to continue to deprive the first of the exercise of his legal right but to restrain the second from illegally interfering with that exercise of legal right. 5 Cal. 132 Ref. (*Kulwant Sahay, J.*) BLONG v. EMPEROR. 1914 P. H. C. 262 : 82 I. C. 42 : 25 Cr. L. J. 1178 : 1924 P. 767.

—S. 144 (2)—*Ex parte order—When to be passed.*

The object of S. 144, Cr. P. C., is to provide a speedy and emergent remedy in case of disputes which are likely to lead to a breach of the peace. An *ex parte* order passed under S. 144 (2) can be revoked or altered as provided in sub-S. 4. (*Wazir Hasan, A. J. C.*) JANG BAHADUR v. EMPEROR. 11 O. L. J. 54 : 77 I. C. 721 : 25 Cr. L. J. 433 : 1924 Oudh 338.

—S. 145—*Alluvial accretion—Breach of the peace—Jurisdiction of the Magistrate to take action—Bengal Act (V of 1920) S. 3—Effect of—Examination of Court witness after close of arguments—Irregularity.*

It is open to the Magistrate in the case of alluvial lands recently formed, where questions of breach of the peace arise, to deal with the matter either under Act V of 1920 or under the provisions of S. 145, Cr. P. Code. There is no implied repeal of S. 145, Cr. P. Code, so far as alluvial lands recently formed are concerned by Bengal Act V of 1920. The mere fact that the court examined a court witness after the arguments on both sides, does not furnish a ground for revision especially where neither party asked the Magistrate to allow further arguments to be addressed after

Cr. P. CODE (1898), S. 145.

such examination. (*Greaves and Deval, JJ.*)
ABDUL JABBAR MUNSHI v. MAFIZUDDI SARKAR.

28 C. W. N. 783: 25 Cr. L. J. 1107;
81 I. C. 931: 1924 Cal. 980.

—S. 145—*Applicability—Moveables—Interference in Revision.*

Proceedings under S. 145, Cr. P. Code, cannot be instituted with respect to moveables.

Orders under the section are not revisable unless they are wholly *ultra vires* and without jurisdiction. (*Wazir Hasan, A. J. C.*) HIRA LAL v. EMPEROR.

11 O. L. J. 59: 77 I. C. 728;
25 Cr. L. J. 440: 1924 Oudh 331.

—S. 145—*Dispute regarding immoveable property—Declaration of a right of way.*

In proceedings under S. 145, Cr. P. Code, it is competent to the Magistrate not only to award possession of the land in dispute but also grant a right of way to one of the parties. 17 C. W. N. 793 not foll. (*Macleod, C. J. and Shah, J.*) AMAR-SING, SHIVASANGHI, *in re*.

26 Bom. L. R. 436;
48 Bom. 512: 1924 Bom. 452.

—S. 145—*Duty of Magistrates—Land in the possession of tenants—Parties.* (*May Oung, J.*)
MA MA GYI v. EMPEROR.

25 Cr. L. J. 1161 (2);
81 I. C. 985 (2): 1924 Rang. 178.

—S. 145—*Effect of Civil Courts order regarding possession.*

In possession proceedings under S. 145, Cr. P. Code, the Magistrate must be guided by the order of a Civil Court given about that time dealing with the possession of the parties. (*Bucknill, J.*)
DURGANAND OJHA v. HIRANAND OJHA.

25 Cr. L. J. 88: 76 I. C. 24: 1924 P. 711 (2).

—S. 145—*“Evicted in due course of law” Ejectment proceedings under Agra Tenancy Act.*

The expression “evicted in due course of law” is just as much applicable to ejectment in proceedings under the Agra Tenancy Act as it is to ejectment under the decree of a Civil Court (*Daniels, J.*) IQBAL AHMAD v. SARAJ BALI.

82 I. C. 651.

—Ss. 145 and 350—*Evidence partly recorded by predecessor—If can be relied on.*

A Magistrate is within his jurisdiction in deciding a case under S. 145, Cr. P. C. on evidence partly recorded by his predecessor and partly by himself even though the party demanded a *de novo* hearing. (*Foster, J.*) SONDI SINGH v. GOVIND SINGH.

5 Pat. L. T. 237: 2 Pat. L. R. 108 (Cr.);
76 I. C. 25 (2): 25 Cr. L. J. 89 (2): 1924 P. 786.

—S. 145—*Evidence—Record of rights—Decree of Civil Court—Weight due to.*

Where the record of right was in favour of the petitioners, it was undoubtedly a most important piece of evidence with the presumption of correctness which attached to it by law. But the presumption might be rebutted by subsequent decrees of the Civil Court and delivery of possession that followed them. The decrees of Civil Courts are good until set aside and the Criminal Courts cannot go into the question whether they are good and valid decrees in accordance with law. (*Ross, J.*) TUFANI LAL v. MT. BIBI UMATUL RASOOL.

5 Pat. L. T. 535: 1924 P. H. C. C. 244.
1924 P. 765.

Cr. P. CODE (1898), S. 145.

—S. 145—*Ex parte Civil decree—If binding in proceedings.*

A decree passed *ex parte* under which only symbolical possession was delivered or one which was not *inter partes* is not binding on a criminal court in proceedings under S. 145. (*Greaves and Panton, JJ.*) PROMODA SUNDARI DASSI v. KHETRA BAG.

81 I. C. 928: 25 Cr. L. J. 1104.

—S. 145—*Judgment of Magistrate—Reasons for decision not given—Fresh enquiry.*

When a Magistrate makes an order under S. 145, Cr. P. Code, declaring possession to be with one party and there is nothing to show how the Magistrate had approached the question or how he had considered the evidence which was before him the High Court will direct the case to be reopened and a fresh enquiry to be made. The High Court is entitled in proceedings under S. 146 to require from the trying Magistrate a statement of the reasons for his decision sufficient to enable it to determine whether he has or has not complied with S. 145, sub-S. 4, Cr. P. C., and whether he has directed his mind to the consideration of the effect of the evidence adduced. (*Greaves and Panton, JJ.*) MOTHASHER ALI JAMADAR v. ESHAQUE SIKDAR.

39 C. L. J. 366;
25 Cr. L. J. 1115: 81 I. C. 939: 1924 Cal. 848.

—S. 145—*Jurisdiction—Apprehension of—Breach of the peace.*

76 I. C. 963 (1);
25 Cr. L. J. 291 (1).

—S. 145—*Likelihood of a breach of the peace—Jurisdiction of Magistrate to draw up proceedings.*

The Magistrate in order to assume jurisdiction under S. 145, Cr. P. C., has to satisfy himself about the likelihood of a breach of the peace. He is to exercise his own judgment upon the materials placed before him, and to arrive at a conclusion as to whether upon the material placed before him there was a likelihood of a breach of the peace. He would not be justified in acting merely upon the expression of an opinion by the police, and if by exercising his own independent judgment he came to the conclusion that there was a likelihood of a breach of the peace he is entitled to act under the section. If in the proceedings so drawn up in the office a reference is made to the police report and to the petition of the second party which documents stated that there was no likelihood of a breach of the peace that will not by itself take away the jurisdiction of the Magistrate to initiate proceedings under S. 145, if he was satisfied that there was a likelihood of a breach of the peace. (*Kulwant Sahay, J.*) GANGA BISHUN SINGH v. RAJO CHAUDHURI.

1924 P. H. C. C. 83;
5 Pat. L. T. 252: 1924 P. 787.

—S. 145—*Object of—Failure to give notice or to affix notice on land—Effect.*

The object of S. 145 is to take speedy measures to prevent a breach of the peace and even the question of possession is subsidiary; failure to affix notice on the property in dispute or to serve notices on the persons interested are at best only irregularities cured by S. 537, Cl. (5), of the section provides for interested parties coming in

Cr. P. CODE (1898), S. 145.

even if they have not been served with notice (*Hallifax, A. J. C.*) BHURE KHAN v. FAKIRA.

25 Cr. L. J. 159; 76 I. C. 303; 1924 Nag. 171.

—S. 145—Object of—Powers when to be exercised—Process fees—Who is to pay.

The object of S. 145 is only to prevent a breach of the peace and not to protect or maintain anybody in possession. Courts should take action under the section only if there is report from a responsible police-officer that he apprehends a breach and the same could not be obviated without an order under the section.

When the Court decides to take action, all processes should be served at the expense of the Crown. (*Hallifax, A. J. C.*) MR. PHUTANIA v. EMPEROR.

81 I. C. 933; 25 Cr. L. J. 1102.

—S. 145—Nature of proceedings—Ex parte order—If can be set aside.

The proceedings under S. 145, Cr. P. C. being quasi civil in nature an ex parte order can be set aside on sufficient grounds being shown. (*C. C. Ghose and Cumming, JJ.*) BANDE ALI v. REIAUL-LAH.

76 I. C. 975 (1); 25 Cr. L. J. 303 (1).

—S. 145—Order passed by a Magistrate—If liable to be superseded by a mutation order.

An order in mutation proceedings is not a final decision as to ownership and has no effect whatsoever on the order passed by the Magistrate in so far as that order limits the period within which civil suit may be brought by any of the parties. (*Pullan, and Kendall, A. J. Cs.*) ABADI BEGAM v. AHMAD MIRZA BEG.

1 O. W. N. 433; 82 I. C. 691;

11 O. L. J. 757.

—S. 145—Order under—If can be passed by a Magistrate after handing over charge.

25 Cr. L. J. 192; 76 I. C. 432; 1924 Cal. 192.

—S. 145—Order under—Whether can be challenged or defied by one not a party to the proceedings, or order—"Actual" possession meaning of—Possession through the exercise of the right of collecting rent from tenants, whether actual.

A person who is not a party either to the proceedings or to an order under S. 145, Cr. P. Code is certainly entitled to challenge the propriety of it. He may even defy it, though only by lawful act, and is clearly entitled to show that the existing possession is not of the nature as it was determined to be in the proceedings under S. 145, Cr. P. Code, 16 I. C. 898 Ref. to.

Held, further, that possession through the exercise of the right of the Zamindar of collecting rent from the tenants in possession cannot from juridic point of view be regarded as actual. The word "actual," therefore, in section 145 of the Code of Criminal Procedure used in relation to possession must be interpreted in the sense of only such actual possession as the nature of the property is susceptible of. (*Wazir Hasan, J. C.*) MAHESH SINGH v. THE KING EMPEROR.

1 O. W. N. 549; 10 O. & A. L. R. 947;

11 O. L. J. 743.

—S. 145—Possession proceedings—Decision of civil or criminal court in another case—Value of—Enquiry—Taking of evidence—Discretion of Magistrate.

Cr. P. CODE (1898), S. 145

It is not always incumbent upon the Magistrate to give effect to the decision of a civil or criminal court and no hard and fast rule can be laid down in this respect. 1 Pat. L. J. 336 Rel. on. Where in proceedings under S. 145, Cr. P. Code, one of the parties files a written statement and adduces evidence in support thereof Magistrate does not act without jurisdiction in relying upon the said written statement or in accepting the decision in a previous case of rioting as to possession. A Magistrate if satisfied on the evidence produced that one of the parties was in possession need not take further evidence (*Kulwant Sahay, J.*) BHULAN RAUT v. KUMAR RAI.

5 Pat. L. T. 69;

2 Pat. L. R. 104 (Cr.); 75 I. C. 535;

25 Cr. L. J. 951; 1924 P. 509.

—S. 145—Proceedings under—Long delay after hearing—Case struck off—Propriety of.

Proceedings under S. 145, Cr. P. Code were initiated in May 1922. The proceedings were amended upon a report from the police and fresh proceedings were drawn up in 7th August 1922. The case was allowed to hang on from August 1922 up to June 1923. Witnesses were examined on certain dates and then the case was postponed from time to time to examine further witnesses. The witnesses were examined at long intervals and although arguments were heard no order was passed for about 10 months. The Magistrate apparently forgot all about the case until he was reminded of it when he was going away on transfer. He then hurriedly disposed of the case by an order of the 27th March 1924, striking off the proceedings on the ground that there would be no likelihood of a breach of the peace after such a long interval. Held, that the order of the Magistrate was not justified by any provision of law. It is highly desirable that once the hearing is commenced and witnesses are examined the hearing should go on from day to day until all the evidence is taken and argument is heard and then the order should be passed as soon as possible. (*Kulwant Sahay, J.*) SASTU SAHU v. NATHUNI THAKUR.

1924 P. H. C. C. 231;

1924 Pat. 689.

—S. 145—Proceedings under whether can be dropped—Magistrate being satisfied that no dispute likely to cause breach of the peace existed—Source of Magistrate's information—Magistrate not bound to record evidence—Sale proceeds of crops on attached lands—Whether may be ordered to be kept in deposit in court pending an order.

In a proceeding under S. 145 of the Cr. P. Code, the Magistrate will not be acting illegally if he drops the proceedings after passing the preliminary order if he is satisfied that no dispute likely to cause a breach of the peace existed, although in coming to the conclusion he acted on the petition of a third party to the proceedings; and the Magistrate is not bound under such circumstances to record the evidence of the witnesses of the petitioner, who might have shown by their evidence that a dispute still existed. 30 Cal. 112 at p. 116; 30 Cal. 161 Referred to.

The sale proceeds of crops standing on the lands, when the lands were attached in possession proceedings, may be ordered to be kept in

Cr. P. CODE (1898), S. 145.

deposit in the Court until the one party or the other obtained an order in his favour. 12 Cr. L. J. 104 referred to. (*Spencer, J.*) *GOTHIPATHI SURYANARAYANA v. SREE RAJA ANKINEED PRASAD BAHADUR.* 20 L. W. 58 : 35 M. L. T. (H. C.) 68 : 47 Mad. 713 : 81 I. C. 626 : 25 Cr. L. J. 978 : 46 M. L. J. 565 : 1924 Mad. 795.

— Ss. 145 and 435—Proceedings without jurisdiction—Breach of the peace—Preliminary order—Revision—Interference by High Court. 1924 Lah. 91.

— S. 145—Omission to state grounds for thinking breach of the peace was likely—Non-mention of plots—Failure to publish notice—Irregularity.

The omission to state in the preliminary order the grounds on which the magistrate is satisfied of the likelihood of a breach of the peace or the failure to publish notice under sub-section (3) are only irregularities and not fatal to the proceedings. So too is the non-mention of the plots in regard to which the dispute existed, where both parties were perfectly aware of the same. (*Kendall, A. J. C.*) *PARBHU DAYAL v. EMPEROR.* 81 I. C. 963 : 25 Cr. L. J. 1139.

— S. 145—Proceedings under—Attachment and sale of crops during pendency of appeal—Proceedings dropped by agreement of parties—Jurisdiction to order amount to be paid out.

Where proceedings initiated under S. 145, Cr. P. Code, are dropped by consent of parties on the ground that there was no further likelihood of a breach of the peace, the Magistrate has no jurisdiction to direct the payment out of the sale proceeds of attached crops to one of the parties. The amount has to be kept in court pending decision by a competent civil court on the rights of parties. (*Beasley, J.*) *NATESA NAICKEN v. RAGHAVACHARIAR.* 20 L. W. 924.

— S. 145—Proceedings under—If can be transferred. 76 I. C. 562 : 25 Cr. L. J. 194.

— S. 145—Proceedings under—Jurisdiction to initiate—Breach of the peace—Omission to put in written statement—Effect of—Transfer of case *MT. RAMJAHARIA v. PIARI KOERI.*

2 Pat. L. R. 6 (Cr.).

— S. 145—Refusing to admit written statement filed by claimants—If revisable.

The very object of the proceeding under Section 145 of the Code is to put an end to disputes as to possession of immovable properties so as to prevent a breach of the peace. This object cannot be gained until all the contending parties are on the record and an opportunity is given to them to put forward their respective claims. The effect of an order rejecting the written statement of certain parties is that his decision under S. 145 will not be binding upon them. (*Jwala Prasad, J.*) *RAGHUNATH KUER v. RAJKISHORE KUER.*

5 Pat. L. T. 458 : 25 Cr. L. J. 906 (1) : 81 I. C. 442 (1) 1924 P. 783.

— S. 145—Scope of—Dispute regarding the water channel.

Where a water channel is actually being used for irrigation purposes, a dispute about the flow of water falls within S. 145, Cr. P. C., but not so

Cr. P. CODE (1898), S. 145.

if it is not being used at the time of dispute. Where there is ample time to have dispute settled in a civil court, action under S. 145 is not justified. (*Dalal, J. C.*) *CHOTEY LAL v. EMPEROR.* 25 Cr. L. J. 227 : 76 I. C. 691 : 1924 Oudh 341.

— S. 145—Scope of enquiry—Reference to arbitration—Award—Order of Magistrate embodying award—Legality of—Inclusion of larger area in final order—Legality of.

The scheme of S. 145, Cr. P. C., is against the view that a reference to arbitration and the award thereon can be made the basis of an order of the Magistrate under S. 145, Cr. P. Code. It is for the court to consider who was in possession at the date of the proceedings. The scheme of the enquiry is retrospective and not prospective. There might conceivably be certain instances in which the parties have agreed that the Court should refer the matter in dispute to arbitration for the purpose of deciding the question as to who is in actual possession at the time of the proceedings. A compromise can only be taken by the Magistrate as evidence for an order to be passed under S. 145 (5), Cr. P. Code and cannot possibly be made the basis of an order passed under cl. (6). A magistrate has no jurisdiction to pass an order under S. 145 (6) in respect of land which was not referred to in the initiatory proceedings. 3 Pat. L. J. 248 : 32 C. 552 : 2 Pat. L. J. 86 : 15 C. W. N. 568, Ref. (*Adam and Foster, J. J.*) *UTTAM SINGH v. JODHAN RAI.* 3 Pat. 288 : 1924 P. 589.

— S. 145—Scope of—Religious disputes—question of title—If relevant.

The object of S. 145, Cr. P. C., is to bring to an end by a summary process disputes relating to land, etc., which are in their nature likely if not suppressed to end in breaches of the peace. The mere circumstance that the dispute is of a religious nature is not sufficient to justify action being taken under the section, unless there is positive evidence on the record that breach of the peace is likely to occur, if proceedings are not instituted.

Questions as to rights of parties cannot legitimately be the subject of inquiry in such proceedings. (*Moti Sagar, J.*) *BHAGWAN DAS v. MAULA DAD KHAN.* 25 Cr. L. J. 78 : 75 I. C. 990 : 1924 Lah. 678.

— S. 145—Witnesses—Discretion in examining—Admitting document without proof—Effect.

In proceedings under S. 145, Cr. P. Code, a Magistrate is not bound to examine all the witnesses adduced by the parties but may limit the number for good and sufficient reason. He must exercise his discretion with care and caution.

Where a document is admitted without proof it is an illegality but it does not affect the jurisdiction of the court to pass the final order. (*Kulwant Sahay, J.*) *MT. WAHIDUNNISSA v. PICHIT LAL MISSIR.* 24 Cr. L. J. 954 : 75 I. C. 538 : 1924 P. 534.

— S. 145—Scope of—Inquiry into title—If warranted.

Cr. P. CODE (1898), S. 145.

Proceedings under S. 145 are intended to be summary proceedings for the prevention of a breach of the peace and not elaborate enquiries into title. (*Kendall, A. J. C.*) *EMPEROR v. MT. MAN KUNWAR*, 81 I. C. 905 : 25 Cr. L. J. 1081.

—S. 145 (1)—Breach of the peace—Evidence of—Police report—Statement of parties.
1924 Cal 414.

—S. 145 (1)—Magistrate's jurisdiction—"Parties concerned in the dispute" Meaning of—Apprehension of the breach of peace.

The words "parties concerned in such dispute" in S. 145 (1), Cr. P. C., are intended to indicate all persons claiming to be in possession and that the proceedings are not without jurisdiction merely because some of those parties are not likely to commit a breach of the peace. 30 C. 155 followed 24 C. W. N. 621 : 57 I. C. 161 and 38 C. L. J. 284 referred to.

Held, also that a formal defect would not affect the Magistrate's jurisdiction to pass an order under cl. (1). (*Pullan and Kendall, A. J. Cs.*) *ABADI BEGAM v. AHMED MIRZA BEG.* 1 O. W. N. 433 : 82 I. C. 691 : 11 O. L. J. 757.

—S. 145 (1)—Order not in terms of the section—Order in the handwriting of the Reader of the Court—Breach of the peace not clearly stated—Proper order.

Where a Magistrate did not prepare an order as required by S. 145 (1) but an order was really passed and was in the handwriting of the Reader of the Court and did not specifically state that there was a danger of the breach of the peace. Held, that it will not be equitable to set aside the order because of the deficient knowledge of the law of the Magistrate and the best order would be to direct him to take proceedings under Chap. XII if he is satisfied of a breach of the peace. (*Dalal, J. C.*) *RAM BHUSAN DAS v. RAM LAKHAN SAHU*.
1 O. W. N. 701.

—S. 145 (4)—Scope of—Dispossession to be forcible and wrongful.

Where L was appointed managing agent for a colliery under certain conditions by N and was dismissed for misconduct and the landlord took direct possession, the dispossessed party instituted proceedings under S. 145 (4) and 144, Cr. Pro. Code before the Magistrate which was dismissed.

Held on revision, that dispossession under subsection (4) of S. 145 should be forcible and wrongful and that Magistrates acting under Ss. 145 and 144 should not usurp the power of a Civil Court in the direction of ejecting the party in actual possession. (*Adami and Bucknill, JJ.*) *H. V. LOW AND CO., LTD. v. MAHARAJA SRI MANINDRA CHANDRA NANDY*.
3 Pat. 809 : 1925 P. 33.

—Ss. 145 (5) and 146—Order of attachment when justified.

It should be held as a very important principle in cases under S. 145, Cr. P. Code that a Magistrate should be extremely reluctant to attach the property in dispute. Where the land is admittedly subject year by year and season by season to cultivation it is his duty to collect and sift the evidence and come to a conclusion as regards

Cr. P. CODE (1898), S. 146.

possession. (*Foster, J.*) *RAM BAHAL SINGH v. RANG BAHADUR SINGH*.

5 Pat. L. T. 589 : 82 I. C. 367 :
25 Cr. L. J. 1295 : 1924 P. 804.

—Ss. 145 (6) and 146—Proceedings under—Difference between—Civil suit.

The provisions of S. 146 are different from those of S. 145 (6). An order under S. 145 (6) entitles the successful party to possession till he is evicted therefrom in due course of law. When there is an attachment under S. 146, the plaintiff who comes to court after attachment has to show the court he has rights in the lands and is entitled to possession. (*Jwala Prasad, A. C. J. and Kulwant Sahay, J.*) *HARGOBIND RAI v. KESHWAS PRASAD SINGH*.
1924 P. H. C. 297.

—S. 145, Cl. (6)—Final order passed in favour of some of the parties and based upon a compromise, if valid and enforceable.

It would be straining the meaning of the Act to forbid a Magistrate to put into temporary possession two parties who have come to terms as against other parties who have not come to terms. (*Pullan, and Kendall, A. J. Cs.*) *RANI ABADI BEGAM v. AHMED MIRZA BEG.*

1 O. W. N. 433 :
82 I. C. 691 : 11 O. L. J. 757.

—Ss. 145 and 439—Finding of fact—Perverse finding—Interference in revision by High Court.

Ordinarily the High Court will not interfere with findings of facts in the exercise of its jurisdiction under S. 439, Cr. P. Code, but there can be no doubt that it has jurisdiction to review even questions of facts as the words of S. 435, Cr. P. Code clearly indicate, and will do so where there is a clear miscarriage of justice. A perverse finding of fact contrary to a mass of un rebutted evidence regarding the possession of one of the parties is liable to be set aside in revision. (*Wazir Hasan, J.*) *EMPEROR v. SARI PRASAD*.

11 O. L. J. 330 : 1 O. W. N. 229 :
81 I. C. 890 : 10 O. & A. L. R. 1042 :
25 Cr. L. J. 1066 : 1924 Oudh 366.

—S. 146—Attachment of property—Subsequent decision of Civil Court—Not inter partes—Effect of—Withdrawal of attachment.

On the 29th of March 1922 a Magistrate before whom proceedings under S. 145 of the Cr. P. Code, had been instituted ordered attachment of the property in dispute consisting of an underground colliery and certain huts on the surface. In a suit relating to a money claim laid by a third person against some members of the second party the subordinate Judge on 24-3-1923 decided adversely to rights of the members of the second party with regard to the ownership of the colliery. Thereupon the 1st party applied to the Magistrate for withdrawal of the attachment that had been effected on 29-3-1922 and for a declaration of possession. The Magistrate withdrew the attachment and gave possession to the 1st party. Held that Magistrate had jurisdiction to pass the order in question even though the first party had not been impleaded as party to the civil litigation and all the members of the second party had

Cr. P. CODE (1898), S. 146.

not been made parties to that litigation. (*Greaves and Panton, JJ.*) *ASES KUMAR MISRA v. KISSORI MOHAN SARKAR*. 39 C. L. J. 353 : 25 Cr. L. J. 937 : 81 I. C. 553 : 1924 Cal. 812.

—S. 146—Order under—Proceedings under S. 145 necessary. *NILAKANTH v. SURYABHAN*. 75 I. C. 80.

—S. 146 (1)—Competent Court—Meaning of—Decision of Revenue Court.

The expression "competent Court" in S. 146 (1) of the Cr. P. Code is wide enough to cover a Revenue Court and the order of Revenue Court under S. 40 of the U. P. Land Revenue Act declaring the person entitled to the property and putting him in possession and ordering mutation in the Revenue Records in his favour is within the section. (*Boys, J.*) *RAM SRI v. SRI KISHAN*. 22 A. L. J. 803 : L. R. 5 A. 129 (Cr.) : 82 I. C. 170 : 25 C. L. J. 1242 : 1924 All. 777.

—S. 147—Final order—What it must contain.

In the absence of a finding that the right has been exercised within the periods specified by Section 147 the final order under Section 147 cannot be maintained. 2 Pat. L. T. 364 Foll. (*Kulwant Sahay, J.*) *SIRKAWAL SINGH v. BHUJA SINGH*. 5 Pat. L. T. 457 : 81 I. C. 708 : 25 Cr. L. J. 996 : 1924 Pat. 784.

—S. 147—Order under—Breach of the peace—New parties if can be added after preliminary order.

Unless there are special circumstances giving rise to an apprehension of the breach of the peace there is no jurisdiction to make an order under S. 147, Cr. P. C. Bringing on record new applicants after a preliminary order has been passed is undesirable. But it is only an irregularity and does not vitiate the proceedings. (*Prideaux, A. J. C.*) *PARASHRAM v. GOPAL RAM CHANDRA*. 25 Cr. L. J. 353 : 77 I. C. 289 : 1924 Nag. 294.

—S. 148—Local inspection—Scope and object. *MT. RAM RATAN KUAR v. TARAK NATH BHATTACHARJI*. 77 I. C. 492 : 25 Cr. L. J. 412.

—S. 150—Irregularity—Misstating of evidence—Effect. *MT. RAM RATAN KUAR v. TARAK NATH*. 77 I. C. 492 : 25 Cr. L. J. 412.

—Ss. 154 and 162—Statement in the course of police investigation—Signature—Effect.

Statement made in course of a police investigation merely because they happen to be signed contrary to the provisions of S. 162, Cr. P. Code, do not thereby become admissible under S. 154. (*Oggers and Wallace, JJ.*) *M. P. NARAYANA MENON, In re*. 25 Cr. L. J. 401 : 77 I. C. 481 : 1925 Mad. 106.

—Ss. 157, 159 and 164 (1) and 423—Investigation—Preliminary enquiry—First class Magistrate deputing Sub Deputy Magistrate—Record of evidence by latter—Admissibility—Appellate court—Duty of.

It is open to a Magistrate of the first class to depute a Sub-Deputy Magistrate to hold an investigation on a preliminary enquiry and the latter can record a statement of a witness under S. 164 Sub-s. (1) made in the course of police investiga-

Cr. P. CODE (1898), S. 162.

tion. This statement is admissible as a statement made in the course of investigation. But statements made by persons to an investigating police-officer in the course of an investigation are inadmissible. Where inadmissible evidence has been received by the lower court, an appellate court has to see whether such reception has materially influenced the conclusions of the jury. An appellate Court would have to see whether the reception of inadmissible evidence has in fact occasioned a failure of justice and whether excluding that evidence there is evidence sufficient to justify verdict of the jury. (*Sanderson, C. J. and Chotzner, J.*) *HARENDRA NATH SAHA v. EMPEROR*. 40 C. L. J. 313.

—S. 159—Right of private citizen to arrest—Extent of.

Where certain villagers *bona fide* believed that certain armed police constables who had come at midnight without their uniforms, were dacoits and consequently arrested and confined them till the arrival of the police from a neighbouring locality. *Held* that the villagers were entitled to arrest and had committed no offence. (*Mukerji, J.*) *KISHEN LAL v. EMPEROR*. 22 A. L. J. 501 : L. R. 5 A. 177 (Cr.) : 1924 All. 645.

—S. 162—General and Special diaries of police—Use of. *MANNA LAL v. EMPEROR*.

27 O. C. 40 : 75 I. C. 753 : 25 Cr. L. J. 49 : 1925 Oudh 1.

—S. 162—Statement made to the Police—Proof of—Duly proved—Meaning of.

Under S. 162, Cr. P. Code as substituted by the Amendment Act of 1923 it is not now permissible for statements made to the police whether oral or written, to be put in evidence, in order to corroborate a prosecution witness or to contradict a defence witness. Under the terms of the Section a police statement can be used only for one purpose and that is by the accused to contradict a prosecution witness in the manner provided by S. 145 of the Evidence Act. The expression "it duly proved" in S. 162 of the Cr. P. Code clearly shows that the record of the statements cannot be admitted in evidence straightway but that the officer before whom the statements were made should ordinarily be examined as to any alleged statement or omitted statement that is relied upon by the accused for the purpose of contradicting the witness ; and the provisions of S. 67 of the Evidence Act apply to this case as well as to any other similar case. (*Shah, A. C. J. and Fawcett, J.*) *EMPEROR v. VITHU*.

26 Bom. L. R. 965 : 1924 Bom. 510.

—S. 162—Use of Police diaries.

When a Sub-Inspector does not remember what witnesses stated at the investigation and refuses to refresh his memory from the diaries, the Court should compel him to look into the diaries for the purpose of answering the question. (*Adami, J.*) *MOHIUDDIN KHAN v. THE KING EMPEROR*. 1924 P. 829.

—S. 164—Confession not voluntarily.

75 I. C. 762 : 25 Cr. L. J. 58.

Cr. P. CODE (1898), S. 164.

—S. 164—Recording of confessions—Duty of Magistrates.

When a confession is made to a Magistrate during the course of a police investigation, there is a duty cast on him to question the person to satisfy by himself that he was making it voluntarily. When such a confession is subsequently retracted, the Court before admitting it in evidence must come to the conclusion it was voluntarily made. (*Scott Smith and Zafar Ali, JJ.*) NEKI v. EMPEROR. 25 Cr. L. J. 116 : 76 I. C. 180 : 1924 Lah. 624.

—S. 164—As amended by Amendment Act of 1923 (XXV of 1923)—Want of certificate in accordance with the code—Failure to ask the accused whether his statement was voluntarily made—Whether curable by the recording Magistrate's deposition.

Where the Committing Magistrate who recorded a confession did not sign a certificate as prescribed under cl 3, or S. 164 of the Code, and did not ask him whether his statements was voluntary but asked him whether he made the same out of his free will and it was contended on appeal that the omissions were so serious as to vitiate the trial,

(1) Held, that the evidence of the Recording Magistrate, showing that he had observed all the provisions of S. 164 of the Code, was sufficient and that the confession is admissible,

(2) that the question of the Magistrate whether the accused made the statement "out of his free will" was equivalent to asking him whether his statement was voluntary. 2 Pat. L. T. 773 followed. (*Adami and Bucknill, JJ.*) RAMAI HO v. EMPEROR. 3 Pat. 872.

—S. 173—Report requesting Court to issue process, if necessary, is a report within S. 173.

In a case investigated by the police against 3 persons for theft the police sent up their report wherein one person had been described as concerned in theft and for the other two they reported that witnesses spoke against them on account of enmity but if the Court thought there was evidence against them the Court may issue warrant. Held, that the report was a police report within S. 173 even as regards the other two persons. (*Kincaid, J. C., Raymond and Aston, A. J. Cs.*) MEHRAB v. EMPEROR. 17 S. L. R. 150 : 1924 S. 71.

—S. 177—Bigamy—Charge of—Jurisdiction—Abetment of offence—Trial of.

It is the court which has territorial jurisdiction at the place where the offence of bigamy is committed that can try the charge under S. 494, I. P. C. Persons charged with abetment of the offence can be tried by the court within whose territorial jurisdiction the abetment takes place. (*Adami and Bucknill, JJ.*) MT. BHAGWATIA v. EMPEROR. 3 Pat. 417.

—S. 177—Offence of bigamy where triable.

The offence of bigamy and the abetment of bigamy is triable only in the district in which the second marriage or the abetment took place and not in the district in which the woman is reported to have been enticed away. (*Martineau, J.*) AMIRCHAND v. THE CROWN. 1924 Lah. 732.

Cr. P. CODE (1898), S. 181.

—S. 177—Criminal misappropriation—Forum of trial.

A charge of misappropriation under S. 406, I. P. C., can be tried only at the place where the money was misappropriated. (*Ghose and Cuming, JJ.*) MAITRA v. KAMINI MOHAN BOSE.

77 I. C. 425 (1) : 25 Cr. L. J. 377 (1).

—S. 179—Offence under S. 409, I. P. C.—Place of trial—Consequence of wrongful act.

A person is not accused of the offence of criminal breach of trust by reason of his having actually caused wrongful loss to anybody; it is enough that he intended to do so, even if no wrongful loss was ever caused in fact. Such loss is certainly the usual consequence of the offence but it is not one of the consequences by reason of which the person is accused of the commission of the offence. It is therefore not one of the consequences contemplated by S. 179, Cr. P. Code. The offence of criminal breach of trust is complete with the act of conversion and the intention to cause wrongful gain or wrongful loss. That intention can only be formed or at least can only be proved to have been formed, at the place where the conversion takes place and that place is the forum for trial of the accused. 38 M. 630 foll 46 B. 641 diss. (*Hallifax, A. J. C.*) BANERJI v. POTNIS. 20 N. L. R. 72 : 81 I. C. 253 : 25 Cr. L. J. 922 : 1924 Nag. 253.

—Ss. 177, 526 (1) (i)—Trial Court not having jurisdiction to try a complaint—Power of High Court to transfer—Quashing of complaint unnecessary—Proper procedure.

Where a complaint is wrongly filed in a Court not having jurisdiction and the Court proceeds to inquire into it in contravention of the provisions of S. 177 of the Code of Criminal Procedure, the High Court has, under the section 526 (1) (i) of the Code, the power to transfer the case to a Court having jurisdiction and it is futile to quash the complaint and direct the complainant to take his complaint to another Court. 23 O. C. 87 dissented from. (*Dalal, J. C.*) MUBARAK ALI v. ABDUL HAQ. 10 O. & A. L. R. 960 : 1 O. W. N. 615.

—Ss. 179 and 181—Applicability of—Cheating and Criminal Breach of Trust—Jurisdiction of Court. 1924 A. 77.

—S. 181 (2)—Criminal breach of trust—Offence where triable—Loss where arises.

The jurisdiction of a court to try an offence of criminal misappropriation or criminal breach of trust is governed by S. 181 (2) and not by S. 179, Cr. P. Code. The resulting loss though a normal result in such cases, is not an ingredient of those offences and cannot therefore be described as a consequence within the meaning of S. 179. Where a firm with headquarters at X employs an agent at Y to sell goods there and he fails to account for some items a complaint with regard to it can only be laid at Y. (*Shadi Lal, C. J.*) MAHTAB DIN v. EMPEROR. 25 Cr. L. J. 410 : 77 I. C. 490 : 1924 Lah. 663.

—S. 181 (2)—Criminal breach of trust—Forum of trial.

In a complaint for an offence under S. 406, I. P. C. it was stated that the accused in collusion with

Cr. P. CODE (1898), s. 183.

each other received from the complainant a sum of money within district A made payable at a place in District B. Held the offence was triable only within district A. (*Campbell, J.*) DINA NATH v. TULSI RAM. 6 Lah. L. J. 471.

—S. 183—Theft from running train
—Place of trial. 1924 Lah. 351.

—S. 183—Offence during Railway journey
—Where triable.

Where an offence is committed in the course of a railway journey, the accused can be tried at the place of destination, though the offence was actually committed outside the jurisdiction of that court. (*Kennedy, J.C. and Raymond, A. J. C.*) EMPEROR v. MOULABUX. 77 I.C. 727; 25 Cr. L. J. 439.

—Ss. 188 and 215—Kidnapping—Offence committed in Native State—Accused arrested in British India—Certificate of Political Agent.

The accused who were native Indian subjects of the British Government of India were charged with having kidnapped two minor girls from the Bharatpur State. The accused were arrested in the United Provinces, but as the minor girls had been conveyed to a place in the Punjab, a District Magistrate of the Punjab having jurisdiction over the place held an enquiry and committed the accused to the Sessions Court of Gujranwala for trial. Held that the offence of kidnapping had been committed in a Native State outside British India and the obtaining of a certificate from the Political Agent of that State was a condition prerequisite to the prosecution. The subsequent obtaining of the certificate would not cure the defect in the prosecution. (*Campbell, J.*) RAM CHARAN v. EMPEROR. 5 Lah. 416.

—S. 188—Offence outside Br. India—Certificate and sanction—Absence of—Effect.

In the case of an offence committed outside British India by native Indian subjects of His Majesty the certificate of the Political Agent or where there is no such Agent the sanction of the Local Government is necessary. Without one of these, the enquiry cannot be proceeded with but there is nothing to prevent proceedings being continued in the event of sanction being subsequently obtained. (*Kincaid, J. C. and Aston, A. J. C.*) ALLIBHOY JIORAJ v. EMPEROR. 81 I. C. 108; 25 Cr. L. J. 620.

—S. 190—Construction.

Under S. 190, a Magistrate takes cognizance of an offence and not of the offender. (*Kincaid, J. C. Raymond and Aston, A. J. Cs.*) MEHRAB v. EMPEROR. 17 S. L. R. 150; 1924 S. 71.

—S. 190—Police report—What is—Notice of act. NAGENDRA NATH CHAKRABARTI v. EMPEROR. 51 Cal. 402; 1924 Cal. 476.

—Ss. 190, 200 and 537—Omission to examine complainant—Irregularity.

A Magistrate has cognizance of a criminal case before he examines the complainant under S. 200, Cr. P. Code. The omission to examine a complainant under S. 200, Cr. P. Code, is a mere irregularity and not an illegality. The person prejudiced by such an irregularity is the complainant and when the case ends in a conviction, he has no

Cr. P. CODE (1898), s. 190.

grievance. The accused cannot in general complain of the irregularity as the omission to take a sworn statement from the complainant cannot prejudice the accused. (*Odgers and Wallace, JJ.*) AMBAYARA GOUNDAN v. PACHAMUTHU GOUNDAN. 19 L. W. 461; 25 Cr. L. J. 730; 81 I. C. 218; 1924 Mad. 587.

—S. 190 (1) (a)—Complaint—Cognizance by a Magistrate—Police report—Showing complaint to be false—Procedure.

If a person is charged by another person with an offence and on enquiry by the police the police consider that the whole case is false, it is open to the complainant on petitioning against the police enquiry to place the matter within the scope of the operation of S. 190, sub-S. 1 (a) Cr. P. Code. But where a Magistrate has already taken cognizance of an offence in which certain persons are accused, there is no authority for the suggestion that if when the charge sheet is placed before the Magistrate the police officer as the prosecution medium omits the name of certain persons whose participation in the offence has up to that time been before the Magistrate he is compelled in any way to follow what is after all no more than advice tendered by the prosecuting authority. But the Magistrate need not, without giving any reason differ from that advice. Once the Magistrate has taken cognizance of an offence he is strictly entirely independent of any opinion which the police officer offers to him and it is within his power to order that any persons who have been, since he has taken cognizance of the matter, accused as being participants in the offence should be produced before him to undergo the preliminary enquiry before committal or for trial in cases which do not go to a higher tribunal for trial. To hold otherwise would be to place in the hands of the police (after a judicial tribunal had taken cognizance of the offence) powers which might be subject to the gravest abuse. (*Adami and Bucknill, JJ.*) RAGHUPAT NARAYAN SINGH v. EMPEROR. 1924 P. H. C. C. 162; 1924 P. 597.

—S. 190 (a) and (c)—Distinction.

When a Magistrate takes cognizance of a complaint under S. 190, cl. (b) and directs process to issue against other persons whose names transpired in the prosecution evidence during the trial, he is perfectly justified in doing so and he is deemed to have taken action against them under clause (a) and not under clause (c). (*Kincaid, J. C., Raymond and Aston, A. J. Cs.*) MEHRAB v. EMPEROR. 17 S. L. R. 150; 1924 S. 71.

—S. 190 (b)—“Police report” does not only mean report under S. 173.

There is no justification for restricting the term “police report” in S. 190 (b) to reports under S. 173 only (1911) 5 S. L. R. 1 Dist. (*Kincaid, J. C. Raymond and Aston, A. J. C.*) MEHRAB v. EMPEROR. 1924 S. 71; 17 S. L. R. 150.

—Ss. 190 (c), 191 and 556—Cognizance of case by Magistrate on his own knowledge—Subsequent trial by same Magistrate.

The mere fact that a Magistrate takes cognizance of a case on his own knowledge under S. 190 (c), Cr. P. Code, does not bring the case

CR. P. CODE (1898), S. 191.

within the operation of S. 556 and so long as the Magistrate complies with the provisions of S. 191, Cr. P. Code, he is entitled to try the case. (*Heald, J.*) *NGA CHIT KYAW v. EMPEROR*.

3 Bur. L. J. 121 : 1924 R. 352 (1).

—Ss. 191 and 447—*Trial Magistrate initiating prosecution—Omission to inform accused of his right to have his trial before another magistrate.*

Where a Magistrate who had himself instituted criminal proceedings under S. 476, Cr. P. C., tried the accused without informing them before taking any evidence that they were entitled to have the case tried by some other Court, *Held* that the trial was illegal. (*Wazir Hasan, J. C.*) *EMPEROR v. NAIPAL*.

10 O. & A. L. R. 735:

11 O. L. J. 582 : 1 O. W. N. 329 : 82 I. C. 152 (1) : 25 Cr. L. J. 1224 (1) : 1924 Oudh 448.

—S. 194—*Confession recorded by Magistrate—Formalities not observed—Admissibility of confession.*

Before recording confessions, the Magistrate although he stated that he was satisfied that the confessions were made voluntarily failed to question the confessants whether they were making a voluntary statement and this defect was not made good at the examination of the Magistrate before the sessions court. *Held*, that the confessions must be rejected as irrelevant. (*Shadi Lal, C. J. and Le Rossignol, J.*) *KHUSI MAHOMED v. EMPEROR*.

6 Lah. L. J. 166.

25 Cr. L. J. 979 : 81 I. C. 627 : 1924 Lah. 481.

—S. 195—*Amendment of—Sanction granted after—Legality of.*

Where after the amendment of S. 195, Cr. P. C. by Act (XVIII) of 1923 a Court grants a sanction on application made prior to the amendment, the sanction is illegal and no Court can take cognizance of the offence on such sanction. The High Court refused to treat the sanction though valueless as a good complaint within S. 195 (b) Cr. P. C. or S. 476, Cr. P. Code. In a criminal case involving the liberty of the subject it was not a proper course to adopt. (*Greaves and Pantou, JJ.*) *BALDEO MISHRA v. DEPUTY INSPECTOR OF POLICE (C.I. D.) BENGAL*.

1924 Cal. 826.

—S. 195—*Amending Act—Grant of sanction afterwards.*

A sanction for prosecution for perjury granted after the 1st of September 1923 when the Amending Act XVIII of 1923 came into force, is illegal. (*Marten and Fawcett, JJ.*) *GAFUR DAUD SAHEB, In re*.

26 Bom. L. R. 1235.

—S. 195—*Appeal—Sub-Magistrate—Granting sanction.* *PALLIKUDATHAN, BUDDU GOUNDAN*.

47 Mad. 229 : 76 I. C. 647 :

25 Cr. L. J. 215 : 1924 Mad. 387 (2).

—Ss. 195 and 196-A—*Conspiracy—Non-cognizable offence—Particulars specified in application for sanction—Omission to specify particulars in the order granting sanction—Effect of.*

1924 Cal. 53.

—S. 195—*Necessity for sanction—Charge under S. 225 and conviction under S. 173, I. P. C.—Legality of.*

CR. P. CODE (1898), S. 195.

Where a Magistrate convicted the accused under S. 173, I. P. C. without a complaint in writing from the public servant concerned and it was contended that his conviction was illegal. *Held*, (1) that S. 195 of the Code lays down that the Court shall take cognizance of an offence under S. 173 only after the consent of the officer concerned is obtained that the Magistrate cannot take cognizance of an offence under S. 225 (b) I. P. C. and convict the accused under S. 173, I. P. C. regarding the latter (2) as a minor offence of the same character, as both are distinct offences (3) that it is not open to a Magistrate to ignore S. 195, Cr. P. Code by the device of instituting the case under another section of the Penal Code. (*Neave, J.*) *SRI NARAIN SINGH v. KING EMPEROR*.

22 A. L. J. 1005 : L. A. 5 A. 153 (Cr.)

—Ss. 195 and 203—*Criminal breach of trust—Complaint—Dismissal of complaint without examining complainant—Sanction for false charge—Revision.*

A Magistrate dismissed a complaint for criminal breach of trust without examining the complainant in contravention of S. 203, Cr. P. Code. The Magistrate thereupon granted sanction to prosecute the complainant for bringing a false charge, *i. e.*, under S. 211 or S. 182, I. P. C. The complainant applied in revision to the High Court. *Held*, that the Magistrate not having dismissed the complaint according to law under S. 203, Cr. P. Code, the complainant could not be convicted of bringing a false charge. On an application in revision for setting aside the order granting sanction the High Court *held*, that the order dismissing the complaint had been made illegally. (*Macleod, C. J. and Crump, J.*) *NINGAPPA RAYAPPA, In re* 48 Bom. 360 : 26 Bom. L. R. 183:

25 Cr. L. J. 960 : 81 I. C. 608 : 1924 Bom. 321.

—S. 195—*Judge sanctioning prosecution—If can hear appeal from conviction.*

It is a fallacy to hold that a Court which sanctions or directs a prosecution under S. 195, Cr. P. Code, is thereby rendered incompetent to try the offence or hear an appeal against a conviction for it. (*Hallifax, A. J. C.*) *SESSIONS JUDGE, BHANDARA v. PANDIA*. 76 I. C. 395 : 25 Cr. L. J. 171.

—Ss. 195 and 200 (a a)—*Offence under S. 182, I. P. C.—Complaint not in writing—Conviction—Liability of.*

Where an objection as to the absence of a complaint in writing was not taken at the trial or in the appellate court but only in revision, it is not sufficient to upset a conviction under S. 182, I. P. C. Assuming there was no complaint in writing, it would not make the conviction illegal. The object of introducing the words "in writing" after the word complaint in S. 195 and adding cl. (a a) to S. 200, Cr. P. Code, was to remove the inconvenience which might be felt if it was made incumbent on the Magistrate to examine the complainant when taking cognizance of an offence. As the provision as regards sanction was removed from S. 195, Cr. P. Code and as it was made obligatory for the public servant concerned to make a complaint instead of giving a sanction in order to prosecute a person for offences referred to in S. 195, Cr. P. Code, it was thought that it would cause a good

CR. P. CODE (1898), S. 195.

deal of inconvenience if such public servant had to attend the court and to appear before the Magistrate in order to lodge the complaint. (*Kulwant Sahay, J.*) LACHMI SINGH v. EMPEROR, 1924 P. H. C. C. 181 : 5 Pat L. T. 505 : 81 I. C. 629 : 25 Cr. L. J. 972 : 1924 Pat 691.

———S. 195—Sanction to debtor against creditor—Expediency of.

It is not expedient that sanction to prosecute should be given to a debtor to use against his creditor. (*Moti Sagar, J.*) BIKRAM SINGH v. NIHAL CHAND. 25 Cr. L. J. 544 : 77 I. C. 1008 : 1924 Lah. 680 (1).

———S. 195—Sanction—Granting of—Effect of delay.

Application for sanction should be made with as little delay as possible. There should be a reasonable expectation of conviction before sanction is granted. (*Lumsden, J.*) ABDUL QADIR v. MAHOMMED IBRAHIM KHAN.

25 Cr. L. J. 119 : 76 I. C. 183 : 1924 Lah. 569.

———S. 195—Sanction to prosecute—Refusal of—Appeal—Passing of new Code—Effect of—Perjury—Passages not set out in the order—Effect of.

Against an order of the subordinate Judge refusing sanction to prosecute the petitioners for perjury there was an appeal to the District Judge. When the appeal was pending the new Cr. P. Code came into force. It was contended that the District Judge had no power to grant sanction afterwards as he did. *Held*, that the petitioners had incurred a liability to have their prosecution for false evidence sanctioned and the complainant on his application being dismissed by the Sub-Judge acquired a right to apply to appellate Court under S. 195, Cr. P.C., (as it was unamended) for the grant of sanction which the lower Court had refused. Under these circumstances the repeal of S. 195 as it then stood could not affect any pending investigation in respect of the right which had accrued to the complainant or the liability which had been incurred by the applicants. The District Judge had therefore power to grant the sanction. Where the particular passages complained of as being perjured evidence were not set out in the order of the District Judge but were set out in the application for sanction the order of sanction must be deemed to have been passed with respect to the statements alleged in the application. (*Daniels, J.*) KASHMIRI LAL v. MT. KISHAN DEI. L. R. 5 A. 99 (Cr.). 1924 All. 563.

———S. 195—Sanction—Necessity for—False complaint—Instigation by third parties.

Where it was found that a false complaint was filed at the instigation of certain persons who were not parties to the complaint and proceedings were started against them under S. 211, I.P. C. *Held*, that as the offence had been committed in relation to the proceedings in Court no prosecution could be launched except on the written complaint of the Magistrate's court or of some court to which it was subordinate. The High Court being a superior Court could file the

CR. P. CODE (1898), S. 195.

necessary complaint and the High Court directed that its order in the revision case should issue as a complaint to the Magistrate. (*Heald, J.*) P. N. S. M. SYED KHAN v. P. K. C. NAGOOR. 3 Bur. L. J. 141 : 1924 Rang. 369.

———S. 195—Sanction—High Court—Interference. 77 I. C. 806 : 25 Cr. L. J. 454.

———Ss. 195 and 238—Offence not requiring sanction—Prosecution for—Conviction for offence requiring sanction—Legality.

When the Code provides that the Court shall not take cognizance of certain offences without complaint from a public servant it is not open to a magistrate to ignore this provision by the device of instituting the case under another section of the Penal Code. Where a magistrate took cognizance of an offence under S. 225 (b), I. P. C., and held that having done so, he was entitled under S. 238, Cr. P.C. to convict the accused under S. 173, I. P. C., which he regarded as a minor offence of the same character as that for which a penalty was provided under S. 225 (b), I. P. C. *Held*, that the conviction was illegal. (*Neave, J.*) SRI NARAIN SINGH v. EMPEROR. L. R. 5 A. 153 (Cr.).

———S. 195 (1)—Sanction—Complaint by public servant—Necessity for sanction.

Under S. 195, Cr. P. Code, sanction is not necessary when the public servant against whom the offence has been committed is himself the complainant. (*Krishnan, J.*) PUBLIC PROSECUTOR v. MARI MUDALI. 19 L. W. 30 :

(1924) M. W. N. 145 : 76 I. C. 653 : 25 Cr. L. J. 221 : 1924 Mad. 730.

———S. 195 (1) and (6)—Offence under S. 186, I. P. C.—Sanction by District Munsif for prosecution—Enquiry—Complaint preferred on sanction—Appeal—New Code—Amending Acts, XII and XVII of 1923.

The petitioner was alleged to have obstructed the Amin of the Munsif's Court in delivering possession of property decreed to the complainant. The Court gave sanction to prosecute after perusing the report of the Amin and the village munsif. *Held*, that there had been sufficient enquiry and the exercise of a judicial discretion by the Court granting the sanction.

Where a complaint has been launched after obtaining sanction under S. 195 (1), Cr. P. Code, the subsequent repeal of the sanction procedure by the Criminal Procedure Code Amending Act does not affect the sanction of the complaint filed under it ; 26 M. L. J. 511 Ref. (*Ramesam and Wallace, JJ.*) MUTHIA GOUNDAN v. CHINNA NALLAPPA GOUNDAN. 19 L. W. 392 : (1924) M. W. N. 358 : 1924 Mad. 615 (2).

———S. 195 (1) (b)—Perjury—Sanction for prosecution when to be given—Conflicting statements. 1924 A. 83.

———S. 195 (4)—Absence of sanction—If a mere irregularity—What sanction should contain. The absence of a sanction under S. 195, Cr. P. Code is not a defect that is curable under S. 537, Cr. P. Code.

A sanction to prosecute for an offence under S. 186, I.P.C. should contain the time and place at

CR. P. CODE (1898), S. 195.

which the offence was committed and a conviction based on a sanction which omitted the particulars acquired by S. 195 (4) will not be sustained. (*Moti Sagar, J.*) JASWANT SINGH v. EMPEROR.

81 I. C. 209 : 25 Cr. L. J. 721.

—S. 195 (6)—*Jurisdiction under—Nature of appellate revisional or special—Sanction to prosecute—Order revoking—Application to High Court under S. 195 (6) to set aside—Maintainability after new Code.*

The petition was under S. 195 (6) of the old Code of Criminal Procedure to set aside an order of a District Magistrate revoking the sanction granted by a Sub-divisional Magistrate, for the prosecution of the respondent for an offence under S. 188, I. P. C. Objection was taken to the maintainability of the petition on the ground that the new Code of Criminal Procedure (Act XVIII of 1923) had abolished such sanction and that was the law applicable to the case. Petitioner contended that the right to move the High Court under S. 195 (6) for sanction was of the nature of a substantive right, such as a right of appeal, which could not be taken away by any alteration of the processual law.

Held, that the right conferred by S. 195 (6) of the old Code was not a right in the nature of a right of appeal, that the amendments made by the new Code did not take away any substantive right and merely affected procedure, and that the petition was therefore unsustainable. (*Odgers and Wallace, JJ.*) NATARAJA PILLAI v. RANGASWAMI PILLAI.

47 Mad. 384 :

19 L. W. 358 : 34 M. L. T. (H. C.) 56 :

77 I. C. 297 : 25 Cr. L. J. 361 :

1924 Mad. 657 : 46 M. L. J. 274.

—S. 195 (6)—*Sanction—Court if can go beyond evidence at the trial Court.*

Before granting sanction to prosecute, a court is not restricted to the evidence given at the original trial. It can itself take such steps as it thinks necessary in the case before passing the order. (*Baker, O. J. C.*) PARMANAND FARWAR v. KARTAR NATH.

75 I. C. 703.

—S. 195 (6)—*Sanction to prosecute—Application to revoke—Maintainability after the passing of the New Amending Act.*

Where sanction to prosecute had been granted by the lower Court and pending an application for revocation to the superior Court, the New Criminal Procedure Amending Act (XVIII of 1923) had come into force, the application for the revocation could not be sustained. The sanction for cognizance of a complaint for offences specified in S. 195, Cr. P. Code is a matter relating to procedure. (*Krishnan and Waller, JJ.*) SSHA AYYAR v. THE PUBLIC PROSECUTOR.

19 L. W. 463 : 34 M. L. T. (H. C.) 353 :

25 Cr. L. J. 702 : 81 I. C. 190 :

1924 Mad. 585.

—S. 195, cl. (6)—*Sanction given by Magistrate—Refusal to revoke sanction by the superior Court—Sanction when can be regarded as "given"—Commencement of six months.*

When a sanction is given by a Magistrate on a certain date and the application for its revocation

CR. P. CODE (1898), S. 196.

is rejected by the Sessions Judge, the sanction must be taken to have been "given" by the court which originally granted it and not by the Court which merely refused to revoke that sanction after it had been granted. Hence the date from which the six months limitation prescribed in S. 195, Cl. (6) begins to run is the date on which the sanction was originally granted by the Magistrate (*Neave, A. J. C.*) MAKHDUM THATER v. EMPEROR.

1 C. W. N. 752.

—S. 195 (6) and (7)—*Order by a sub-Divisional Magistrate prohibiting interference with a religious ceremony—Disobedience of the Order—Sanction to prosecute, given by sub-Divisional Magistrate—Interference by Sessions Judge whether legal—Nature of an order by a Magistrate under S. 144, whether passed as a "public servant" or "court"—District Magistrate the proper authority to revoke.* NATARAJA PILLAI v. RANGASWAMI PILLAI.

47 M. 56.

—S. 195 (1) (c)—*Whether Sanction for prosecution could be entertained except on a complaint by the court.*

S. 195 (1), C. of the Criminal Procedure Code prohibits the court from taking cognizance of an offence described in S. 463, I. P. C. when such offence is alleged to have been committed by a party to any proceeding in a court in respect of a document produced in evidence, except on the complaint in writing of such court.

Held, that a prosecution for forgery could not be entertained except on a complaint by the court. (*Martineau, J.*) KAHRAH RAM v. MALAUT RAM.

5 L. R. 550.

—S. 195 (7)—*First Class Magistrate—Subordinate to Sessions Judge.*

First Class Magistrates when acting as courts are subordinate for the purposes of S. 195 (7) to the Sessions Judge inasmuch as although certain appeals lie to the District Magistrate, the majority lie to the Sessions Judge. The only test to be applied is the character which the Magistrate was assuming when passing the order. (*Pipon, J. C.*) SANT RAM v. DIWAN CHAND.

75 I. C. 289 : 24 Cr. L. J. 913.

—S. 196—*Order—Sanctioning prosecution—Form of.*

There is a special mode laid down in the Cr. P. Code whereby the order of sanction of Government is to be conveyed to the officer who puts the law in motion in cases under Ss. 121 or 124-A of the Penal Code. All that the Court has to see is whether the complaint was made by the order or under the authority of Government. (*Odgers and Wallace, JJ.*) M. P. NARAYANA MENON, *in re.* 25 Cr. L. J. 401 : 77 I. C. 481 :

1925 Mad. 106.

—S. 196—*Nature of sanction—Penal Code, S. 124-A.* 76 I. C. 871 : 25 Cr. L. J. 279.

—S. 196—*Sanction—Necessity for—Condition precedent.*

Where the law clearly lays down that it is a condition precedent to the prosecution that a sanction shall be obtained from the Local Government, it is not open to any subordinate

CR. P. CODE (1898), S. 197.

authority to override the provision of the law by saying that the offence falls under another section of the Penal Code and no sanction is necessary for a prosecution under that section. (*Mukerji, J.*) *RAM NATH v. EMPEROR*.
22 A. L. J. 1106.

—S. 197—Municipal Secretary—Prosecution for offence—Sanction if necessary.
1924 Lah. 310.

—S. 198—Complaint by husband—Defamation—Imputation of unchastity to wife. See PENAL CODE, S. 499.
47 M. L. J. 746.

—S. 198—Person aggrieved—Meaning of —Complaint by husband—Imputation of unchastity to wife.

Where a married woman is defamed by the imputation of unchastity, her husband is a person aggrieved, upon whose complaint the magistrate may take cognizance of the offence under section 198, Cr. P. Code. 14 M. 379; 25 B. 151 followed. (*Scott-Smith and Harrison, JJ.*) *GURDIT SINGH v. EMPEROR*. 5 Lah. 301; 1924 Lah. 559.

—S. 200—District Magistrate to whom case is sent for being transferred can legally dismiss it.

The complaint was originally before a Deputy Magistrate. The Deputy Magistrate sent the case to the District Magistrate with a view to the District Magistrate transferring it to another court. Instead of transferring it to another court the District Magistrate after examining the record came to the conclusion that the complaint was wholly without foundation and dismissed it. *Held* the order passed by him was not passed without jurisdiction. (*Daniels, J.*) *GOVIND PRASAD SINGH v. RAM DAS DUSADH*.
L. R. 5 A. 70 (Cr.) : 81 I. C. 43 : 25 Cr. L. J. 555 : 1924 A. 666 (1).

—S. 200—Failure to examine complainant—If vitiates trial—Prejudice. *MEHR CHIRAGH DIN v. EMPEROR*. 25 Cr. L. J. 125 : 76 I. C. 189 : 1924 Lah. 258.

—Ss. 202 and 203—Dismissal of complaint—Enquiry—Scope of.

The enquiry contemplated by S. 202, Cr. P. Code, does not necessarily mean an inquiry by the Magistrate himself examining witnesses or by holding investigation into the case. It is open to the Magistrate to investigate into the matter in order to ascertain the truth or falsity of the complaint in any way he thinks proper. Where an investigation had been made by the police and witnesses had been examined by the investigating police-officer, there is nothing in law to prevent the Magistrate from looking into the police papers for the purpose of ascertaining the truth or falsehood of the complaint. The enquiry contemplated by S. 202, Cr. P. Code is not limited to any particular form of enquiry and if upon looking into the police papers the Magistrate was satisfied that it was not a fit case in which process ought to be issued against the accused person, there is nothing in law to prevent the Magistrate from doing so. (*Kulwant Sahay, J.*) *RAMANAND LAL v. ALI HASSAN*.
1924 P. H. C. 226 : 1924 P. 797.

CR. P. CODE (1898), S. 209.

—Ss. 203 and 437—Dismissal of complaint—Further enquiry—Opportunity to show cause.
76 I. C. 236 : 25 Cr. L. J. 140.

—S. 203—Applicability—Petition under S. 107.

S. 203 does not apply to applications under S. 107, Cr. P. Code. (*Zafar Ali, J.*) *SHAMASUDDIN v. RAM DYAL SINGH*. 25 Cr. L. J. 89 (1) : 76 I. C. 25 (1) : 1924 Lah. 630.

—S. 203—Hearing evidence on both sides—Discharge—Effect of.

Where a Magistrate who has jurisdiction to try a case hears the evidence on both sides and then discharges the accused, it is tantamount to an acquittal. (*Dalal, J. C.*) *DAL CHAND v. RAM LAL*. 75 I. C. 727 : 25 Cr. L. J. 39.

—S. 203—Fresh complaint after prior discharge—If entertainable.

A prior order dismissing a complaint or discharging an accused, does not bar fresh proceedings against him. But unless the Court is satisfied that new facts are alleged which with due diligence could not have been brought forward on the prior occasion, the Court should dismiss the complaint under S. 203, Cr. P. Code. (*Brown, J.*) *U SHWE KYAW v. MA SEIN EWIN*.
3 B. L. J. 228.

—S. 204—Order under—Subsequent passing of another order under S. 202.

39 C. L. J. 329 : 77 I. C. 816 : 25 Cr. L. J. 464.

—S. 205 (2)—Prosecution under the Income Tax Act—Appearance by pleader.

75 I. C. 150.

—S. 208—Failure to take defence evidence—Effect.

L. R. 5 A. 50 (Cr.) : 1924 A. 317 : 46 A. 137.

—S. 209—Case triable by Sessions court—Preliminary enquiry—Grounds for committing accused.

76 I. C. 702 : 25 Cr. L. J. 238.

—S. 209—Commitment to Sessions by District Magistrate—Discharge by Deputy Magistrate—Conclusions of Civil Court—Reliance on.

The petitioners were prosecuted for forgery and the Deputy Magistrate who inquired into the case disbelieved the evidence and discharged the accused. The District Magistrate relied on two judgments of a civil court and committed the accused for trial to the Sessions. *Held*, that the District Magistrate was influenced by the decisions of the civil court and that he had no right to rely on them.

It is open to a Deputy Magistrate to form his opinion with regard to the credibility of the witnesses called before him. If a *prima facie* case is made out he should clearly leave it to the jury at the Sessions to form their own view as to their credibility of the evidence. But if after hearing the evidence he is satisfied that it is not trustworthy and that a conviction will not result, he is entitled to record a finding that the witnesses who spoke in support of the charge cannot be believed and that a conviction will not result.

CR. P. CODE (1898), S. 209.

(Greaves and Panton, JJ.) TARAPADA BISWAS v. KALIPADA GHOSH. 28 C. W. N. 587 : 51 Cal. 849 : 1924 Cal. 639.

—S. 209—Committing Magistrate—Powers of.

A Magistrate making an enquiry into a case triable by the Sessions Court can himself judge of the credibility of the prosecution witnesses and if he thinks the evidence unreliable discharge them, (Ross, J.) MUNSHI MANDER v. KARU MANDER. 81 I. C. 913 : 25 Cr. L. J. 1069.

—S. 209—No foundation for charge—Discharge.

Where in a charge triable by the Sessions Judge, the Magistrate who heard the case is of opinion that there is no foundation for a prosecution he is bound to discharge him after recording his reasons. (Daniels, J.) GANPAT LAL v. EMPEROR, 22 A. L. J. 411 : 10 O. & A. L. R. 551 : 46 A. 537 : L. R. 5 A. 174 (Cr.) : 81 I. C. 315 : 25 Cr. L. J. 795.

—Ss. 213 (2) and 347—Case tried as warrant-case—Framing of charge—Order of discharge, whether legal—Acquittal—Inquiry preliminary to commitment—Court's power to discharge—Cancellation of charge—Discharge of, accused against whom charge has been framed, whether authorised by S. 347, Cr. P. C.

After a charge under S. 409, I. P. C. is framed against an accused under Chapter XXI of the Code of Criminal Procedure, the Magistrate cannot discharge the accused but can only acquit him unless he convicts or decides to commit him to the Sessions under S. 347, Cr. P. Code.

When, however, a case is taken up from the first under Ch. XVIII as an enquiry preliminary to commitment a Magistrate can, under S. 213 (2), cancel the charge and discharge the accused even after hearing witnesses for the defence if he is satisfied that there are no sufficient grounds for committing the case. A charge framed by the Magistrate when trying a warrant case cannot be cancelled under the above section.

It is open to a Magistrate to pass an order of acquittal in respect to one part of the offence, e. g. criminal breach of trust in respect to one item and to commit the accused under S. 347, Cr. P. C. to the Sessions in respect to another part of the offence if he finds that a *prima facie* case is made out.

S. 347, Cr. P. Code does not empower a Magistrate to discharge an accused against whom a charge has been framed. It is only in respect of the offence for which the accused is to be committed to the court of session that the proceedings are taken out of Chapter XXI and the other proceedings of the Magistrate must remain governed by the provisions of that Chap. (Wazir Hasan and Neave, A. J. Cs.) PANDIT BISHAMBHAR NATH v. EMPEROR. 1 O. W. N. 705.

—S. 215—Error of law—First Class Magistrate not punishing an offence punishable by him is error of law.

Where the case was not only exclusively triable by the Sessions Court and the Committing Magis-

trate who was the First Class Magistrate was empowered to pass an adequate sentence.

Held, the commitment by the Magistrate to the Sessions, was an error of law and the quashing of commitment was justified. 14 C. L. J. 304 Dist 1 S. L. R. 31: 8 S. L. R. 23 and 14 S. L. R. 85 and 15 B. L. R. 98 Foll. (Raymond and Madgavkar, A. J. C.) UTLI BAI v. EMPEROR. 17 S. L. R. 188 : 1924 S. 61.

—S. 215—Judicial commissioner when sitting in Sessions division can pass an order under S. 215.

The Judicial Commissioner when sitting in the Session Divisions is not divested of his dual capacity as a High Court Judge and he has full power to make an order under S. 215, Cr. P. C. even when sitting as a Sessions Judge 32 Cal. 379 Dist. (Raymond and Madgavkar, A. J. Cs.) UTLIBAI v. EMPEROR. 17 S. L. R. 188 : 1924 S. 61.

—S. 215—Power to quash commitment—Credibility of evidence—If a question of law.

25 Cr. L. J. 261 : 76 I. C. 821 : 1924 Rang. 165 (2).

—S. 222 (2)—Effect of amendment.

The introduction of Cl. 2 in S. 222, Cr. P. Code was not to amend the Penal Code but to amend the processual law. As the law stood before, there was great difficulty in convicting where there was a running account and where the prosecution were unable to put their hands on a specific item out of which the particular sum was embezzled; also there was the difficulty of joinder of charges under S. 234. (Walsmsley and Mukerji, JJ.) KHIRODE KUMAR MUKERJI v. EMPEROR. 29 C. W. N. 54 : 40 C. L. J. 555.

—Ss. 226 and 227—Sessions Trial—Power to add a charge distinct from the charges framed by Committing Magistrate.

The accused were committed to the Sessions for the murder of one person and for causing hurt to another person. The Sessions Judge added a charge relating to the murder of the latter person also. Held that in the circumstances of the case the Sessions Judge had power to add a charge distinct from the charge framed by the committing Magistrate. (Newbould and Ghose, JJ.) HASSENULLA SHEIKH v. EMPEROR.

28 C. W. N. 561 : 1924 Cal. 625.

—Ss. 225 and 537—Omission in charge—Cure—Re-trial—When to commence.

Ss. 225 and 537 would cure any omission there may be of the particulars required by S. 223.

Even in cases of defective charges, the whole trial is not vitiated but only the portion after the framing of the charge. (Holifax, A. J. C.) GANGADHAR v. BHANGI SAO. 81 I. C. 976 : 25 Cr. L. J. 1152.

—S. 226—Amendment of charge—Powers of.

The power to amend a charge after commitment extends only to imperfect or erroneous

CR. P. CODE (1898), S. 231.

charges and relates only to defects in form. (*Wazir Hasan, J.C. and Pullan, A. J. C.*) SURAT
BAHADUR v. EMPEROR. 11 O. L. J. 640 :

1 O. W. N. 362 : 81 I. C. 986 :
25 Cr. L. J. 1162.

—S. 231—*Criminal trial—Charge—Alteration of, after commencement of trial—Right of accused to re-examine prosecution witnesses, and adduce further evidence in defence—Legality of procedure.*

The accused was originally tried under S. 324 of the Penal Code. After the evidence for the prosecution closed, the accused was charged under S. 324 of the Penal Code and the trying Magistrate recorded his plea and proceeded to hear the evidence for the defence. The charge aforesaid was framed on the 16th November, 1923. The evidence for the defence was concluded on the 12th of December 1923. On the 15th of December, 1923, the trying Magistrate altered the charge into one under S. 307 of the Penal Code and without giving the accused an opportunity to re-examine the witnesses for the prosecution in regard to the altered charge or to produce such further defence evidence as he may have in his defence on that charge, committed him to the Court of Sessions for trial on the charge so altered. S. 231, Cr. P. Code requires that when a charge is altered by the Court after commencement of the trial, the prosecutor and the accused shall be allowed to re-call or re-summon and examine with reference to such alteration or addition any witness who may have been examined and also to call any such further witness whom the Court may think material. The alteration was made at a very late stage of the case and no commitment ought to have been made on the altered charge without giving the accused an opportunity of re-examining the witnesses for the prosecution and producing his defence in regard thereto. *Held*, that the procedure of the Magistrate was entirely illegal and likely to prejudice the accused in his trial before the Court of Session. (*Kanhaiya Lal, J.*) MOHAN LAL v. EMPEROR. 22 A. L. J. 239 : L. R. 5 A 79 Cr. : 81 I. C. 318 : 25 Cr. L. J. 738.

—S. 233—*Joint trial—Cross cases—Legality.*

In respect of a riot between two factions there were two cross cases. A joint trial was held, the prosecution evidence in each being treated as the defence evidence in the other. *Held*, the procedure was illegal. (*Abdul Raof, J.*) MUHAMMAD v. EMPEROR. 81 I. C. 39.

—S. 234—*Stolen properties—Several diverse articles found—Procedure at trial—Joint or separate.*

When the date or dates at which various parcels of stolen property were received are not known, the date is not material in dealing with charges of retention upon which the prosecution is thrown back. If the prosecution forms a charge on the presumption that the retentions constituted a set of independent offences, it must include only three parcels in respect of which the charge is made and it may there be met by the plea that the retentions in fact constitute one

CR. P. CODE (1898), S. 235.

transaction, in which case the charge may be amended and the whole tried at one trial. If the prosecution launches several separate proceedings, the accused can take the benefit of S. 403, Cr. P. Code, on the ground the retention constituted a single transaction. The only safe course for the prosecution in such cases is to adopt the first course.

Even if the articles recovered were of diverse character, it constitutes the same offence, as being punishable under the same section of the Penal Code. (*Adami and Bucknill, JJ.*) EMPEROR v. BISHUN SINGH. 3 Pat. 503 :

5 Pat. L. T. 319 : 2 Pat. L. R. 131 : (Cr.)
1924 P. H. C. C. 126 : 25 Cr. L. J. 738 :
81 I. C. 226 : 1925 P. 20.

—S. 234—*Joint trial—Members of the same crowd—Common object—Series of attacks at different places and at short intervals, whether constituting a single or a number of separate riots.*

Held, that where all those persons who attack are actuated by a single motive a continuous series of attacks with the same common object, even though the composition of the crowd may vary, constitutes a single riot and not a number of separate riots. The mere fact that one of them attacks at one place and another at another place a few minutes after does not prevent them from being tried jointly as long as they are members of the same crowd actuated by the same motive. (*Pullan, A. J. C.*) PRAG v. EMPEROR.

1 O. W. N. 473 : 10 O. & A. L. R. 871 :
82 I. C. 33 : 25 Cr. L. J. 1169 :
11 O. L. J. 693.

—S. 234—*Misappropriation—Twenty-six items—Joint trial—Legality.*

76 I. C. 652 : 25 Cr. L. J. 22.

—Ss. 235, and 239—*Abduction and concealment on different dates—Same transaction—Joint trial.*

25 Cr. L. J. 1082 : 81 I. C. 906 :
1924 Cal. 389.

—S. 235—*Joint trial—Offences under Ss. 366 and 147, I. P. C.—Illegality.*

77 I. C. 997 : 25 Cr. L. J. 533.

—Ss. 235 and 239—*Misjoinder of charges—Offences under Ss. 147, 149 and 304, I. P. C.—Offence under S. 201, I. P. C.*

Five persons were charged with rioting in the course of which one of the other persons who took part in the affray died on the spot. Thereafter the 5th accused along with another carried away the dead body. The 5th accused was tried under S. 201, I. P. C. along with others under Ss. 34, 147, 148, 149, 201 and 304, I. P. C. *Held*, that the trial of the 5th accused on a charge under S. 201, I. P. C. along with the others was illegal and the trial was vitiated by misjoinder of charges. In framing charges under Ss. 34 and 147 and 304, I. P. C. attention should be paid to the case as put forward on behalf of the prosecution and the matter should then be dealt with strictly in accordance with the allegations which the prosecution desired to prove. (*Walmsley and Mukerjee, JJ.*) SURENDRA LAL DAS v. EMPEROR. 40 C. L. J. 559.

CR. P. CODE (1898), S. 235.

—S. 235—Same transaction—What is—Separate acts of cheating—Joint trial—Legality.

A number of accused were tried jointly under S. 420, I.P. C. in respect of acts of defrauding on various persons on different occasions and not all by the same accused. Held a joint trial of all the accused was illegal. Each act was complete in itself and the defrauding could not be said to be in the course of "the same transaction". (*Moti Sagar, J.*) NANAK CHAND v. EMPEROR. 25 Cr. L. J. 1020 : 81 I. C. 796. 1924 Lah. 734.

—S. 236—Scope—Deposition in Sessions Court and civil suit are not series of acts.

To attract the applicability of S. 236, Cr. P. Code and justify a charge in the alternative it is essential to remember that it is only when the statements constitute a "series of acts" that an alternative charge can be framed. As there is a common relation between a police investigation, an inquiry by the Magistrate preliminary to commitment and a final trial in the Sessions Court, to the statements made at these different stages the words "series of acts" would be applicable. A series of acts means two or more acts connected together by some common relation. 45 Bom. 834 Exp. and Dist. (*Kennedey, C. J. and Raymond, A. J. C.*) SALEH SHAH v. EMPEROR. 82 I. C. 59 : 16 S. L. R. 285 : 25 Cr. L. J. 1195 : 1924 Sindh 1.

—Ss. 236, 237 and 238—Alteration of charge—Powers of.

A person was convicted under S. 325, I.P.C. for a charge that he caused such bodily injury which resulted in the man's death. The appellate court disbelieved the evidence, and was asked to amend the charge by changing it into one under Ss. 34 and 325, I. P. C. as there was a common intention to beat. Held, the charge could not be amended in appeal as it would in effect deprive the accused of an opportunity to meet the new case. Nor could a re-trial be ordered in the case on the amended charge. (*Boys, J.*) CHHIDDA SINGH v. EMPEROR. 82 I. C. 364 : 25 Cr. L. J. 1292.

—S. 238—Conviction for abetment—Charge only of substantive offence.

Where a person is charged only with a substantive offence under the Penal Code, he cannot be convicted of abetting the commission of the offence (*MacLeod, C. J. and Shah, J.*) EMPEROR v. RAGHYA NAGYA. 26 Bom. L. R. 323 : 25 Cr. L. J. 1135 : 81 I. C. 959 : 1924 Bom. 432.

—S. 239—Conspiracy—Trial for—Jurisdiction of Court.

Where a conspiracy is entered into in one district and the acts in pursuance thereof are committed in another district, the Magistrate of the former district can try the offence of conspiracy but cannot try the accused in the same trial for offences committed outside his district. The mere fact that the offences could have been tried jointly under S. 239, Cr. P. C. if committed within the jurisdiction would not give a Magistrate jurisdiction to try the offence committed outside the jurisdiction, (*Newbould and Chakravarti, J.J.*) BISSESWAR v. EMPEROR. 28 C. W. N. 975 : 1924 Cal. 1034.

CR. P. CODE (1898), S. 243.

—S. 238 (2)—Charge under S. 452, I. P. C. Conviction under S. 426—If proper.

A person was charged under S. 452, I. P. C. but was convicted for an offence under S. 426, I. P. C. Held the procedure was sanctioned by S. 238 (2), Cr. P. Code. (*Wazir Hasan, J.C.*) MUN-NAY MIRZA v. EMPEROR. 81 I. C. 911 : 25 Cr. L. J. 1087.

—S. 239—Joint trial—Discretion.

78 I. C. 966 (2) : 25 Cr. L. J. 294 (2).

—S. 239—Joinder of charges—Boycott, promotion of—Trial under Ss. 4 (a) and 4 (c) of Burma Ante Boycott Act.

Where an association decides to boycott a person and shortly after some members take joint action to boycott that person, they act in furtherance of a common purpose and acts done in pursuance thereof can be the subject of a joint trial. There is a continuity of purpose and action and the acts must be deemed parts of the same transaction. (*Pratt, J.*) EMPEROR v. NGA AUNG GYAW. 76 I. C. 830.

—S. 239—Same transaction—Receiver of stolen property selling it to another—Joint trial.

Where a receiver of stolen property sold it to another and both were jointly tried under S. 411, I. P. C., the joint trial is illegal as the acts for which they were respectively charged did not form part of the same transaction (*Greaves and Chotzner, J.J.*) DALSUK ROY AGARWALLA v. EMPEROR. 81 I. C. 343 : 25 Cr. L. J. 807.

—S. 239 (d)—Forgery of Currency notes—Conspiracy—Abetment—Joint trial of accused.

The accused entered into a conspiracy to forge currency notes and were in possession of instruments and material for manufacturing forged notes. The first accused was charged with having attempted to pass the forged notes. All the accused were tried together for being members of a conspiracy and being in possession of instruments for manufacture of forged notes. Held that joint trial was legal in view of S. 239 (d), Cr. P. C., since the attempts of the first accused to pass the currency notes was part of the same transaction of conspiracy. (*Watson, R.M.*) NARAYANACHARI v. EMPEROR. 2 Mys. L. J. (B and C) 11.

—S. 243—Plea of guilty—What amounts to.

In a prosecution for obstructing a public road with a bullock cart, the accused on being asked whether on the day in question he drove a bullock cart on the particular road without permission and thus caused danger by obstructing the road, answered that he drove the cart without permission on account of ignorance and begged to be excused. On that, he was convicted under S. 283, I. P. C. Held the plea was not one of guilty and the conviction was wrong. (*Moti Sagar, J.*) EMPEROR v. GHULAM RAZA. 81 I. C. 195 : 25 Cr. L. J. 707.

—Ss. 243 and 244—Summons Case—Procedure—Conviction on an admission by the accused's counsel, whether correct.

It is an incorrect procedure to convict an accused in a summons case on an admission by

CR. P. CODE (1898), S. 247.

his counsel without examining him or recording any evidence. (*Neave, A.J.C.*) THE MUNICIPAL BOARD *v.* MESSRS. TULSI RAM & SONS.

1 O. W. N. 495 : 10 O. & A. L. B. 100.

— S. 247—Absence of complainant—Acquittal of accused—Effect—Bar of fresh trial, 5 Pat. L. T. 15 : 2 Pat. L. R. 10 (Cr.) : 1924 P. 140.

— Ss. 247 and 403—Acquittal—Different charge on same facts—Trial barred.

76 I. C. 293 : 25 Cr. L. J. 149.

— S. 247—Applicability of—Case not instituted on complaint—Non-appearance of complainant—Effect of—U.P. Act, (11 of 1916) S. 47.

Under S. 47 of the U. P. Act II of 1916, it is the Magistrate who takes cognizance of the offence upon information received. So the case is not one instituted upon a complaint within the meaning of the word "complaint" in Section 4 (h) of the Code of Criminal Procedure, and S. 247 of the Code of Criminal Procedure has no application. In spite of the non-appearance of the complainant the proceedings must continue, (*Stuart, J.*) MT. BASANTI *v.* MAQSUD ALI KHAN.

L. R. 5 A. 63 (Cr.) : 1924 A. 528.

— S. 247—Summons case—Dismissal for default—Fresh complaint on same facts—If lies.

Where the complaint in a summons case is dismissed for default, the order is one under S. 247, Cr. P. Code, and is tantamount to an acquittal. Such an order does not fall within the purview of S. 436, Cr. P. Code. (*Wazir Hasan, A. J. C.*) BINDRA *v.* MT. BHAGWANTA.

77 I. C. 295 : 25 Cr. L. J. 359.

— S. 247—Order of acquittal—Who can set aside—Revival of, 1924 Cal. 96. NITYANANDA KOER *v.* RADHAHARI MISRA. 1924 Cal. 96.

— Ss. 248 and 345—Withdrawal of complaint—Composition of offence—Several accused—Trial as regards some.

Under S. 345 (6), Cr. P. Code as recently amended by Act XVIII of 1923, a composition of an offence with some of several accused has the effect of an acquittal as regards them, but does not affect the case as against the remaining accused. The complainant charged five persons with an offence under S. 326, I. P. C., and subsequently put in a petition whereby he withdrew his complaint against one of the accused who had apologised and wished the case to proceed against the others. *Held*, that there was in effect a composition of the offence with one of the accused and that expression "withdrew the complaint" was loosely used. Per *Le Rossignol, J.* (*Harrison, J. Contra*) There is nothing in S. 248, Cr. P. C. which involves a withdrawal of the whole complaint merely because the complaint is withdrawn against one of the accused. (*Le Rossignol, Abdul Raoof and Harrison, JJ.*) ANANTIA *v.* EMPEROR. 5 Lah. 239 : 25 Cr. L. J. 629 : 81 I. C. 117 : 1924 Lah. 595.

— S. 250—Acquittal of accused—Award of compensation—Interference.

Where no prejudice is caused the High Court will be very reluctant to interfere with the acquittal of persons who have undergone a trial in a

CR. P. CODE (1898), S. 253.

Court of Competent Jurisdiction or with the order of such a competent Court under S. 250, Cr. P. C. (*Dalai, J.*) DEBI PRASAD *v.* EMPEROR, L. R. 5 A. 93 (Cr.) : 1924 All. 674.

— S. 250—Compensation—Failure of Court to examine witnesses of complainant—Order for compensation invalid—Against conviction under S. 250, Criminal Procedure Code.

Compensation under S. 250, Cr. Pro. Code, can only be awarded after the complainant has had an opportunity of producing all his evidence including those witnesses whose names are not contained in the list but are brought to Court without summons. (*May Oung, J.*) SYA KAW *v.* EMPEROR. 3 Bur. L. J. 26 : 82 I. C. 288 : 25 Cr. L. J. 1280 : 1924 Rang. 293.

— S. 250—Order for compensation—Information given to village Magistrate—Liability of informant for false information. 1924 Mad. 91.

— S. 250, Sub-S. (3)—Appeal by Complainant—Order of compensation—Amount exceeding fifty rupees.

Whenever a complainant has been ordered under Sub-S. (2) of S. 250, Cr. P. Code, to pay compensation exceeding rupees fifty, he has a right of appeal, whether the amount is awarded to one accused or is ordered to be distributed among a number of accused persons in sums not exceeding 50 rupees. (*Macleod, C. J. and Crump, J.*) AUGUSTIN MANWAL *v.* DUMING PASTOL. 28 Bom. L. R. 1243.

— S. 250 (3)—Notice of appeal under, should be given to accused though no express provision exists—Cr. P. Code, S. 422.

Where an appeal is preferred against an order directing payment of compensation to accused, *Held*, that although there is no express provision nevertheless on the principle *audi alteram partem* the accused should have notice of the appeal in order that they should have an opportunity of supporting the order passed in their favour 29 Mad. 187 Foll ; 38 Mad. 1091 Foll, (*Campbell, J.*) RAM CHAND *v.* JESA RAM.

25 Cr. L. J. 209 (2) : 76 I. C. 641 (2) : 1924 Lah. 675 (2).

— S. 253—Discharge of accused—Sessions case—Committing Magistrate—Discretion of.

A Magistrate is not compelled to commit to Sessions any case in which he considers that a conviction is impossible. At the same time where the accused is charged with an offence triable only by a Court of Session the Magistrate must exercise a proper discretion in ordering the discharge of the accused. It is not enough for the Magistrate merely to doubt some portions of the Prosecution Evidence. He must be satisfied that the prosecution will fail in the Sessions Court and rightly fail. (*Pullan, A. J. C.*) CHEDA KHAN *v.* EMPEROR, 10 O. & A. L. R. 722 : 1 O. W. N. 402 : 82 I. C. 53 : 25 Cr. L. J. 1189 : 11 O. L. J. 664.

— S. 253 (2)—Discharge prior to date fixed for hearing—Propriety of.

Under S. 253 (2) a Magistrate has ample jurisdiction to make an order of discharge even before

CRIM. P. CODE (1898), S. 254.

the date fixed for hearing if upon the materials then before him he is satisfied the offence could not have been committed. (*Kulwant Sahay, J. J. WATSON v. METCALFE*, 81 I. C. 184 : 25 Cr. L. J. 696.)

—S. 254 — Commitment to Sessions — Ground for—Petty case—Commitment to Sessions. 1924 All. 185.

—S. 256—Omission to ask accused if he desired to recall prosecution witnesses for cross-examination after framing of charge. 1924 Lah. 215.

—Ss. 256 and 544—Accused—Right to cross-examine witnesses—Batta for witnesses—Liability to pay.

Where an accused seeks to exercise the right of cross examination conferred by section 256, Criminal Procedure Code, he cannot be legally required to deposit the expenses.

The question who should pay whether the Government or the complainant, is one to be decided by the Magistrate. Section 544 of the Code of Criminal Procedure is subject to rules made by the Local Government. The rules in force in the Central Provinces will be found in the Judicial Commissioner's Circular, No. 1—37. If the complaint is a private one brought for using false trade-mark and the prosecution is not one carried on by, or under the orders or with the sanction of the Government and is bailable, the only provision under which the Government could be made to pay the expenses is if it appears to the presiding officer that the prosecution is directly in the interests of public justice, a point which is one obviously for the Magistrate to decide. But in no case can the accused be compelled to pay the expenses of the witnesses for the prosecution whom he wishes to cross-examine under Section 256, Criminal Procedure Code. Under that section the right of the accused to cross-examine is absolute. (*Baker, O. J. C.*) RADHAKISAN v. RAMKRISHNA. 7 N. L. J. 57 : 25 Cr. L. J. 912 : 81 I. C. 448 : 1924 Nag. 114.

—S. 256—Declaration of accused that he had no witnesses for defence—Cross-examination of prosecution witnesses—Right of accused to produce defence thereafter

The accused declared that he had no witnesses for the defence and the cross-examination of the prosecution witnesses took place under the direction of the Court. Held that the accused could not claim any right to produce his defence after cross examination under S. 256 Cr. P. Code. (*Dalai, J.*) MUSHTAQ HUSAIN v. EMPEROR.

L. R. 5 A 92 (Cr.) : 1924 All. 673.

—Ss. 256 and 257 — Scope of—Recall of prosecution witnesses—When done.

Where prosecution witnesses are re-called for cross-examination at the instance of the accused after charge has been framed, it is not always under S. 256. S. 256 authorises this only when the prosecution case is incomplete and when it is done after close of the case as put forward by the prosecution; it is done under S. 257 after the accused has entered on his defence. Scope of sections fully dealt with. (*Hallifax, A. J. C.*) GANGADHAR v. BHANGI SA. 81 I. C. 976 : 25 Cr. L. J. 1152.

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CRIM. P. CODE (1898), S. 257.

—S. 257—Criminal Trial—Duty of magistrate to examine all witnesses cited for defence.

Where in a criminal trial it became obvious, that, if the prosecution story which put as the leader of an assault an individual whose presence at the scene of the alleged occurrence was conclusively disproved, it could not but throw serious grounds of suspicion upon the whole of the prosecution story, and the defence cited an important witness to prove his absence, the magistrate is not justified in refusing to examine the witnesses simply because he was unwell at the time. The proper course could have been that some effort should have been made to ascertain (either by telegram or by correspondence and either undertaken on behalf of the Court or undertaken by the applicant himself) as to whether it would, within a reasonable time, be possible for the invalid gentleman to come and if not, then, reluctantly to come to the conclusion that it was necessary that his evidence should be taken on commission owing to his inability to be present at the place where the case was being decided. (*Adami and Bucknill, JJ.*) JAMUNA SINGH v. EMPEROR. 3 Pat. 591 : 82 I. C. 263 : 25 Cr. L. J. 1255 : 1925 P. 55.

—8. 257—Refusal to summon witnesses—No reasons recorded—Effect.

Where a Magistrate rejects an application to summon witnesses without recording any reasons as required by S. 257, Cr. P. C. and the accused is prejudiced by such refusal, the High Court will interfere in revision. (*C. C. Ghose and Panton, JJ.*) ABDUL JABBAR v. EMPEROR.

25 Cr. L. J. 310 (2) : 76 I. C. 1030 (2) : 1925 Cal. 80.

—S. 257—Scope of—Rejection of application to summon witnesses—Grounds for—Failure to record reasons—Effect.

Where a judge dismisses an application to summon witnesses but does not give his reasons as contemplated by S. 257, but merely states the fact, the procedure is irregular but does not amount to an illegality which cannot be cured.

Per Wallace, J.—Whether an application is vexatious or not it is for the judge to decide and where he decides that the evidence of a witness who is sought to be summoned will not be of any use in deciding the case, the application is in substance rejected under S. 257. (*Odgers and Wallace, JJ.*) In re M. P. NARAYANA MENON.

77 I. C. 481 : 25 Cr. L. J. 401 : 1925 Mad. 106.

—S. 257—Criminal trial—Witnesses for prosecution—Right of accused to cross examine—Refusal to issue process without recording grounds.

The accused, even after he has entered upon his defence, is entitled to have the prosecution witnesses summoned for cross-examination, unless the magistrate considers that such application should be refused on the ground that it was made for purpose of Vexation or delay or for defeating the ends of justice. If the Magistrate does so consider, the section is imperative that such ground shall be recorded by him in writing. Omission to comply with this provision of law is

CRIM. P. CODE (1898), S. 258.

an illegality which vitiates the trial. (*Newbould and Ghese, JJ*) MANOMOHAN DASTIDAR v. BANKIM BEHARI CHOUDHURY. 51 C. 1044.

—Ss. 258, 259 and 514—Charge framed against accused—Complainant and accused absent—Order of discharge if valid—Proper procedure—For forfeiture of bond, when accused's presence held unnecessary.

When the parties are, after a charge is framed, absent the proper procedure for the Magistrate is to get the accused arrested under a warrant and then decide whether he is guilty or not, and not to discharge the accused and then direct the taking of proceedings under S. 514 for forfeiture of his bond. After a charge is framed the provisions of S. 259 will not apply and to apply the provisions of S. 258 the Magistrate must find the accused not guilty.

Held further, that where in a case an order of discharge is passed after a charge is framed and obviously the complainant has no desire to proceed with his complaint, justice will be done by altering the order of discharge to one of acquittal holding the accused to be not guilty of the offence charged against him.

Held also, that when the court itself by discharging the accused persons holds that their presence on the date of hearing was unnecessary, no action should be taken under S. 514. (*Dalal, J. C. and Neave, A. J. C.*) EMPEROR v. GODHAN, 10 W. N. 586 : 10 O. & A. L. R. 998.

—S. 258—Warrant Case—Procedure—Charge framed against accused—Accused, whether can be acquitted in complainant's absence.

Where a charge has been framed against the accused and the latter have entered upon their defence and produced some defence witnesses, they cannot be acquitted on account of the absence of the complainant.

An order of acquittal is justified only under S. 258 of the Code of Criminal Procedure after the Court records a finding that the accused is not guilty. (*Wazir Hasan, A. J. C.*) RAM BAKSH v. JAIRAM DAS, 1 O. W. N. 613 : 10 O. & A. L. R. 916.

—S. 259—Warrant case—Adjournment in absence of complainant—Liability to pay costs.

In a warrant case after charge is framed the magistrate has to go on with the trial irrespective of the presence or absence of the complainant. The position of the latter thereafter is reduced to that of a witness and he cannot be asked to pay the costs of an adjournment necessitated by his absence. (*Zafar Ali, J.*) NABI BAKSH v. EMPEROR. 76 I. C. 23 : 25 Cr. L. J. 87 : 1924 Lah. 627.

—S. 260—Summary trial—Clear finding necessary.

In summary trials it is very important there should be clear findings on questions of facts because it is only through such findings that the court of revision can form its own judgment with regard to the legality or otherwise of the proceedings of the Trial Court. (*Wazir Hasan, A. J. C.*) EMPEROR v. JEGMOHAN DAS, 75 I. C. 292 : 24 Cr. L. J. 916 : 1924 Oudh 297.

CRIM. P. CODE (1898), S. 275

—S. 261—Scope of—Trial by bench of Magistrates—Discretion of Government.

S. 261 of the Cr. P. Code implies the exercise of discretion on the part of the local Government as to whether it would confer on the Bench of Magistrates jurisdiction to try summarily all or any of the offences referred to in the section. It could not exercise such discretion, if any new offence subsequently brought within the scope of the section was to be by the mere fact of its inclusion in the section triable by the Bench. (*Barton.*) RUBIN v. MOSES. 2 Mys. L. J. (B. & C.) 18.

—Ss. 262 and 263—Warrant case—Trial as summons case—Effect of—Plea of accused. NATABAR KHAN v. EMPEROR. 25 Cr. L. J. 1270 : 82 I. C. 278 : 1924 Cal. 63.

—S. 262 (2)—Summary trial—Maximum sentence. NGA SAN BA v. EMPEROR. 76 I. C. 704 : 25 Cr. L. J. 240.

—Ss. 263, 370, 439 and 537—Presidency Towns—Honorary Magistrates—Summary trial—Omission to record reasons—Revision—Interference.

Honorary Magistrates as Presidency Magistrates are governed also by S. 370, Cr. P. Code in cases where imprisonment is inflicted. The omission of the reasons for the conviction is no doubt an irregularity but unless the irregularity has prejudiced the accused, there would be no interference in revision. 46 M 253 Ref (*Oagers and Wallace, JJ.*) THURMAN *In re*, 20 L. W. 330 : 25 Cr. L. J. 1084 : 81 I. C. 908 : 1924 Mad. 799.

—Ss. 263 (h) and 537—Trial by Bench Magistrates—Omission to record reasons for conviction.

The omission to comply with cl. (h) of S. 263 of the Cr. P. C. on the part of the Bench Magistrates trying a criminal case is only an irregularity which can be cured under S. 537 of the Cr. P. Code where the case was a non-appellable one and there was clear evidence justifying the conviction. It is an omission which does not occasion a failure of justice. (*Marten and Fawcett, JJ.*) EMPEROR v. NAMDEO LAKMAN. 26 Bom. L. R. 1236.

—Ss. 275 and 528 A—Indian British subject—Claim to be dealt with as such—Rejection of—Trial by Sessions Judge—High Court—Claim to be tried by majority of Indian Jurors.

An Indian British subject claiming to be dealt with as such must put in his claim before the Magistrate before whom he is brought for the purpose of enquiry or trial. This applies to Presidency Magistrates as well as Magistrates in the mofussil. If the Magistrate rejects the claim and tries him, the decision shall form a ground of appeal from the sentence or order passed in such appeal. This applies to Presidency Magistrates as well as Magistrates in the mofussil. If the Magistrate rejects the claim and commits him to the Court of Session, he may repeat the claim before the said Court. Such repetition may only be made in a Court of Session and not

CRIM. P. CODE (1898), S. 284.

in the High Court exercising original criminal jurisdiction. If the Court of Session rejects the claim and tries him, the decision shall form a ground of appeal from the sentence or order passed in such a trial. It necessarily follows that if a claim is made before Presidency Magistrate and rejected by him and the accused is committed to the High Court, there is no provision for repetition of the claim before the High Court, and the accused will not be entitled to put in, under S. 275, Cr. P. Code before the High Court, a further claim for being tried by a jury the majority of whom should be Indians. Where no such claim was put forward before a Magistrate there being no provision for repetition of the claim before the High Court, S. 528 B is a bar to the assertion of the same in any subsequent stage of the case. The claim may be made at any time up till the time when the commitment is made. The committing court becomes *functus officio* and loses all jurisdiction over the case after the commitment and special provisions have been made in Ss. 216 to 219 to enable the Court to retain jurisdiction only in respect of some matters. (*Mukerji, J.*) *EMPEROR v. HARENDRA CHANDRA CHAKRAVARTHY.*

51 Cal. 980.

—S. 284—Trial with two assessors—Effect.

Where a criminal trial takes place after the 1st September 1923 with only two assessors when the law requires at least three, the proceedings are null and void. In cases triable with the aid of assessors the judge together with the assessors constitute the Court. (*Prideaux and Kinkhede, A. J. C.*) *JAIRAM KUNBI v. EMPEROR.*

77 I. C. 811 : 25 Cr. L. J. 459 ;
20 N. L. R. 129 : 1924 Nag. 287.

—S. 284—Trial with assessors—Requisite number not obtained—Effect on trial.

Where the criminal trial was commenced after the amended Criminal Procedure Code came into force with two assessors only contrary to the provisions of S. 284 as amended, this renders the trial illegal. (*Daniels, J. C.*) *PRAGI v. EMPEROR.*

11 O. L. J. 245 : 1924 Oudh 417 (1).

—S. 288 (as amended by Act XVIII of 1923)—Its meaning—Value of evidence before the committing Magistrate—Subsequent retraction of statements in the Sessions Court—Validity of conviction based on former statements as evidence.

Where an accused was convicted solely upon the evidence given before the Magistrate while rejecting entirely the evidence given by the witnesses at the trial under S. 288 of the Code, and it was contended (1) that the addition of the words "subject to the provisions of the Indian Evidence Act," prohibits the use of evidence taken in magisterial enquiry, as evidence at a trial (1) except in such cases as are provided in the Evidence Act, (2) that it would be illegal to base a conviction upon evidence given before a Magistrate, when the evidence at the trial differs from it and is in favour of the accused.

Held, reversing the conviction, (1) the object of the amendment of S. 288 is that evidence duly

CRIM. P. CODE (1898), S. 297.

taken before a Magistrate can be used for all purposes in a trial Court so long as the testimony is of evidentiary value (2) Affirming *Queen-Empress v. Amanullah* (21 W. R. 49.) regarding (2) that unless there is clearly present besides the evidence given before the Magistrate evidence which will show, that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge the evidence given before the Magistrate cannot be utilized to support a conviction. (*Adami and Bucknill, JJ.*) *EMPEROR v. JEHAL TALI.*

3 Pat. 781 : 1925 P. 51.

—S. 288—Value of evidence in the magisterial proceedings transferred to sessions record—Whether testimony under the Evidence Act and admissible to corroborate statement of witnesses made before the Police.

The evidence of a witness recorded by the committing magistrate is by the operation of S. 288, Cr. P. Code, held to be just as much evidence in the case, as that recorded at the trial in the Sessions, and is therefore 'testimony' within the meaning of S. 157 of Evidence Act

Held, further that the statement of the witnesses before the Police is admissible in evidence in corroboration of the one made before the committing magistrate. 72 I. C. 529 followed and 27 Cal. 295 referred to. (*Scott-Smith and Fforde, JJ.*) *MAMCHAND v. EMPEROR.*

5 Lah. 324 ;
25 Cr. L. J. 1201 : 82 I. C. 129 : 1924 Lah. 609.

—S. 297—Charge to jury—Evidence incomplete—Fresh charge after verdict—Legality

25 Cr. L. J. 377 (2) : 77 I. C. 425 (2) :
1924 Lah. 17.

—S. 297—Charge to jury—Misdirection—Private defence—Person and property—Not distinctly put to the jury—More injury than reasonably necessary—Causing of.

On a charge under S. 304, I. P. C., the defence of the accused was that the deceased came into his house at midnight for robbery, that the accused woke up, saw the deceased coming from house and inflicted wounds on him which proved fatal. The Asst. Sessions Judge who charged the jury expounded the law only with reference to the right of private defence of the body and omitted all reference to the right of private defence of property. *Held*, that the Judge should have charged the jury that if they believed that the accused had reasonable ground for supposing that the thief had with him articles taken from the house, the accused was entitled to exercise his right of private defence of property under S. 103, I. P. C. The Judge should have further directed the jury to consider whether the accused had not used more force than was reasonably necessary for preventing the thief from running away with the stolen property. (*Greaves and Panton, JJ.*) *BASRUDDI SHEIKH v. EMPEROR.*

28 C. W. N. 585.

—Ss. 297 and 537—Sessions trial—Charge to the Jury—Dacoity—Misdirection—Irregularity

CRIM. P. CODE (1898), S. 297.

A Sessions Judge in a case of dacoity charged the jury as follows on the nature of the offence. "The nature of the charge is no doubt, familiar to you all. It must be proved that there was robbery committed by five people or more and also that each of accused took part in the robbery." *Held*, that the direction was insufficient and illegal in that it did not explain to the jury the ingredients necessary to constitute the offence of robbery and that the defect could not be cured by S. 537, Cr. P. Code, 30 M. 44, 39 A. 348, Ref. (*Wazir Hasan, J.C.*) *NAWAB ALI v. EMPEROR*

10 O. & A. L. R. 538 : 11 O. L. J. 315 :
25 Cr. L. J. 1129 : 81 I. C. 853 :
1924 Oudh 411.

—S. 297—*Misdirection—Offence under S. 395, I. P. C.—Omission to give detailed explanation of the offence—Case of each accused not separately mentioned.*

On a charge of dacoity it is insufficient to read the definition of the offence to the jury. At the same time an omission to give a detailed definition of the offence amounts to a misdirection when it is clear that the nature of the offence has been described in detail to the jury. The charge to a jury can never be absolutely exhaustive. This is particularly the case where the accused persons have remained undefended. Though the Judge did not definitely explain that the jury must give a distinct verdict as to each of the three accused, but he has dealt with the case of each separately, and there is no reason to suppose that the jury did not regard the accused persons as distinct individuals, or that any of the accused has been prejudiced by this omission on the part of the Judge, the conviction will not be set aside on appeal. (*Pullan, A. J. C.*) *JINDAR SINGH v. EMPEROR.*

10 O. & A. L. R. 794 :
81 I. C. 808 : 25 Cr. L. J. 1032 :
1 O. W. N. 332.

—S. 297—*Charge to jury—Misdirection—Leaving jury to decide common object—Prejudice—Penal Code (XLV of 1860), S. 141—Unlawful assembly.*

Where the appellants were convicted by the verdict of a jury under Ss. 147 and 353, I. P. C., it was urged on their behalf in appeal, that there was misdirection to the jury owing to the fact that the Judge did not place before them the evidence that there was against the accused separately, as S. 352 is essentially an individual offence, (2) that the Judge erred in his charge to the jury because he left it to them to find out the common intention, and his statement "that the mob had a premeditated object of disturbing the public peace and resisting the Police by criminal force" was beyond the common objects set out in S. 141, I. P. C. so as to prejudice the accused.

Held, dismissing the appeal, that the jury did not come to a wrong conclusion because (1) of the Judge's omission to place the evidence against each of the accused separately, (2) that the Judge's charge to the jury in respect of the accused forming an unlawful assembly with the object of disturbing the public peace, did not go beyond the common objects set out in S. 141, I. P. C. "A com-

CRIM. P. CODE (1898), S. 307.

mon object may change in the course of an occurrence. A crowd may have a common object at one time and may have another common object as things develop, and it may well be there are various common objects in the course of an occurrence and these have to be placed before a jury for the jury to decide, if any of them has been proved against the accused and if so which of them. (*Greaves and Pantou, JJ.*) *ABDUL GANI v. EMPEROR,*

83 I. C. 346 : 25 C. L. J. 1386.

—S. 297—Charge to the jury—Misdirection—Private defence—Offence under S. 326—Statement of accused—Admissibility of.

77 I. C. 819 (2) : 25 Cr. L. J. 467 (2).

—S. 297—Trial by jury—Different trials—Reference to former trial—Sentence. *MOFIZUDDIN v. EMPEROR.*

1924 Cal. 435.

—S. 298—Charge to the jury—Non-direction—Right of private defence.

Where a charge to the jury omits to make any reference to the right of private defence under S. 103, I. P. C., set up by the accused, the charge is bad in law and vitiates the trial. (*Greaves and Pantou, JJ.*) *BASERUDDI SHEIKH v. EMPEROR.*

39 C. L. J. 525 : 1924 Cal. 776.

—S. 303—Qualified verdict—Duty of Judge.

Where instead of a simple verdict of guilty or not guilty, the jury gives a qualified verdict, it is the duty of the Judge to put questions to the jury and ascertain the scope of the verdict. (*Walmsley and Mukerji, JJ.*) *KHIRODE KUMAR MUKERJI v. EMPEROR.*

29 C. W. N. 54 : 40 C. L. J. 555.

—S. 307—High Court—Verdict of jury—Reference—Powers of High Court.

S. 307 of the Cr. P. Code requires the High Court to give due weight to the opinion of the Sessions Judge and the jury after considering the entire evidence and then to acquit or convict the accused. It does not require the High Court to attempt to reconstruct the verdict of the jury. In giving due weight to the opinion of the jury, the High Court would always hesitate to reverse a unanimous verdict unless it is perverse or unreasonable. Where the verdict is unreasonable, having regard to the cumulative effect of the evidence and there cannot be any doubt as to the guilt of the accused, the High Court would accept the reference and set aside the jury's verdict. (*Newbould and B. B. Ghose, JJ.*) *EMPEROR v. SAGARMAL AGARWALLA.*

40 C. L. J. 135 : 25 C. W. N. 947 :
25 Cr. L. J. 1217 : 82 I. C. 145 : 1924 Cal. 960.

—S. 307—Aspersions on jurors—Opinion of Judge—Propriety of such reflections. (*Mookerjee and Chatterjee, JJ.*) *MANFPU CHOWDHURY v. EMPEROR.*

51 Cal. 418 : 1924 Cal. 323.

—S. 307—Duty of High Court. *NANNI KUDUMBAN In re.*

25 Cr. L. J. 145 : 16 I. C. 299 : 1924 Mad. 232.

—S. 307—Judicial Commissioner of Sindh—Differing from Jury—If can refer case to High Court.

CRIM. P. CODE (1898), S. 307.

A Judge of the Judicial Commissioner's Court at Sindh sitting in sessions and differing from a verdict of the jury has no power to refer the case to the High Court under S. 307. (*Kennedy, A. J. C.*) EMPEROR *v.* MITHOO.

77 I. C. 604 : 25 Cr. L. J. 428.

———S. 307—Reference—Duty of Court.

519 Cal. 271 : 1924 Cal. 448.

———S. 307—Reference to High Court—Duty of the High Court.

75 I. C. 145 : 1924 Cal. 317.

———S. 307—Reference to High Court—Difference between Judge and jury—Weight due to their opinions—Charge of rape.

On a reference under S. 307, High Court may exercise any powers which it may exercise on appeal but it is perfectly within its rights in considering that in cases such as these, interference should only be permitted in cases of perversity or clear and manifest error and that where a jury has arrived at a verdict which is not perverse and not clearly and manifestly wrong, such verdict should not be interfered with although it is perfectly possible to form a not unreasonable opinion contrary to the opinion taken by the jury. The advantage of adopting this course is that it secures the object of the legislature in creating juries. If the other view be taken and the case is re-opened *ab initio*, it is somewhat difficult to see what useful function is performed by a jury. For in every case in which the Judge does not agree with their verdict, the case can be referred to the High Court which then proceeds to try it *de novo*. The High Court should not interfere unless the verdict is perverse or clearly and manifestly wrong. In no case is it more difficult to arrive at a confident verdict as to whether evidence is false or true than in cases in which women alleged that they have been outraged or that outrage has been attempted upon them. Not only has one to consider the possibility of deliberate falsehood but those who have to arrive at a verdict have to consider the possibility of unintentional mis-statements produced by hysterical conditions which are apt to be found for in cases of this nature. The difficulties are increased when from the nature of the charge there can be no physical trace of outrage such as in a case of attempted rape. Where there is no reason to suppose that the jury did not give an honest and a not unreasonable verdict, the High Court will not interfere with that verdict. (*Stuart and Mukerji, JJ.*) EMPEROR *v.* PANNA LAL.

22 A. L. J. 162 : L. R. 5 A. 65 (Cr.) : 81 I. C. 629 : 25 Cr. L. J. 981 : 46 All. 265.

———S. 307—Reference to High Court—Difference between Judge and Jury—Verdict of Jury—Weight due to.

Only in cases where the verdict of the jury is perverse, will the High Court place its own estimate of the evidence as against the verdict of the jury. (*Macleod, C. J. and Fawcett, J.*) EMPEROR *v.* CHARLES JOHN WALKER.

26 Bom. L. R. 610 : 1924 Bom. 450.

———S. 307—Reference to the High Court—Powers of the High Court on such reference—Opinion of jury—Weight due to.

CRIM. P. CODE (1898), S. 307.

Sec. 307, Cr. P. Code, lays down that, in dealing with a case submitted thereunder, the High Court "may exercise any of the powers which it may exercise on an appeal" and that "subject thereto, it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the Jury, acquit or convict the accused of any offence of which the Jury could have convicted him upon the charge framed and placed before it." The High Court's duty accordingly is to consider the evidence on record as it stands, to weigh the respective opinions of the Sessions Judge and the Jury, and then to form its own conclusion. It still remains that the verdict of the Jury is first in the field and the Sec. 299 of the Code makes it primarily the function of the Jury "to decide which view of the facts is true and then to return the verdict which under such view ought according to the direction of the Judge to be returned" and "to decide all questions which according to law are to be deemed to be questions of fact." On general principles therefore it appears that when the process which Sec. 307 directs has not been carried out, and the opinions of the Judge and the Jury have been measured, in the result the verdict of the Jury should stand unless the evidence and the opinion of the Judge show clearly that it is wrong and that in the interests of justice it ought to be reversed. (*Richardson and Suhrawardy, JJ.*) EMPEROR *v.* JAMALDI FAKIR.

51 Cal. 160 : 28 C. W. N. 536 : 81 I. C. 712 : 25 Cr. L. J. 1000 : 1924 Cal. 701.

———S. 307—Reference to High Court—Verdict of jury—Interference with—When justified

Where there is a reference to the High Court by the Sessions Judge disagreeing with an unanimous verdict of "not guilty" by the jury, the High Court will have to consider whether the jury were entirely unreasonable in giving the benefit of the doubt, as they did to the accused, and whether it was impossible for the jury to arrive at any other reasonable conclusion than that the guilt of the accused had been brought home to him. (*Greaves and Duval, JJ.*) EMPEROR *v.* GOLAM KADER.

28 C. W. N. 876 : 25 Cr. L. J. 1284 : 82 I. C. 356 : 1924 Cal. 956.

———S. 307—Unanimous verdict—Reference—Duty of Court—Imputation to jurors.

51 Cal. 347 : 1924 Cal. 321.

———S. 307—Verdict of jury—Reference to High Court—Interference when justified.

76 I. C. 389 : 45 Cr. L. J. 165.

———S. 337—Evidence of accomplice—Admissibility—Case outside section.

77 I. C. 961 : 25 Cr. L. J. 497.

———S. 337—Pardon validly tendered—Subsequent trial and conviction for offence not exclusively triable by Sessions Court—Validity of.

A pardon once validly given is not in any way affected by the subsequent proceedings in the case.

An accused was given a pardon in respect of an offence triable exclusively by a Court of Session. Later on the trial and conviction were for

CRIM. P. CODE (1898), S. 337.

offences not exclusively triable by such Court. *Held*, the evidence of the approver was admissible. (*Kincaid, J. C. and Aston, A. J. C.*) KAURMAL v. EMPEROR. 81 I. C. 881.

—Ss. 337, 339—Tender of pardon—Reasons for—Failure to give—Effect.

25 Cr. L. J. 174 : 76 I. C. 398 : 1924 Lah. 90.

—S. 337 (2 A)—Scope of—If governs S. 30—Trial by Magistrate.

A magistrate with powers under S. 30 when he tenders a pardon to one of the accused, must not try the case himself but commit the accused to the Sessions. S. 337 (2 A) governs S. 30, Cr. P. Code. (*Prideaux, A. J. C.*) KISHAR v. EMPEROR. 82 I. C. 573 : 25 Cr. L. J. 1341

—S. 339—Applicability of—Dacoity—Pardon for—Confession—Admissibility of confession.

Where a pardon is given to the accused in respect of a particular dacoity and he makes a confession implicating himself and others in several previous dacoities there is nothing in S. 339, Cr. P. Code, to forbid the confession of the accused from being admissible in evidence on a trial for such previous dacoities. 11 A 79 dist. (*Piggott, Lindsay and Sulaiman, JJ.*) SARDARA v. EMPEROR. 46 A. 236 : 22 A. L. J. 85 : L. R. 5 A. 25 (Cr.) : 81 I. C. 604 : 25 Cr. L. J. 956 : 1924 A. 220.

—Ss. 339 and 339 (A)—Approver—Forfeiture of pardon—Trial for offence—Procedure—Non-compliance with statutory formalities—Effect of.

Non-compliance with the provisions of S. 339 and 339 (A) of the Criminal Procedure Code as amended by Act XVIII of 1923 vitiates the trial of an approver on forfeiture of pardon. Where no certificate had been given by the Public Prosecutor to the effect that the accused had not complied with the conditions on which pardon was tendered and where the accused was not asked before the charge was read out to him whether his plea was that he had complied with the conditions on which the tender of pardon was made and the terms of S. 339 (a) were not explained to him, the trial is vitiated by illegality and his conviction is unsustainable. (*Scott-Smith and Fforde, JJ.*) ALI v. EMPEROR.

5 Lah. 379 : 1925 Lah. 15.

—S. 339—Approver—Tender and withdrawal of pardon.

Where an approver who has been tendered pardon is placed on his trial because he has forfeited it and has not complied with the conditions on which pardon was tendered, the certificate of the Public Prosecutor is a condition precedent to the trial. (*Martin and Fawcett, JJ.*) EMPEROR v. MANA BASAPPA.

26 Bom. L. R. 1240.

—S. 339—Certificate of Public Prosecutor—If essential—Pardon forfeited by Magistrate—Statement made by person who has accepted pardon—If covers statement before pardoning Magistrate.

In the absence of a certificate by the Public Prosecutor that in his opinion the conditions on

CRIM. P. CODE (1898), S. 342.

which the tender of pardon was made have not been complied with, their trial is invalid. But this does not apply to a case in which the pardon had been declared forfeited by the Magistrate and the proceedings commenced before the amended section came into force.

The words "statement made by a person who has accepted the tender of pardon" in Sub-section (2) are wide enough to cover a statement before the pardoning Magistrate. But such statements should not be used against them unless they are put to them in their examination as accused persons and their explanations taken. (*Kotwal and Prideaux, A. J. C.*) GANGARAM v. EMPEROR.

82 I. C. 715 : 25 Cr. L. J. 1355.

—S. 339—Forfeiture of—pardon—Sessions Judge—If can order commitment.

Where a person who has been tendered a pardon has not fulfilled the conditions upon which he was pardoned the Sessions Judge is competent to order his commitment. (*Scott-Smith and Fforde, JJ.*) DIL BAHADUR v. EMPEROR.

76 I. C. 185 : 25 Cr. L. J. 121 : 1924 Lah. 568.

—S. 339—Tender of pardon—Acceptance—What constitutes—Plea of ignorance.

A pardon is accepted when the person to whom it is tendered does volunteer to make some statement with reference to the crime. Where a person expresses complete ignorance of the crime and states that he is indifferent whether a pardon is granted to him or not, he cannot be said to have accepted the tender of pardon. (*Dalal, J.*) PALTI RAI v. EMPEROR. L. R. 5 A. 89 (Cr.) : 1924 A. 564.

—S. 339 &—Proper compliance with the section.

Where the accused was not asked in the manner provided by the section but was asked whether he had fulfilled the conditions on which the pardon had been granted and had given true evidence.

Held: there was no proper compliance with the section. (*Scott-Smith and Fforde, JJ.*) ALI v. EMPEROR.

5 Lah. 379 : 1925 Lah. 15.

—S. 339 (1)—Certificate by Public Prosecutor.

The absence of certificate by the Public Prosecutor vitiates the trial. (*Scott-Smith and Fforde, JJ.*) ALI v. EMPEROR.

5 Lah. 379 : 1925 Lah. 15.

—S. 342—Applicability—Proceedings under S. 488, Cr. P. C. Accused examined as his own witness—Effect of. See CR. P. CODE, S. 488.

81 I. C. 915.

—S. 342—Examination of accused—Close of the defence—Conviction—Legality of.

A complaint under Ss. 426 and 447, I. P. C. was lodged against the accused. The examination and cross-examination of the prosecution witnesses closed on 4-10-1923. Defence witnesses were examined on 15-11-1923 and the trial posted to the 29th December for arguments. The accused was examined on the latter date for the first time. He was convicted. *Held*,

CRIM. P. CODE (1898), S. 342.

that the omission to examine the accused at the close of the prosecution case and before the accused has entered upon his defence, was fatal to the conviction. The High Court ordered a retrial from the close of the prosecution case. (*Greaves and Duvai, JJ.*) SURENDRA LAL SHAHA v. ISAMADDI. 51 Cal. 933.

———Ss. 342 and 349—*Examination of complainant after close of defence—Court witness—Further examination of accused—Trying Magistrate forwarding case to higher Magistrate for sentence.*

S. 342, Cr. P. Code does not apply where a court witness is examined, be he the complainant or any other person. If a Magistrate considers a person to be guilty and to deserve a larger penalty than the Magistrate himself can impose, he should send the case to a superior court for a fitting sentence. He should not convict the accused and send the record of conviction with a request for a higher sentence. (*Adami and Sen, JJ.*) PRAYAG GOPE v. EMPEROR.

(1924) P. H. C. C. 247 : 5 Pat. L. J. 571 :
3 Pat. 1015 : 25 Cr. L. J. 1276 :
82 I. C. 284 : 1924 P. 764 :

———S. 342—*Examination of accused after framing of charge—Mode of examination.*

An examination of the accused before the charge is framed is under the first part of S. 342, Cr. P. Code, and is optional to the Court. But after the witnesses for the prosecution have all been examined and cross-examined and before the accused is called on for his defence, it is compulsory for the court to question the accused in such a way as to enable him to explain any circumstances which appear in the evidence against him. The mere asking the accused as to whether they had anything further to say is not a sufficient compliance with the second part of S. 342, Cr. P. Code. The question must be framed in such a way as to enable the accused to know what he is to explain, as to what are the circumstances which are against him and for which an explanation is needed. A general question as to whether they had anything further to say is not a sufficient compliance with the requirements of the law. 5 Pat. L. J. 430 : 6 Pat. L. J. 147 Ref. (*Kulwant Sahay, J.*) BHOKARI SINGH v. EMPEROR.

(1924) P. H. C. C. 198 : 5 Pat. L. T. 445 :
25 Cr. L. J. 711 : 81 I. C. 199 : 1924 P. 791 (2).

———S. 342—*Examination of the accused—Stage for—Examination of prosecution witnesses—Cross-examination after charge.*

The word "examined" in S. 342, Cr. P. Code, includes cross examination and re-examination. The omission to examine the accused after the cross-examination and re-examination of all the prosecution witnesses vitiates the trial and conviction. The examination of the accused only after the examination in chief of the prosecution witness is not a compliance with S. 342 Cr. P. Code. The examination of a witness means his examination in chief, cross-examination and re-examination. The expression "after the witnesses for the prosecution have been examined" used in S. 342 Cr. P. Code includes any cross-examination of them after the charge has been framed,

CRIM. P. CODE (1898), S. 342.

The obligatory examination of the accused must be made after the witnesses for the prosecution have been cross-examined after the charge. 50 C. 939 foll 46 M. 449 diss. (*Baker J. C. Prideaux ann Kinkhede A. J. C.*) LOCAL GOVERNMENT v. MARIA. 20 N. L. R. 174.

———S. 342—*Extent of immunity of accused against prosecution for false and defamatory statement.*

S. 342 of the Criminal Procedure Code protects an accused person in Court. It does not protect him when he goes out of his way to a Court which is not trying him and makes a false charge against other persons. (*Puillan, A.J.C.*) MAKHDOM v. KING EMPEROR. 1 O. W. N. 657 :

10 O. & A. L. R. 1189 : 82 I. C. 58 (1) :
25 Cr. L. J. 1194 (1).

———S. 342—*Failure to comply with—Cases—Effect of examination in.* NAGESHAR PRASAD v. EMPEROR. 1924 Oudh 111.

———S. 342—*Failure to question—Effect—Cross-examination of prosecution witnesses after charge—If accused to be questioned thereafter.*

Where a court entirely fails to question an accused after the close of the prosecution evidence the trial from that point onwards is illegal and a fresh trial should be ordered therefrom.

Where after charge, the prosecution witnesses are cross-examined under S. 257, S. 342 does not apply and the accused need not be examined thereafter. (*Hallifax, A.J.C.*) GANGADHAR v. BHANGI SAO. 81 I. C. 976 : 25 Cr. L. J. 1152.

———S. 342—*Finger impressions of accused—If prohibited.* 1924 Rang. 115.

———S. 342—*Mandatory—Omission to examine—Effect.*

The provisions of S. 342 are mandatory and where an accused is examined at one stage, but thereafter other prosecution witnesses are examined and the accused was not examined again, the procedure is illegal and the trial is vitiated. (*Moti Sagar, J.*) NANAK CHAND v. EMPEROR. 25 Cr. L. J. 1020 : 81 I. C. 796 : 1924 Lah. 734.

———S. 342—*Non-compliance with—Effect.*

25 Cr. L. J. 289 : 76 I. C. 961 : 1924 Cal. 182.

———S. 342—*Non-compliance with—Effect on acquittal of accused—Retrial.*

Non-compliance with the mandatory provisions of S. 342, Cr. P. Code, vitiates the trial and the order of acquittal must be set aside. But in the circumstances of the case, (where there were many serious defects in the prosecution case) the chance of a conviction was very remote and the High Court did not order a retrial. (*Suhrawardy and Graham, JJ.*) LEGAL REMEMBRANCE v. SATISH CHANDRA ROY. 51 I. C. 924.

———S. 342—*Omission to question the accused generally after the conclusion of the prosecution evidence—Accused prejudiced—Fresh trial.*

Where the accused are not questioned generally on the case after the prosecution evidence is over and they are prejudiced for want of such examination, they are entitled to a fresh trial. 45 M. L. J. 224 F. B. Not followed. (*Dalal, J. C.*) EMPEROR v. SHEOPAL. 1 O. W. N. 833

CRIM. P. CODE (1898), S. 342.

—Ss 342, 423—*Omission of trial court to comply with the provisions of S. 342, Cr.P. Code—Procedure on appeal—Remand.*

The Sessions Judge on an appeal from a conviction by a Magistrate under S. 147, I.P.C., passed an order to the following effect: "The lower court will now examine all the accused persons afresh under S. 342, Cr. P. Code and call upon them to adduce any evidence if they choose to give any and after the examination and cross-examination of the defence witnesses, if any, he will resubmit the record to this court with any observations that he may choose to make on the additional evidence, if any, adduced before him within a month from the receipt of the record by him. The appeal will then be heard on the merits." *Held*, that the Sessions Judge had no authority to keep the case on file and remand it for trial but he should have set aside the conviction and sentence and remanded the case to the first court with a direction that the trial court should, after compliance with the provisions of S. 342, Cr. P. Code and after giving the accused an opportunity of calling evidence, deal with the case on the merits *de novo*. (*Walmsley and Mukerji, JJ.*) MAHOMED ABDUL SAMAD v. EMPEROR. 40 C. L. J. 319.

—S. 342—*Omission to examine an accused—Irregularity—Effect on trial.*

The omission of the Magistrate to examine the accused at the end of the trial in accordance with the provisions of S. 342, Cr. P. Code, is an irregularity but the irregularity is not an illegality vitiating the whole trial. Unless the irregularity is shown to have prejudiced the accused in any way the conviction will not be set aside. (*Boys, J.*) GANGASAHAI v. EMPEROR.

L. R. 5 A. 124 (Cr.) : 1924 All. 763.

—S. 342—*Non-examination of accused after cross-examination after charge vitiates trial though accused is not prejudiced.*

It is obligatory on the Magistrate to question the accused generally on the whole case after the prosecution have closed their case, *i.e.*, when all the prosecution witnesses have been examined in chief, cross-examined, and re-examined. The examination of the accused after the charge and the examination in-chief of only some of the prosecution witnesses and again after the cross-examination of only sum of such witnesses is not a compliance with the mandatory provisions of law and the trial is vitiated by the omission to question the accused generally after the cross-examination of a re-called witness is finished although the accused may not have been thereby prejudiced on the merits. 50 Cal. 223 at 227 Foll. (*Kinkhede, A.J.C.*) KRISHNAPPA v. EMPEROR.

25 Cr. L. J. 713 : 81 I. C. 201 : 1924 Nag. 51.

—S. 342 (1)—*Failure to examine accused—Effect of—Mode of examination—Written statement—If obviates necessity of examining.*

S. 342 (1) is mandatory and the omission to question the accused generally on the case as required by the section is not a mere irregularity but it is an illegality which vitiates the whole trial. The examination contemplated is after the prosecution case is closed and if the Magistrate

CRIM. P. CODE (1898), S. 344.

discharges the accused without calling on the defence, the proceedings are not vitiated in any way. A general question as to what the accused has to say is not sufficient. The court must communicate to the accused by appropriate questions everything that is alleged against him and ascertain what explanation or defence in law or in fact he wishes to put forward.

Written statements filed in court cannot take the place of the examination contemplated by the section. (*Kinkhede, A.J.C.*) UDHAO v. EMPEROR.

25 Cr. L. J. 417 : 77 I. C. 593 : 1924 Nag. 801.

—S. 342—*Object of.*

The object of S. 342, Cr.P.C. is not to help the prosecution by supplementing their evidence or to make the accused make incriminating statements but only to give the accused a chance to explain circumstances appearing against him. (*Kennedy, J.C. and Raymond, A.J.C.*) TOPANDAS v. EMPEROR.

81 I. C. 249 : 25 Cr. L. J. 761.

—S. 342—*Object of section—General questions not sufficient.*

25 Cr. L. J. 487 :

77 I. C. 887 : 1924 Rang. 172.

—S. 342—*Provisions of, mandatory—Examination of accused—When should be made.*

77 I. C. 988 : 25 Cr. L. J. 524.

—S. 342—*Provisions of, mandatory—Non-compliance with—Acquittal.*

The provisions of S. 342, Cr. P. Code are mandatory and non-compliance with its terms vitiates a criminal trial. The High Court when it sets aside an order of acquittal on the above ground will not determine whether the accused should be retried. (*Suhrawardy and Graham, JJ.*) REMEMBRANCE OF LEGAL AFFAIRS, BENGALU. SATISH CHANDRA ROY, 39 C. L. J. 411 : 1924 Cal. 975.

—S. 342—*Scope of—Prosecution witnesses called after charge—Failure to examine accused—Effect.*

The object of S. 342, Cr. P. Code is to give the accused an opportunity to explain circumstances in the prosecution evidence appearing against him and hence he should be examined after the prosecution evidence is concluded. The provisions of the section are mandatory. Where after the framing of the charge two prosecution witnesses were put in and thereafter the court failed to examine the accused, the procedure adopted is wrong. (*Bilaram, A.J.C.*) JHANGLI v. EMPEROR.

81 I. C. 150 : 25 Cr. L. J. 662.

—S. 342—*Summons Case—Examination of accused—Stage at which examination could be held.*

39 C. L. J. 31

—S. 342—*Examination of accused—Form of—Compliance with the section.*

Under S. 342, Cr P. Code, it is incumbent on the court to ask the accused generally whether he wishes to offer an explanation of any of the evidence which has been given against him and if the Court does so, that would be a sufficient compliance with the section. But the section also gives the court power to put specific questions to the accused with regard to any of the evidence adduced for the prosecution. Without

CRIM. P. CODE (1898), S. 344.

S. 342 the Courts would have no such power. But it is left entirely to the discretion of the Magistrates as judges whether they should, after having put the general question, ask specific questions on particular point in the evidence. (*Macleod, C. J. and Crump, J.*) *EMPEROR v. NARAYAN SAYANNA KAMATHI*,
26 Bom. L. R. 109 : 25 Cr. L. J. 1127 (2) : 81 I. C. 951 (2) : 1924 Bom. 334.

—S. 344—Criminal trial—Power of postponement and adjournment.

Once a Magistrate has taken cognizance of a case, his powers of postponement and adjournment are regulated by S. 344, Cr. P. Code. (*Greaves and Panton, JJ.*) *BHOLANATH DAS v. EMPEROR*.
28 C. W. N. 490 : 1924 Cal. 614.

—S. 344—Cross cases instituted upon a police complaint and private complaint—Police case if entitled to precedence—Procedure—Interference by District Magistrate—Legality of.

Two cross cases were started, one on a police report and the other on complaint, the accused in each case being the complainants in the other. The Sub-divisional Magistrate directed the trial of the police case first and then of the private complaint case. The District Magistrate set aside the order and directed the simultaneous trial of the two cases. *Held*, that the District Magistrate had no jurisdiction to pass the order he did and his proper course was to make a reference to the High Court under S. 438, Cr. P. Code. But the High Court passed an order that both the cases should be tried simultaneously but should be dealt with wholly separately from each other each on its own merits and judgments should be pronounced after both the trials were over. 14 C. 358 : 27 C. W. N. 700 dist. (*Page and Mukerji, JJ.*) *SHEIKH BAHATAR v. NOBADALI*.
28 C. W. N. 487 : 1924 Cal. 684.

—S. 344—Court of Bench Magistrates—Criminal trespass—Power to stay proceedings pending decision of civil suit.

A Court of Bench Magistrate has got power to stay criminal proceedings pending before it till the disposal of a civil suit between the same parties in respect of the same property. Where on a charge of criminal trespass the defence of the accused is that he was in possession of the property on the date of the alleged criminal trespass, the result of the trial in the civil suit will have no bearing on the case before the criminal court and the criminal trial is not to be stayed. Where, however, the defence of the accused is that he was not in possession but that he went to take possession in pursuance of his title, then the decision of the civil court will have some bearing on the Criminal case and the criminal case might be stayed. (*Wallace, J.*) *PERIASAMI MUTHIRIYAN, In re*.
20 L. W. 544 : (1924) M. W. N. 762 : 35 M. L. T. 99 (H.C.) : 1924 Mad. 888.

—S. 345—Complaint of abduction—Who can compound.
1924 Lah. 330.

—S. 345—Compoundable offence—Compromise—If can be resiled from.

The composition of a compoundable offence has the effect of an acquittal. The complainant cannot

CRIM. P. CODE (1898), S. 350.

afterwards draw back from the compromise or deny it. (*Moti Sagar, J.*) *RAM RICHPAL v. MATA DIN*.
81 I. C. 346 : 25 Cr. L. J. 810.

—S. 347—Scope of—Controlled by Chapter 18.

S. 347 is subject to the provisions of Chap. 18 and even when a committal order is made under S. 347 the Magistrate has to conform to the provisions of Chapter 18 and cannot deprive the accused of any right he has under this chapter. S. 347 appears in Chapter 24 of the Code which contains general provisions for inquiries or trial and is one of those sections providing what a Magistrate should do when in the course of an enquiry he finds that he should not finally deal with the case himself. But when he does make up his mind to commit he cannot disregard the provisions of chapter 18. 36 Mad. 321, Foll. (*Raymond and Madgavkar, A. J. Cs.*) *UTLIBAI v. EMPEROR*.
17 S. L. R. 188 : 1924 S. 61.

—S. 347—Cross-examination of prosecution witnesses before framing of charges—Commitment to Sessions—Right of accused.

Where an application for cross examination of the prosecution witnesses was made to the Magistrate before the charge was framed and before the Magistrate had decided to commit the case to the Court of Sessions the Magistrate is bound to allow such cross examination of the witnesses called on behalf of the prosecution. 21 C. 642 : 36 C. 48 : 16 C. L. J. 45, Ref. (*Greaves and Panton, JJ.*) *JYOTSNA NATH SIKDAR v. EMPEROR*.
51 Cal. 442 : 1924 Cal. 780.

—S. 347—Warrant case—Charge framed—Power to cancel charge and discharge accused.

The accused was sent up for trial at the instance of the police under S. 409, I. P. Code as a warrant case under Chapter 21 of the Cr. P. Code. The magistrate framed a charge in respect of Rs. 24,000 alleged to have been criminally misappropriated and having regard to the heavy amount involved decided to commit the accused to the sessions. But afterwards he came to the conclusion that there was no offence made out in respect of Rs. 7,000 and he discharged the accused of the offence in respect of this amount and framed a new charge under S. 409, I. P. C., in respect of Rs. 17,000 only and cancelled the charge framed before. *Held*, that having framed a charge under Ch. XXI the Magistrate could not discharge the accused but could only acquit him unless he decided to commit him to Sessions or to convict. If, however, the case had been taken up under Ch. XVIII, Cr. P. Code, the magistrate could after preliminary enquiry under S. 213 (2), Cr. P. Code, have cancelled the charge and discharged the accused for proper reasons after hearing the defence witnesses. (*Wazir Hasan and Neave, A. J. Cs.*) *BISHAMBHAR NATH v. EMPEROR*.
10 O. & A. L. R. 1210.

—S. 350—Applicability—Proceedings under S. 145.

S. 350 applies in part to proceedings under S. 145 and a Magistrate can let in evidence partly

CRIM. P. CODE (1898), S. 350.

recorded by himself and partly by his predecessor. (*Foster, J.*) *SONDI SINGH v. GOVIND SINGH*.
5 Pat. L. T. 287 : 76 I. C. 25 (2) :
25 Cr. L. J. 89 (2) 2 Pat. L. R. 108 (Cr.) :
1924 P. 786

S. 350—*Applicability—Proceedings under S. 247, U P Municipalities Act.*

The provisions of S. 350, Cr. P. Code, apply to proceedings under S. 247 U. P. Municipalities Act. (*Daniels, J.*) *MT BASANTI v. EMPEROR*.
81 I. C. 139 : 25 Cr. L. J. 651.

S. 350—*Change of Magistrate—De novo trial—Pleader not heard—Effect.*

A *de novo* trial cannot be demanded by an accused before the successor of a magistrate on the mere ground his pleader was not heard by his predecessor. (*Kendal, A. J. C.*) *CHANDIKA PRASAD v. EMPEROR*.
1 O. W. N. 491 :

10 O. & A. L. R. 1101 : 11 O. L. J. 725 :
81 I. C. 899 : 25 Cr. L. J. 1075.

Ss. 350 and 528—*Case partly tried by one magistrate—Transfer—De novo trial granted by successor—Transfer of case to old magistrate to avoid de novo trial—Legality of.*

A magistrate who had almost completed the trial of a case was transferred to another station and his successor taking up the case granted a *de novo* trial. Thereupon the District Magistrate ordered the case to be transferred to the magistrate who had heard it before as he thought he could thereby obviate the necessity for a *de novo* trial. *Held*, the grant of a *de novo* trial to the accused wiped out the prior proceedings and even the old magistrate could not proceed with the trial from the point where he left it; there was no question of balance of convenience, and a transfer was not necessary. (*Madhavan Nair, J.*) *SARDAR KHAN SAHIB v. ATHANLLA*.
20 L. W. 847 : 47 M. L. J. 926.

S. 350—*Summons case—Re-examination of witnesses—Succeeding magistrate—Arguments—Duty of Court to hear.*

The provisions of S. 350 Cr. P. Code apply to summons cases as well as warrant cases. The accused in a summons case may demand that the witnesses or any of them may be summoned and reheard when the second magistrate commences the proceedings on the first ceasing to have jurisdiction. 43 M 511 Foll. A court is bound to hear arguments, if offered, in every criminal trial or proceedings. (*Dalal, J. C.*) *BAJI NATH SHAH v. EMPEROR*.
10 O. & A. L. R. 1017 :
83 I. C. 340 : 25 Cr. L. J. 1380.

S. 360—*Evidence not read over—Effect.*

Not reading over the deposition to the witness before his signing it is not such an irregularity as to make the evidence inadmissible entirely. (*Foster, J.*) *SONDI SINGH v. GOVIND SINGH*.
5 Pat. L. T. 287 : 2 Pat. L. R. 108 (Cr.) :
76 I. C. 25 (2) 25 Cr. L. J. 89 (2) : 1924 P. 786.

S. 360—*Non-compliance with—Effect.*

25 Cr. L. J. 289 : 76 I. C. 961 : 1924 Cal. 182.

S. 360—*Provisions of, mandatory—Non-compliance—Effect of.*

CRIM. P. CODE (1898), S. 367.

The provisions of S. 360, Cr. P. Code are mandatory and an omission to comply with them vitiates the trial. The general object of S. 350 is to ensure the accuracy of the record and also that the accused should know and understand what evidence is given at the trial. The reading over of the evidence to the witnesses is so essential to the framing of an accurate record that the direction in S. 360 that the evidence should be read over to the witness is imperative and not merely directory. The omission to read over their evidence to the witnesses is an illegality which vitiates the trial, and is not cured by S. 537, Cr. P. Code (*Newbould and Mukerji, J.J.*) *HIRA LAL GHOSH v. EMPEROR*.
28 C. W. N. 968 :
1924 Cal. 889.

S. 362—*Trial by Presidency Magistrate—Sentence of imprisonment exceeding six months—Record of evidence.*

Where a Presidency Magistrate sentences an accused person to imprisonment for more than six months, he is bound to record evidence of witnesses, even though the sentence is imposed for the purpose of detention of the accused in the reformatory. (*Marten and Fawcett, J.J.*) *EMPEROR v. MAHOMED ROSHAN*.
26 Bom. L. R. 1232.

Ss. 367, 424—*Appellate judgment—Contents of.*

An appellate judgment, like that of the Court of first instance should contain the points for determination, the decision thereon and the reasons for the same. (*Sanderson, C. J. and Chotener, J.*) *GAHARALI v. EMPEROR*.
81 I. C. 437.

S. 367—*Appellate judgment—Contents of.*

An appellate judgment should be a self-contained document and it cannot be read in connection with and supplementary to the judgment of the trial Court. If it is impossible to follow the appellate judgment without reading the judgment of the trial Court, it is not a proper judgment. The court must apply its mind in a case where there are several accused to the evidence against each separately. (*Shadi Lal, C. J.*) *SOLHU v. KISHNA RAM*.
25 Cr. L. J. 113 : 76 I. C. 177 :
1924 Lah. 660.

S. 367—*Judgment—Contents of—Interference on appeal.*

2 Pat. L. R. 154 (Cr.) :
1924 P. 181.

Ss. 367 and 424—*Judgment of appellate Court—Contents of—Joint trial.*

S. 424 of the Cr. P. Code read with S. 367 lays down what the contents of a judgment of any appellate Court other than a High Court should be. The appellant is entitled to have from the Court of appeal that has to deal with them an explicit opinion on the questions of fact involved in the case and the Court of Appeal should take its own view of the evidence after perusing the record. The judgment of the Court of Appeal should be such that the High Court, as a court of revision might on looking into the judgment be in a position to judge for itself what the case was and how far the Court of Appeal had considered the evidence as bearing on the guilt or innocence of

CRIM. P. CODE (1898), S. 367.

the individual accused before the latter affirmed the judgment of the trial Court. (*Newbould and Ghose, JJ.*) INATULLA SARKAR v. EMPEROR.

39 C. L. J. 117; 25 Cr. L. J. 1041 :
81 I. C. 820 : 1924 Cal. 618.

— S. 367—Magistrate writing out judgment—Transfer—Judgment pronounced by successor—Validity.

A magistrate wrote out the judgment in a case, but was transferred before pronouncing it. His successor pronounced the judgment. *Held*, he cannot be said to have acted without jurisdiction. (*Kendall, A. J. C.*) CHANDIKA PRASAD v. EMPEROR.

1 O. W. N. 491; 10 O. & A. L. R. 1101 :
11 O. L. J. 725; 81 I. C. 899; 25 Cr. L. J. 1075.

— Ss. 367, 537—Omission to write judgment before sentencing—Effect.

The omission to write a judgment before an accused is sentenced is only an irregularity curable by S. 537 unless there has been a failure of justice (*Moti Sagar, J.*) ATA MUHAMMAD v. EMPEROR. 81 I. C. 193 (1); 25 Cr. L. J. 705 (1).

— S. 367 (5)—Lesser sentence than capital—Circumstances under which to be passed. *MR SHWE YI v. EMPEROR.*

25 Cr. L. J. 1121;
81 I. C. 945 : 1924 Rang. 179.

— Ss. 369 and 439 (2)—Criminal case—Power of High Court to review its own decision—Criminal revision—Order enhancing sentence without notice to accused—Legality of—Rehearing of the case.

Where the High Court acting under S. 439, Cr. P. Code, enhances the sentences passed by the Lower Court on the accused without giving him a reasonable opportunity to be heard the High Court acts without jurisdiction and its order is void *ab initio*. It is therefore open to the High Court notwithstanding the prior order to decide the case on its merits after giving proper notice to the accused. Where there is jurisdiction, the judgment of the High Court in a criminal case is final as soon as it is signed and thereafter there is no power in the Court to review or alter that decision. (*Odgers and Wallace, JJ.*) TADI SOMU NAIDU, *In re*.

20 L. W. 18 :
47 Mad. 428 : 34 M. L. T. (H. C.) 218 :
1924 M. 640 : 6 M. L. J. 456.

— Ss. 369 and 439 (2)—Jurisdiction of court to review or revise its own orders—Order passed without hearing the accused either personally or by pleader, legal effect of.

Under S. 369 of the Code of Criminal Procedure a Court has no jurisdiction to review or revise its own orders.

An order passed in contravention of sub-section (2) of S. 439 of the Code of Criminal Procedure without the accused having had an opportunity of being heard either personally or by pleader in his own defence is null and void *ab initio* as being one passed without jurisdiction. 7 A. 672; 14 C. 42; 10 B. 176 : 46 Mad. 382; 47 M. 428 referred to and relied on. (*Wazir Hasan, A. J. C.*) PARAS RAM v. EMPEROR.

1 O. W. N. 891 : 10 O. & A. L. R. 1828.

— S. 397—Sentence passed on same day in separate trials—Concurrent sentences—Whether legal.

CRIM. P. CODE (1898), S. 403.

Where the accused was convicted in two separate trials on the same day the cases being numbered 145 and 146 and the sentences were ordered to run concurrently,

Held, that on the presumption that the sentence in case 145 was passed first, the accused had already begun to undergo that sentence from the moment it was pronounced and the provisions of S. 397, Cr. P. Code, applied and that the order for concurrent sentences was proper. (*Carr, J.*) EMPEROR v. NGA PO THAUNG. 3 Bur. L. J. 32 :

82 I. C. 478 : 25 Cr. L. J. 1310; 1924 R. 307.

— S. 403—Acquittal for forgery—Retrial for offence under Registration Act—If legal.

76 I. C. 431 (2) :
25 Cr. L. J. 191 (2) : 1924 R. 213.

— S. 403—Autrefois acquit—Criminal misappropriation—Prosecution in respect of gross sum misappropriated—Withdrawal—Subsequent prosecution for minor items—Bar. NAGENDRA NATH BOSE v. EMPEROR.

76 I. C. 300;
25 Cr. L. J. 156.

— S. 403—Autrefois acquit—Trial for mischief—Acquittal—Fresh charge for rioting on the same facts—Bar of trial.

The accused who had been tried for and acquitted of a charge of mischief was again charged on the same facts for rioting. The case was that the second accused went with a number of others to a palmyra tope and cut down the spathes of trees and also threw down the pots attached to them in which toddy was being collected. The charge of rioting was based on the allegation that accused went along with the same body of people as alleged before and the palmyra spathes and pots were destroyed in pursuance of the common object *viz.* commission of mischief. *Held*, when the accused was tried for mischief it was open to the prosecution to have framed an alternative charge of rioting and that the case fell within the prohibition contained in S. 403 (1), Cr. P. Code. The second trial was therefore illegal. (*Krishnan, J.*) CHINNAPPA NAIDU *In re*.

19 L. W. 31 :
1924 M. W. N. 153 : 33 M. L. T. (H. C.) 269 :
76 I. C. 708 : 25 Cr. L. J. 244; 1924 Mad. 478.

— S. 403—Bar of trial—Acquittal under S. 247—Effect.

5 Pat. L. T. 15 :
2 Pat. L. R. 10 (Cr.) : 1924 P. 140.

— S. 403—Discharge under S. 494 (a) of the Code whether bars the entertainment of fresh complaint on same facts.

An order made under S. 494 (a) is an order of discharge of the accused person and under the circumstances of the cases held that S. 403 did not debar the entertainment of a fresh complaint. (*Kulwant Sahay, J.*) RAMANAND LAL v. ALI HASSAN. (1924) P. H. C. C. 226 : 1924 P. 797.

— S. 403—Previous trial and conviction under S. 121-A, Penal Code—Subsequent trial under Ss. 302 and 120-B—If barred.

A person convicted under S. 121, A.I.P.C., for a conspiracy to overawe the Government by throwing bombs on British officers cannot subsequently be tried under S. 120-B. for a conspiracy to kill

CRIM. P. CODE (1898), S. 403.

Europeans, as the conspiracy is the same the object in the latter being only a means to carry out the former object. (*Marlineau, J.*) *HUSSAIN v. EMPEROR*. 25 Cr. L. J. 1241 : 82 I. C. 169 : 1925 Lah. 157 (2).

—S. 403 (1)—*Abetment of theft—Acquittal—Subsequent charge of receiving stolen property—Bar of trial.*

The accused was charged before the Sessions Judge with offences under Ss. 109 and 382, I.P.C. The Judge acquitted the accused but observed that he was satisfied that the accused had committed an offence under S. 411, I.P.C. The Judge however did not charge him with an offence under S. 411, I.P.C., at the trial as he could have done in view of S. 236, II (a), Cr. P. Code. The accused was subsequently charged with an offence under S. 411, I.P.C. and put on his trial. *Held*, that the provisions of S. 403 (1), Cr. P. C. applied to the proceedings and it was not competent to the prosecution to put up the accused again on a charge of receiving stolen property. (*Macleod, C. J. and Shah, J.*) *PUNDALIK SHANKAR GUJAR, In re.* 26 Bom. L. R. 440 : 1924 B. 448.

—Ss. 407, 408 and 415-A—*Order passed against a person under S. 562—Appeal by convicted person—Non-appealable sentences.*

Though no provision as to appeal has been expressly made in respect of an order under S. 562 Cr. P. Code, a person convicted of an offence has a right of appeal from an order releasing him on probation of good conduct. Where an appeal lay on behalf of the convicted person against whom the order under S. 562 (1), Cr. P. Code was made, there was a right of appeal as regards the other convicted persons not so released but who got non-appealable sentences under S. 415-A, Cr. P. Code. (*Suhrawardy and Mukerji JJ.*) *BAHADUR MOLLA v. ISMAIL*. 29 C. W. N. 151 : 1925 Cal. 329.

—408-B—*Sentence passed by specially empowered magistrate—Appeal whether lies to Sessions Court or to High Court.*

When a magistrate specially empowered under S. 408 B passes a sentence upon the accused for a period exceeding 4 years and an appeal was presented to the Sessions Court instead of to the High Court, *held*, that the Sessions Judge acted without jurisdiction and that under S. 530-R the proceedings were void and the word "magistrate" in that section will include a Sessions Judge and that the accused has a right of appeal to the High Court. (*Duckworth, J.*) *ABDULLA, In re.* 2 Rang. 386 : 1925 Rang. 39.

—Ss. 414 and 562—*Summary trial—Order of Magistrate under S. 562—Right of appeal.*

Under S. 408, Cr. P. Code there is a right of appeal to the Sessions Judge from an order of a Magistrate, passed in a summary trial under S. 562 Cr. P. Code. An order under S. 562 Cr. P. Code does not amount to sentence. (*Boys, J.*) *HIRA LAL v. EMPEROR*. 46 A. 828 : 22 A. L. J. 751 : L. R. 5 A. 131 : 82 I. C. 172 : 25 Cr. L. J. 1244 : 1924 All. 765.

—S. 417—*Acquittal—Interference.*

6 Lah. L. J. 50.

CRIM. P. CODE (1898), S. 421.

—S. 417—*Acquittal—No appeal against—Remarks of appellate court in connected case against acquittal—Propriety of.*

When one of two accused tried together is acquitted, in the absence of an appeal against acquittal the appellate court in an appeal against the conviction of the co-accused cannot make remarks impugning the correctness of the acquittal. Such expressions should not be allowed to remain on record. (*Eforde, J.*) *ABDUL AZIZ v. EMPEROR*. 25 Cr. L. J. 1245 : 82 I. C. 173 : 1925 Lah. 129.

—S. 417—*Appeal against acquittal—Appreciation of evidence—Conviction.*

The right of appeal against an acquittal under S. 417 Cr. P. Code, is one that vests with the Government and should be sparingly used. But the discretion is not subject to the control of the Court. The Cr. P. Code makes no distinction between an appeal from an acquittal and an appeal from a conviction. If in an appeal from an acquittal the appellate court thinks that the lower court has taken an erroneous view of the evidence it has no power to refuse to convict. 20 A. 459 : 19 B. 51 : 17 C. 485 : 38 M. 1028. (*Pratt and Fawcett, JJ.*) *EMPEROR v. MOTI KHODA*. 26 Bom. L. R. 113 : 25 Cr. L. J. 786 : 81 I. C. 306 : 1924 Bom. 335.

—S. 417—*Appeal against acquittal—Offence under S. 121, I. P. C.—Delay in prosecution—Effect of.*

The accused was summarily convicted by a magistrate having no jurisdiction on 6th September 1921 under S. 149 I.P.C. but this conviction was set aside by the High Court on *habeas corpus* proceedings which ended on 30th August 1922. The Government did not either in 1921 or till 8th December 1922 decide to prosecute the accused under S. 121, I. P. C. Subsequently the accused was again charged on a charge of waging war but the Sessions Judge acquitted him. *Held*, that under the circumstances the High Court would not interfere on appeal, especially as it was doubtful whether the accused were conscious that what they were doing was an act of waging war. (*Odgers and Wallace, JJ.*) *THE PUBLIC PROSECUTOR v. PALATHINGAL VALIA P. MUHAMAD*. 20 L. W. 98 : (1924) M. W. N. 548 : 1924 Mad. 768.

—S. 417—*Reference by Sessions Judge—Acquittal—Interference.*

It is not in accordance with the practice of the Allahabad High Court to interfere on a reference by the sessions judge where the Government could have appealed under S. 417, Cr. P. Code, and has not done so. (*Boys, J.*) *QALANPAR SINGH v. MAHOMED RAZAKHAN*. L. R. 5 A. 120 (Cr.) : 1924 All. 624.

—S. 417—*Verdict of jury—When can be set aside. MULIMAYANDI THEVAN v. EMPEROR.* 1924 Mad. 230 : 76 I. C. 829 : 25 Cr. L. J. 69.

—S. 421—*Appeal—Hearing of, at time of presentation of appeal—Legality—Posting for hearing under S. 421—Lapse of reasonable time—Original records of Court below containing depositions—Necessity—Legal Practitioners who drafted memo. of appeal—Failure to argue appeal at time of presentation of appeal.*

CRIM. P. CODE (1898), S. 421.

A criminal appeal ought not to be heard at the time of the presentation of the papers even for the purpose of dismissal under S. 421. The posting for the purpose of hearing under S. 421 must be a special posting after a reasonable time not less than a week. If questions of fact are argued in the appeal, the appeal ought not to be disposed of even under S. 421 without sending for the original records of the Court below containing the depositions.

A pleader who has looked into the papers of a case for the purpose of drafting grounds of appeal is not guilty of professional misconduct merely because he is not prepared to argue the appeal at the time of presentation of the appeal papers. (*Ramesam, J.*) TURKA HUSSAIN SAHIB, *In re*.
47 M. L. J. 661 : 20 L.W. 623 : 1924 M.W.N. 893 :
1924 Mad. 895 (1).

—Ss. 421, 422 and 423—*Appeal admitted—Dismissal without notice to pleader—Legality.*

Where a criminal appeal filed through a counsel was admitted, and subsequently dismissed without giving notice to the counsel, the order of dismissal is invalid; for after an appeal is admitted the Court cannot act under S. 421, Cr. P. C. (*Lenlaigne, J.*) TA PU v. EMPEROR.

3 Bur. L. J. 18 : 81 I. C. 549 :
25 Cr. L. J. 933 : 1924 R. 294.

—S. 221—*Judgment—What to contain.*

In dismissing an appeal summarily under S. 421, an appellate Court is not bound to write a judgment as required by S. 367, but it should give reasons for dismissing the same. (*Kulwant Sahay, J.*) JAGARNATH SINGH v. EMPEROR.

82 I. C. 165 : 25 Cr. L. J. 1237.

—Ss. 421 and 423.

Appeal once formally admitted, cannot be summarily dismissed. (*Sanderson, C. J. and Panton, J.*) RAM HARI CHAKRAWARTY v. SANTOSH KUMAR MANNA.
1924 Cal. 642.

—Ss. 421 and 423—*Appellate Court whether required by law to give a second hearing to the appellant.*

Under S. 423 of the Code an appellate Court is not required by law to give a second hearing to the appellant. The latter has not got a right under law to reply in an appellate Court, but permission to do so is a privilege which should not ordinarily be refused. (*Pullan, A. J. C.*) PRAG v. EMPEROR.

1 O. W. N. 473 : 10 O. & A. L. R. 871 :
82 I. C. 33 : 25 Cr. L. J. 1169 : 11 O. L. J. 693 :
1925 Oudh 65

—Ss. 421 and 430—*Dismissal of jail appeal—Subsequent appeal through pleader—Maintainability.*

Where an appeal prepared by a prisoner in jail has been dismissed under S. 421, Cr. P. Code the matter cannot be reopened again by the High Court by way of an appeal presented through counsel. (*Wazir Hasan, J. C.*) RAM AUTAR v. EMPEROR.

10 O. & A. L. R. 739 : 11 O. L. J. 536 :
1 O. W. N. 354 : 82 I. C. 541 (1) :
25 Cr. L. J. 1313 (1) : 1924 Oudh 425 (1).

—S. 423—*Appeal—Enhancement of sentence.*

CRIM. P. CODE (1898), S. 435.

The petitioner was convicted under S. 429, I. P. C. by the Deputy Magistrate and sentenced to rigorous imprisonment for 2 months and to a fine of Rs. 50 or in default one month's rigorous imprisonment. On appeal the District Magistrate changed the sentence to one of one month's rigorous imprisonment and a fine of Rs. 200 or in default to two months' rigorous imprisonment. Held that the latter sentence amounted to an enhancement of the sentence passed by the trial court for supposing the fine was not paid, the petitioner would have to undergo 3 months' rigorous imprisonment and be still liable to the fine. (*Adami and Bucknill, JJ.*) BHOLA SINGH v. EMPEROR.

3 Pat. 638 : 5 P. L. T. 622 : 82 I. C. 50 (1) :
25 Cr. L. J. 1186 (1) : 1924 Pat. 563.

—S. 423—*Powers of appellate court—If can alter conviction to one for a graver offence.*

A court of appeal can alter a conviction for one offence into one for a graver offence, if it does not prejudice the accused. (*Kincaid, J. C. and Aston, A. J. C.*) KAWROMAL v. EMPEROR.

81 I. C. 881 : 25 Cr. L. J. 1057

—S. 423—*Right to reply—Practice.*

Accused persons have no right to reply under S. 423, but the privilege of replying should never be refused by an appellate court. (*Pullan, A. J. C.*) BAHRA v. EMPEROR.

81 I. C. 881 : 25 Cr. L. J. 1057
25 Cr. L. J. 1173 : 82 I. C. 37 :
1925 Oudh 50.

—S. 423 (1) (b) and 439—*Court of Session on an appeal quashing conviction and ordering commitment for trial—Power of High Court in revision to reverse or alter the order of commitment—Penal Code (XLV of 1866) S. 395—Dacoity, charge of—Not made out—Magistrate's jurisdiction to discharge.*

The High Court has jurisdiction in revision to reverse or alter an order of commitment passed by a Sessions Judge under S. 423 (i) (b) of the Code of Criminal procedure. Held also that where the trial Magistrate does not think that a charge of dacoity is made out, he has jurisdiction to discharge the accused persons of that offence. (*Dalul, J. C.*) RAL SAMUJH LAL v. EMPEROR.

1 O. W. N. 525 : 10 O. & A. L. R. 957 :
25 Cr. L. J. 1375 (2) : 82 I. C. 767 (2) :
11 O. L. J. 748.

—S. 428—*Necessary—Meaning of—Scope of section—Additional evidence or fresh trial.*

The word "necessary" in S. 428 does not import that it should be impossible to pronounce judgment without the additional evidence. There is no restriction in the wording of the section either as to the nature of the evidence or that it is to be taken for the prosecution only to be invoked when formal proof for the prosecution is necessary. The power of the appellate court is not restricted in such cases to ordering a retrial. (*Odgers and Wallace, JJ.*) M. P. NARAYANA MENON, *In re*.

25 Cr. L. J. 401 : 77 I. C. 481 : 1925 Mad. 106.

—S. 435—*Order of discharge—Compensation awarded—Revision—Forum.*

76 I. C. 1030 (1) : 25 Cr. L. J. 310 (1) :
1924 Mad. 228.

CRIM. P. CODE (1898), S. 435.

—S. 435—*Order under S. 88—If revisable.*
An order under S. 88, Cr. P. C. is a proceeding within the meaning of S. 435, Cr. P. C., and is revisable. (*Shadi Lal, C. J.*) *SANTA SINGH v. EMPEROR.*

76 I. C. 18 : 25 Cr. L. J. 82 : 1924 Lah. 617.

—S. 435—*Powers of District Magistrate.*

Under S. 435, Cr. P. C. a District Magistrate after looking into the records of a case can reject the application altogether or take action under S. 438. In the latter case his power is limited to report for orders to the High Court the result of the examination of proceedings under S. 435. (*Wazir Hasan, A. J. C.*) *HIR LAL v. EMPEROR.*

11 O. L. J. 59 : 77 I. C. 728 : 1924 Oudh 331.

—S. 435—*Powers of High Court—Evidence if can be gone into—Case of non-appealing accused—If can be considered.*

There is no provision of law which debars a Court of revision from going into the evidence, if it thinks it fit to do so in the interests of justice. Where a number of accused are convicted and some only apply in revision to the High Court the court has jurisdiction to consider the case of the non-appealing accused also. (*Moti Sagar, J.*) *ALLAH DITTA v. EMPEROR.*

25 Cr. L. J. 435;
77 I. C. 723 : 1924 Lah. 585.

—S. 435—*Security for good behaviour and keeping peace—Order based on insufficient material—Interference.* *NAFER CHANDRA PAL CHOUDHURY v. EMPEROR.*

25 Cr. L. J. 189 : 76 I. C. 479 : 1924 Cal. 114.

—Ss. 435 and 439—*Conviction by Sessions Court at Bangalore—Power of revision—European British subject.*

25 Cr. L. J. 231 : 76 I. C. 695 :
1924 M. W. N. 60 : 1924 Mad. 373.

—Ss. 435 and 439—*Criminal Trial—Judgment of Sessions court on appeal—Expunging remarks—Application for—Power of High Court.*

On an appeal from a conviction by a District Magistrate, the Sessions Judge commented adversely on the evidence of a police sub-inspector and remarked that he was guilty of perjury on the strength of a roznamcha which the Sessions Judge sent for from the police station and exhibited in the case. The Sub-Inspector was given no opportunity to explain his evidence in the light of the roznamcha nor did it appear that the evidence of the Sub-Inspector was incapable of a reasonable explanation and reconciliation with the roznamcha. *Held*, that the conduct of the Sessions Judge in condemning the police Sub-Inspector of perjury without giving him an opportunity to explain and in the light of material which had not been legally put in evidence was improper and that the offensive remarks should be expunged from the judgment of the Sessions Judge. (*Eforde, J.*) *AMAR NATH v. EMPEROR.*

5 Lah. 476 (1) : 1925 Lah. 187.

—Ss. 435 and 439—*Discharge of accused by Magistrate—Order for further enquiry by Sessions Judge—Revision by High Court.*

The trying magistrate after recording the evidence of a number of prosecution witnesses was of opinion that no case had been made out against

CRIM. P. CODE (1898), S. 437.

the accused under S. 408, I. P. C., and discharged the accused. The Sessions Judge on going through the evidence was of opinion that the Magistrate had not given proper reasons for discharging the accused and ordered a further enquiry. *Held*, that the order of the Sessions Judge was not illegal or improper and the High Court would not interfere in revision. (*Kendall, A. J. C.*) *KARHLEY v. PANDIT JAGGANNATH PRASAD.*

10 O. & A. L. R. 576;

11 O. L. J. 611 : 1 O. W. N. 302 : 1925 Oudh 180.

—Ss. 435 and 439—*High Court—Proceedings pending before subordinate criminal court—Power to quash.*

It is competent to the High Court to quash or set aside the proceedings pending before an inferior Criminal Court at any stage for proper reasons. The powers of the High Court under Ss. 435 and 439, Cr. P. C. are not confined to those conferred upon the court as a court of appeal. (*Venkatasubba Rao, J.*) *RAMANATHAN CHETTIAR v. SIVARAMA SUBRAMANJA AIYAR.*

35 M. L. T. (H. C.) 77 :

(1924) M. W. N. 556 : 20 L. W. 234 :

47 Mad. 722 : 25 Cr. L. J. 1009 :

81 I. C. 785 : 1925 Mad. 39 : 47 M. L. J. 373.

—Ss. 435 and 439—*"Inferior Criminal Court"—Secretary to Government—Order under Bengal Act I of 1923, S. 6 directing a person to leave Bengal Province—Order not open to revision by High Court. See LETTERS PATENT (CAL.) CL. 28.*

51 C. 460.

—Ss. 435 and 439—*Revision—High Court Interference—Charge of cheating.*

Where there was absolutely no dishonesty in a commercial transaction and where the facts disclosed did not constitute an offence under S. 420 I. P. C. the High Court would interfere in revision and quash the proceedings so as to prevent an abuse of the process of Court. (*Walmsley and Mukerji, JJ.*) *HARENDRANATH DAS v. JOTISH CHANDRA DUTT.*

40 C. J. 283 : 1925 All. 100.

—S. 436—*Fresh enquiry—Discharged person cited as witness against co-accused—Procedure.*

Where a person is discharged and is then examined as a prosecution witness against two co-accused, it is improper to direct fresh enquiry on the basis of the evidence given by him as witness. (*B. Ghose and Cumming, JJ.*) *EASATULLA MIAN v. EMPEROR.*

76 I. C. 1031 (2) : 25 Cr. L. J. 311. (2) :

1925 Cal. 104.

—S. 436 (New Code)—*If applies to proceedings under Ch. VIII.* *MAUNG THAN v. EMPEROR.*

2 Bang. 30 :

81 I. C. 970 : 21 Cr. L. J. 1146 : 1924 R. 207.

—S. 437—*Further enquiry—Same materials.*

75 I. C. 978 : 25 Cr. L. J. 66.

—S. 437—*Commitment order—Powers of High Court over.*

The High Court can revise an order of commitment on points of fact as well as on questions of law. (*Ross, J.*) *MUNSHI MANDER v. KANI MANDEK.*

81 I. C. 913 : 25 Cr. L. J. 1089.

CRIM. P. CODE (1898), S. 437.

—S. 437—*Reference to High Court—Disagreement between Judge and jury—Duty of court—Opinion of jury—Weight due to.*

Where there is a verdict of a jury from which the judge differs and refers the case to the High Court, it is not for the High Court to see whether it is necessary for the ends of justice that the opinion of the jury should be reversed. That condition is set down for the Sessions Judge to observe. When once a reference is made to the High Court, the language of the Code does not justify any undue preference being given to the opinion of the jury over that of the judge. The High Court has to weigh both the opinions and consider the entire evidence on the record just as it would consider in any criminal matter coming before it for decision. (*Dafal, J. C.*) *EMPEROR v. RAM CHARAN.* 27 O. C. 29 : 10 O. & A. L. R. 25 : 11 O. L. J. 210 : 81 I. C. 305 : 25 Cr. L. J. 785 : 1924 Oudh 314.

—S. 437—Want of notice vitiates order.
25 Cr. L. J. 523 : 77 I. C. 987.

—S. 437—Wrong inference of fact—Interference.

The High Court can interfere in revision with a wrong inference, even of fact, from proved facts. (*Kinkhede, A. J. C.*) *SABIMIYA v. EMPEROR.* 25 Cr. L. J. 1073 : 81 I. C. 897 : 1925 Nag. 123.

—S. 438—District Magistrate—Reference to High Court—Enhancement of Sentence passed by Sessions Judge.

A District Magistrate is incompetent to make a reference under S. 438, Cr. P. Code, recommending that a sentence passed by a Sessions Judge should be enhanced. The power conferred by S. 438, Cr. P. Code, is confined to proceedings of any inferior criminal courts 23 C. 249 : 11 Bom. L.R. 796 foll. (*Abdul Raouf and Harrison, JJ.*) *EMPEROR v. WASAWI.* 5 Lah. 11 : 25 Cr. L. J. 928 : 81 I. C. 544 : 1924 Lah. 437.

—Ss. 438 and 439—Order of acquittal—Revision by High Court.

Ordinarily the High Court would not entertain a reference under S. 438, Cr. P. Code the object of which is to have an order of acquittal passed by an inferior court set aside. 24 A 346 : 25 A 128 : 68 I. C. 615 : 62 I. C. 869 Rel. (*Abdul Raouf and Harrison, JJ.*) *EMPEROR v. ACHHAR SINGH.* 5 Lah. 16 : 25 Cr. L. J. 931 : 81 I. C. 547 : 1924 Lah. 451.

—S. 439—Acquittal—Error of procedure—Effect of.

A mere error of procedure by itself is not good ground for setting aside an acquittal. But if it is of a grave character but not a mere error of improper admission of evidence, which was not essential to a result which might have been come to wholly independently of it, it would afford ground for interference. (*Macpherson, J.*) *GANGA SINGH v. RAMBHAJAN SINGH.* 25 Cr. L. J. 1266 : 82 I. C. 274 : 1925 Pat. 165.

CRIM. P. CODE (1898), S. 439.

—S. 439—Acquittal—Meaning of—Conviction under S. 326, I. P. C.—Appeal—Conviction altered into one under S. 323, I. P. C.—Revision—Interference.

The trial court convicted the accused under S. 326, I. P. C., but the appellate court altered the conviction into one under S. 323, I. P. C. Held in revision that the effect of the appellate court's order was to acquit the accused of an offence under S. 326, I. P. C. and that the High Court should not convert a finding of acquittal into one of conviction. It cannot be said that "acquittal", in S. 439, Cr. P. Code, means a complete acquittal on all the charges framed. (*Macleod, C. J. and Shah, J.*) *EMPEROR v. SHIVAPUTRAYA.* 26 Bom. L. R. 438 : 48 Bom. 510 : 1924 Bom. 456.

—S. 439—Acquittal—Powers of interference.

The High Court has power under S. 439 to interfere with an order of acquittal, but in practice it is largely restricted to cases which have not been tried out ordinarily. It is only in cases where it is urgently demanded in the interests of public justice. (*Macpherson, J.*) *GANGA SINGH v. RAMBHAJAN SINGH.* 25 Cr. L. J. 1266 : 82 I. C. 274 : 1925 Pat. 165.

—S. 439—Acquittal—Powers of revision.
1924 Lah. 286 (1).

—S. 439—Acquittal—Revision against—Interference by High Court.

It is settled law that the High Court ought not to interfere in revision with an order of acquittal unless interference is urgently demanded in the interests of public justice. The omission to serve notice of appeal on the complainant or on the officer appointed under S. 422, Cr. P. Code, is not a ground for setting aside the acquittal. 39 M. 505 : 16 L. W. 413 foll. (*Venkatasubba Rao, J.*) *PARA KANAKKAN v. AMIR BIBI.* 20 L. W. 327 : 1924 Mad. 837.

—S. 439—Appeal from conviction under S. 304, I. P. C.—Enhancement—Powers of Court.
ON SHWE v. EMPEROR. 25 Cr. L. J. 247 : 76 I. C. 711 : 1924 Rang. 93.

—S. 439—Criminal trial—Sentence—Enhancement of—Application of complainant.

As a matter of practice the High Court will not entertain a revision application for enhancement of a sentence at the instance of a private complainant. The remedy of a private complainant who considers a sentence unduly lenient is to draw the attention of the Government to that fact and the District Magistrate, Sessions Judge or Government Pleader may draw the attention of the High Court to a sentence with a view to its being enhanced. (*Macleod, C. J. and Shah, J.*) *NAGH DULA, In re.* 48 Bom. 358 : 26 Bom. L. R. 182 : 25 Cr. L. J. 966 : 81 I. C. 614 : 1924 Bom. 320.

—S. 439—Discretion—Exercise of.
5 Pat. L. T. 404 : 2 Pat. L. R. 165 (Cr.) : 2 Pat. L. R. 187 (Cr.) : 25 Cr. L. J. 446 : 77 I. C. 734 : 1924 Pat. 283.

—S. 439—Exercise of jurisdiction—Accused not applying—Effect.

CRIM. P. CODE (1898), S. 439.

The revisional jurisdiction of the High Court can be exercised even in cases where the accused does not desire it. Unless a miscarriage of justice has resulted, findings of fact are not generally interfered with. (*Kennedy, J. C. and Madgavkar, A. J. C.*) *HIRANAND v. EMPEROR*.

76 I. C. 230 : 25 Cr. L. J. 134 : 17 S. L. R. 245 : 1924 S. 129.

— Ss. 439 and 440—*Finding of facts—Interference by High Court in revision, whether desirable—Party's right to be heard before a Court of Revision.*

The High Court is always adverse to interfering on facts by way of revision as it would tend to remove the difference specifically laid down by statute between appeal and revision. Under S. 440, Cr. P. Code no party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision (*Dalal, J. C.*) *HAFIZ KHAN v. EMPEROR*.

1 O. W. N. 878 : 10 O & A. L. R. 1169.

— S. 439—*Findings of fact—Powers of High Court.*

76 I. C. 870 : 25 Cr. L. J. 278.

— S. 439—*High Court—Power to quash proceedings—Magistrate before whom complaint is made asking for advice from appellate Magistrate—Propriety of.*

The accused complained that he had lost a revolver but the police reported that the complaint was false. Thereupon the Police Sub-Inspector before whom the accused had complained filed a complaint under S. 182, I. P. C. The Magistrate before whom the complaint was made consulted the superior Magistrate having appellate authority over him as to the course he should adopt and on his advice returned the complaint on the ground that the complaint should have been made by the police Sub-Inspector who investigated the case. Subsequently the same police Sub-Inspector filed a complaint under S. 182, I. P. C. before the superior Magistrate who took it on file and transferred it for disposal to the inferior Magistrate. Eventually as per oral orders of the superior Magistrate the inferior Magistrate again sent the case back to the former who with his advice returned the case to the inferior Magistrate for disposal. At this stage an application was made to the High Court to quash the proceedings. *Held*, that though the proceedings were wholly irregular, and the High Court had power to quash the proceedings at any stage there was no ground for interfering with the proceedings at that stage. (*Venratasubba Rao, J.*) *SAMI GOUNDAN, In re.*

20 L. W. 937.

— S. 439—*High Court—Revisional jurisdiction—Upper Burma Ruby Regulation XII of 1887—Conviction—Imprisonment—Confiscation of property.*

Orders passed under the Upper Burma Ruby Regulation convicting a person and sentencing him to imprisonment and also confiscating precious stones are open to revision by the High Court. (*Duckworth, J.*) *MAUNG PO LON v. EMPEROR*.

3 Bur. L. J. 168 : 2 Rang. 321 : 1925 Rang. 12.

CRIM. P. CODE (1898), S. 443.

— S. 439—*Interference—Right of appeal not availed of—Conviction illegal—Effect.*

Ordinarily when an accused has a right of appeal, but has not exercised the same the High Court will not permit him to apply in revision instead. But where the effect of not allowing the revision is to make them suffer long periods of imprisonment, when under the law a sentence of only a few months could be imposed on them, the High Court will interfere under the general powers of revision. (*Wallace and Madhavan Nair, JJ.*) *PUVANAR ATHAMU, In re.*

20 L. W. 914 : 1925 Mad. 239.

— S. 439—*Joint trial—Plea of illegality—Not raised in court below—If open in revision.*

A plea that a joint trial was illegal under S. 239, Cr. P. C. can be raised for the first time in revision. If the point is made out, the trial is vitiated even if there is no prejudice. (*Greves and Cholzner, JJ.*) *DALSUK ROY AGARWALLA v. EMPEROR*.

25 Cr. L. J. 807 : 81 I. C. 343 : 1925 Cal. 248.

— S. 439—*Order of acquittal.*

6 Lah. L. J. 50.

— S. 439—*Revision—Conflicting views of evidence by the lower Courts.*

The respondents were called upon to show cause why they should not be ordered to furnish security for their good behaviour for one year. A Magistrate of the first class held an inquiry as to the truth of the information under S. 117, Cr. P. Code, and finally under S. 119 of the same Code discharged the respondents. The District Magistrate referred the case to the High Court asking it to set aside the order of discharge and either convict the accused under S. 118, Cr. P. Code or pass an order for further enquiry. *Held*, that the trial court having fully considered the evidence and discharged the accused, the High Court would not interfere unless it could be shown that the order of the trial court was either perverse or unreasonable. (*Wazir Hasan, J. C.*) *EMPEROR v. JAGDAMBA SINGH*.

10 O. & A. L. R. 511 : 11 O. L. J. 334 :

1 O. W. N. 245 : 81 I. C. 802 :

25 Cr. L. J. 1026 : 1924 Oudh 368.

— S. 439—*Revision—Power of interference—Consideration of evidence.*

The High Court is not debarred from entering into a discussion of and looking into the evidence and the facts in order to find out if there has been a miscarriage of justice when exercising its powers under Ss. 435 and 439, Cr. P. Code. (*Kulwant Sahai, J.*) *DAROGA SINGH v. EMPEROR*.

1924 P. H. C. C. 177.

— S. 443—*Indian subject—Prosecution by British employee on behalf of Railway administration.*

Where a European employee of a Railway administration launches a complaint against a British Indian subject, the latter cannot claim to be tried under Ch. 33 of the Cr. P. Code. (*Carr, J.*) *A. V. JOSEPH v. J. L. LAMMOND*.

3 Bur. L. J. 147 : 1924 Rang. 373 (2).

CRIM. P. CODE (1898), S. 443.

—Ss. 443 and 446—(Ss. amended by XII of 1923)—*Complainant and accused are respectively European and Indian British subjects and vice versa—Intention of the legislature.*

Where the petitioner who was committed to Sessions under S. 446, had not desired to be tried by European assessors but claimed to be tried by a jury of his own nationality, the Sessions Judge refused his prayer, in the absence of a notification by the Local Government under S. 269, Cr. P. Code, held by the Full Bench, that the object of the legislature was to place Indian and European British subjects on the same footing, and had been carried out by S. 446. That the trial of the accused was by law bound to be by jury unless he himself desired to be tried by European assessors by the proviso to sub-cl. (2) of S. 446.

Per *Fforde, J.*—The accused must be tried by a jury the majority of whom shall if the accused so desired, be of the category within which the accused himself came, provided, that where the trial in the ordinary course would be with the aid of assessors the accused had the right under the proviso to S. 446 to be tried with the aid of assessors all of whom shall be European or Americans according to the nationality to which the accused belonged.

“By ordinary course” is meant the course which would be followed in the absence of a claim by the accused to be dealt with under Ch. XXXIII of the Code or in the absence of a notification by the Local Govt. under S. 269. (*Broadway, Fforde and Campbell, JJ.*) *BRAY v. REX.*

5 Lah. 515.

—Ss. 449, 528-A and 528-B—*European British subject—Status of—Appeal—Claim when to be urged—Granting of leave ex parte—Notice to Crown.*

Even though an accused person tried before the Presidency Magistrate did not put forward his claim to be dealt with as an European British subject in accordance with the provisions of S. 528-A, Cr. P. Code, he can rely upon his right under S. 449 (1) (c) Cr. P. Code, for the purposes of an appeal. Where the accused asked for leave under S. 449 (1) (c), Cr. P. Code, on the ground he was a European British subject and that the case if tried outside the Presidency town, would have been tried under Ch. 33 of the Cr. P. Code he must satisfy the Court in these matters and the Crown should have notice to show, if possible, that the allegations are not true or that the case would not have been triable under Ch. 33 of the Cr. P. Code if triable outside the Presidency town. It is not incumbent on the accused to put forward his claim as a European British subject either before a Magistrate holding an enquiry or trial in a Presidency town or before the High Court during the trial of the case. The question should be raised at the time when leave to appeal under S. 449 (1) (c), Cr. P. Code, is asked for. The right of appeal under S. 449 is at the best a qualified right very different from the right conferred by S. 410, Cr. P. Code.

Per *Mukerjee, J.*—A claim to be dealt with as an European British subject or an Indian British

CRIM. P. CODE (1898), S. 476.

subject or an European not being an European British subject or an American, which is dealt with in Ch. XLIV A of the Cr. P. Code, the claimant has to prove his own status. If the claim is based on S. 443 (1) (a), the claimant will have to prove that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects. If it is based on S. 443, sub-S. (1), he will have to prove that in view of the connection both of an European British subject and an Indian British subject, it is expedient for the ends of justice that the case should be tried under Ch. 33 of the Code. (*Walmsley and Mukerjee, JJ.*) *MARTINDALE v. EMPEROR.* 40 C L J. 256 : 1925 Cal. 14.

—S. 454—Any subsequent stage—If includes revision. 25 Cr. L. J. 31 : 76 I. C. 695 : (1924) M. W. N. 60 : 1924 Mad. 373.

—S. 465 (1) and (2)—*Unsoundness of mind of the accused—Enquiry into—Burden of proof.*

In an enquiry under S. 465 (1), Cr. P. Code, where the accused pleads insanity it is for the prosecution to satisfy the Court with regard to the accused's capacity to stand the trial. Where there was a unanimous verdict of the jury that the accused was fit to stand his trial the High Court refused to interfere. (*Greaves and Pantou, JJ.*) *SHIB DAS KUNDU v. EMPEROR.*

51 Cal. 584 : 81 I. C. 827 : 25 Cr. L. J. 1051 : 1924 Cal. 713.

—S. 465 (1)—*Criminal trial—Unsoundness of mind—Plea of—Burden of proof.*

Where in a criminal trial an inquiry is made into the question of the soundness of mind of the accused and his capacity for making defence, it is in the nature of a preliminary enquiry conducted for the satisfaction of the court and the prosecution ought to commence and give their evidence. (*Pearson, J.*) *EMPEROR v. GOPI MOHAN SAHA.* 51 C. 827.

—S. 476—*Complaint before Tahsildar—Inquiry and prosecution under Ss. 467 and 471, I. P. C. legality.*

A Tahsildar, Second Class Magistrate before whom a complaint of attempt to cheat is filed can hold a judicial inquiry and if he finds a *prima facie* case can direct them to be prosecuted for offences under Ss. 467 and 471, I. P. C.) before a competent Magistrate. (*Stuart, J.*) *ABDUL QAUJU KHAN v. EMPEROR.* 25 Cr. L. J. 628 : 81 I. C. 118 : 1925 All. 99.

—S. 476—Court—Successor or Judge. 1924 Lah. 101.

—S. 476—*Judicial proceeding—Enquiry before Magistrate—Information by police—Sanction.*

An order for sanction under S. 476, Cr. P. Code, is bad in law where there was no judicial proceeding before the Court, as the offence must be one committed in or in relation to any proceeding in any Court.

CRIM. P. CODE (1898), S. 476.

Where on a complaint of theft, the police inquired into the case and reported it to be false, a Magistrate cannot direct prosecution under S. 211, I. P. C. (*Kulwant Sahay, J.*) *NAND KISHORE I. AL. v. EMPEROR*, 1924 P. H. C. C. 124 :

5 Pat. L. T. 300 : 2 Pat. L. R. 184 (Cr.) :
81 I. C. 158 : 25 Cr. L. J. 670 : 1924 P. 789.

— S. 476—Order under—Essentials of.
L. R. 5 A. 52 (Cr.).

— S. 476—Proceedings under—Notice to accused if necessary—Admission of other evidence in preliminary enquiry.

Though a notice to the accused is not essential under S. 476, Cr. P. Code, still it is highly desirable that it should be given 38 A. 142 foll. This is especially the case where the court holds a preliminary enquiry and records additional evidence and takes into consideration the result of another independent private inquiry made by the Circle Inspector. (*Sulaiman, J.*) *IMAM ALI v. EMPEROR* L. R. 5 A. 5 (Cr.) : 77 I. C. 888 : 25 Cr. L. J. 488 : 1924 A. 435.

— S. 476—Summons—Refusal of Affidavit by person identifying—Perjury—Prosecution.

Summons sent to the defendant in a suit residing at Devakotah was returned with the endorsement that defendant had refused the summons. The petitioner filed an affidavit to that effect and an *ex parte* decree was passed. Subsequently defendant applied to set aside the *ex parte* and the petitioner then denied the identity of the person served. On an application for sanction to prosecute the petitioner for perjury. *Held*, that one of the two statements must be false and that a complaint should be made against the petitioner of perjury so as to start an enquiry. (*Young and Heald, JJ.*) *U. P. R. N. SWAMINATHAN CHETTY v. PERIYA NAN.* 3 Bur. L. J. 149 : 1924 Rang. 374.

— S. 476—Transfer of Magistrate—Proceedings taken by Magistrate after the transfer—Legality of—Reference by District Magistrate.

A Judicial Officer acting as the City Magistrate decided a criminal case and was subsequently transferred from the station. After the transfer he purported to pass an order under S. 476, Cr. P. Code, on the application of one of the parties. *Held*, that the Magistrate had no jurisdiction to pass the order in question. A successor in a Court is the same Court as his predecessor in that Court and the predecessor who has departed to another Court can no longer be held to be a presiding officer of the first Court. Where a District Magistrate referred a case to the High Court through the Sessions Judge instead of acting either through the Government Advocate or Legal Remembrancer, the High Court will not ordinarily accept the reference direct. (*Boys, J.*) *EMPEROR v. BALDEO PRASAD.* 22 A. L. J. 772 :

L. R. 5 A. 121 (Cr.) : 82 I. C. 285 :
25 Cr. L. J. 1277 : 1924 All. 770

— Ss. 476 and 467 A—Forged document—Production in Court by person not party to the proceedings nor by alleged forger—Complaint by Court—Procedure.

CRIM. P. CODE (1898), S. 476-B.

Where it is possible that a document was forged by one B. but there was no evidence to suggest that he did so for the purpose of using them in court nor was it proved that he used the document in court, a complaint under S. 476, Cr. P. C., against B. by the Court is not justified. (*Greaves and Panton, JJ.*) *BAHERUDDY SIKDAR v. EMPEROR.* 28 C. W. N. 880 :

81 I. C. 919 : 25 Cr. L. J. 1095 :
1924 Cal. 986.

— Ss. 476 and 195 (b) and (c)—Their relation—Whether a Court can make complaint against persons who are not parties to—Effect of recent amendments.

In an insolvency proceeding, where the Judge was convinced that there was flagrant tampering with the Court records, and ordered a judicial enquiry under S. 476, to enquire into offences under S. 120-b read with Ss. 465, 466 and 109, I. P. C., alleged to have been committed by persons not parties to the suit and it was doubted whether a Court can make a complaint in respect of any person other than persons who were parties to the proceedings before it.

Held, that by the recent amendment of the Code the necessity for sanction to prosecute has been done away with altogether and in the place of that sanction, has been substituted a complaint made by a Court itself in writing, Powers given in S. 476 should be strictly confined to those granted.

Held, further, that the offence referred to in S. 195, sub S. (1) cl. (b) or cl. (c) must be read in conjunction with the wording of S. 195 (1) (c) and that the offence alleged to have been committed by a party to a proceeding before a Court is the only exception which a Magistrate can take cognizance of without sanction and complaints under S. 476 against the persons who are not parties to the proceedings before it was not contemplated by the Code.

Per Brown, J.—Recent amendments to Ss. 476 and 195 have resulted in connecting the two sections more closely together, and the 2 sections must be read together. 15 M. 224 : 22 C. 1004, 18 Bom. 581 : 14 Bom. L. R. 968 : 18 M. L. T. 488, referred to. (*Robinson, C. J. and Brown, J.*) *G. T. GURUSWAMY & SONS v. D. K. S. EBRAHIM.* 2 Rang. 374 : 1925 Rang. 28.

— S. 476-A—Sanction to prosecute—Power of appellate Court while application is pending in the Lower Court.

Where an application under S. 476 is pending before an inferior Court there is no objection to the superior Court taking such action as could be taken by the Court under S. 476, Cr. P. Code. The pendency of the application cannot mean rejection of the application within the meaning of S. 476 A. (*Shah, A. C. J. and Fawcett, J.*) *RAMDAS VISHNUDAS, In re.* 26 Bom. L. R. 713 : 82 I. C. 359 : 25 Cr. L. J. 187 : 1924 Bom. 511.

— Ss. 476 B and 439—Direction to prosecute—Appeal to District Judge—Withdrawal of sanction—Further appeal—Revision.

CRIM. P. CODE (1898), S. 487.

Under S. 476 of the Cr. P. Code, no appeal lies against an order made by the Court to which the Court making a complaint is subordinate. Where the Lower Appellate Court withdraws a complaint made under S. 476, the High Court would not generally interfere in revision, except perhaps in extraordinary cases. The question whether the complaint should be made under S. 476, Cr. P. Code, is almost invariably a matter of discretion and if the trial Court or a Court to which it is subordinate, thinks that there should be no complaint made, then it would not be desirable that the High Court should interfere (*MacLeod, C. J. and Shah, J.*) *SOMABHAI v. ADITBHAI*

26 Bom. L. R. 289; 48 Bom 401;
25 Cr. L. J. 1123 : 81 I. C. 947 : 1924 Bom 347.

—S. 487—Court that heard appeal in sanction proceedings cannot hear appeal from conviction.

The mandatory provisions of S. 487, Cr. P. Code, as amended, clearly prohibit the Sessions Judge from trying any person for any offence referred to in S. 195 of that Code. The word "try" as used in S. 487 includes the "hearing of an appeal". 16 Cal. 121 Foll. (*Kinkhede, A. J. C.*) *KRISHNAPPA v. EMPEROR*.

25 Cr. L. J. 713 :
81 I. C. 201 : 1924 Nag 51.

—S. 488—Application for maintenance—Evidence.

76 I. C. 974 : 25 Cr. L. J. 302.

—S. 488—Application for maintenance—Neglect to maintain—Offer to maintain not enough to reject application.

What entitles the children to get maintenance is not merely a formal refusal of the child-rear's father to maintain, but also his neglect to do so. That gives the Magistrate jurisdiction under S. 488, Cr. P. Code, to give maintenance to the children. A mere offer to maintain the children, at the time of the trial, is not a justification for rejecting the petition of the children. (*Krishnan, J.*) *KAMBU AMMAL v. RANGANATHAN*,

(1924) M. W. N. 465 : 76 I. C. 30 :
25 Cr. L. J. 94 : 1924 Mad. 624.

—S. 488—Application under—Nature of—Chin Hills Regulation.

An application under S. 488, Cr. P. Code, is not a proceeding of a civil nature within the meaning of S. 12 (1) of the Chin Hills Regulation. (*Maccoll, A. J. C.*) *MAUNG v. MAUNG TOM*,
25 Cr. L. J. 111 : 76 I. C. 111 : 1925 Rang. 140 (1).

—S. 488—Grain allowance—Separate residence—It can be ordered.

A Magistrate is not entitled to order a grant of grain allowance or separate residence being provided under S. 488, Cr. P. Code. The section provides only for cash allowance. (*Scott-Smith, O. C. J.*) *ATNI v. MT. MAHON*,
82 I. C. 279 (1).

—S. 488—Maintenance—Malabar tarwad—Offspring of sambhandam—Maintenance from tarwad—Liability of putative father.

The offspring of a sambhandam in Malabar are entitled to maintenance from their tavazhi and if the tavazhi or tarwad has sufficient means to

CRIM. P. CODE (1898), S. 488.

maintain them, they are not entitled to an order for maintenance. (*Odgers, J.*) *BHARATA AIYAR, In re*.

46 M. L. J. 324 : (1924) M. W. N. 305
34 M. L. T. (H. C.) 167 : 77 I. C. 418 :
25 Cr. L. J. 370 : 19 L. W. 275 : 1924 Mad. 549.

—S. 488—Marrying second wife—Effect—Offer to to give separate residence.

The mere fact the husband has taken another wife is no ground for the first wife to refuse to go and live with him. Where she is offered separate residence which she rejects, she cannot be said to "refuse to live with her husband" within the meaning of subsections. 3 and 4 of S. 488 if she disapproves of the offer. (*Kinkhede, A. J. C.*) *SUKRULLA FAKIR v. FATMA*,
25 Cr. L. J. 483 :
77 I. C. 805 : 1924 Nag. 297.

—S. 488—Order for maintenance—Evidence of neglect or refusal to maintain.

The first essential for proceedings under S. 488, Criminal Procedure Code, is that the person proceeded against should have neglected or refused to maintain his wife or child unable to maintain itself. The mere fact that a person states that the complainant is his daughter and he is willing to maintain her does not justify an order for maintenance. (*Kendall, A. J. C.*) *EMPEROR v. INTZAR AHMED*,
10 O & A. L. R. 323 :
1 O. W. N. 150.

—S. 488—Proceedings under—Accused examined under—If should be questioned under S. 342.

Where in proceedings under S. 488, Cr. P. Code, the accused gave evidence on his own behalf, he cannot afterwards object that the trial is vitiated by absence of examination under S. 342. (*Greaves and Panton, J. J.*) *BACHAI KALWAR v. JAMUNA KALWARIM*,
25 Cr. L. J. 1091 :
81 I. C. 915 : 1925 Cal. 339.

—S. 488—Wife—Maintenance—Payment in kind and cash.

S. 488, Cr. P. Code, only permits of the Court directing a monthly payment of money, and an order directing a mixed payment in kind and cash every year is contrary to the terms of S. 488. (*MacLeod, C. J. and Shah, J.*) *MUKTA v. DATTU-MAHADEV*,
26 Bom. L. R. 186 :
81 I. C. 613 (1) :

25 Cr. L. J. 965 (1) : 1924 Bom. 332.

—S. 488 (6)—Order for maintenance—Application to successor of Magistrate who passed the order for its modification. *MAUNG TUN YIN v. MA. THEIN SHIN*,
75 I. C. 304 :

—S. 488 (7)—Omission of—Effect.

Quære : whether by omission of cl. 7 and describing the accused party as "a person" in cl. 9 the legislature intended that in such proceedings the opposite party should no longer be looked upon as an accused person and hence free to give evidence on his own behalf. (*Greaves and Panton, J. J.*) *BACHAI KALWAR v. JAMUNA KALWARIM*,
25 Cr. L. J. 1091 : 81 I. C. 915 :
1925 Cal. 339.

CRIM. P. CODE (1898), S. 462.

—S. 488 (8) — *Restitution of conjugal rights—Subsequent ill-treatment by husband—Order for maintenance.*

The weight to be attached to the decree of a civil court must depend upon the particular circumstances of the case and no hard and fast rule can be laid down that a decree of a civil court is for ever and aye binding on the Magistrate or that his discretion is never fettered. Where after the passing of a decree for restitution of conjugal rights it was found that the wife was being ill-treated by her husband and driven out with blows, a magistrate is justified in making an order for maintenance in favour of the woman and in the exercise of his discretion in absolving her from the condition that she must live with her husband. (*Boys, J.*) *RAJPATTI v. EMPEROR.*

22 A. L. J. 806 : L. R. 5 A. 126 (Cr.) : 82 I.C. 174 : 25 Cr. L. J. 1246 : 1924 All. 784.

—S. 491—*Amendment—Effect—Power of Criminal Appellate Bench to dispose of.*

After the recent amendment of S. 491, Cr. P. Code, the Criminal Appellate Bench of the High Court has power to dispose of applications under S. 491 Cr. P. Code. (*Walmsley and Mukerjee, JJ.*) *SUBODH CHANDRA RAY CHOUDHURI v. EMPEROR.* 29 C. W. N. 98 : 40 C. L. J. 489 : 1925 Cal. 278.

—S. 491—*Habeas Corpus—Arrest and detention of foreigners—Delay in issuing order—Costs of application.*

The accused was born in a village which was once British India but which had since been ceded to the Rajah of Benares under a treaty. The accused was doing business in Bombay and living there for a number of years. On 17-9-1924 he was arrested by the warrant of the Commissioner of Police, Bombay, under S. 3 A of the Foreigners Act. On 23-9-1924 the Commissioner reported the case to the Government of Bombay. The accused applied on the same date to the High Court under S. 491, Cr. P. Code, and the Government did not pass any order till 14-10-1924 when the application was heard. *Held*, that in the absence of any order of Government, the continued detention of the accused was illegal and improper. Having regard to the delay on the part of the Government, the crown was directed to pay the costs of the applicant. (*Marten and Fawcett, JJ.*) *JAGRAI RAMSUMER TEWARI, In re.* 26 Bom. L. R. 1252 : 1925 Bom. 139.

—S. 491—*Withdrawal allowed—Revision against—Reasons if to be recorded—Private party.*

2 Pat. L. R. 165 (Cr.) : 2 Pat. L. R. 187 (Cr.) : 25 Cr. L. J. 446 : 77 I. C. 734 : 1924 Pat. 283.

—Ss. 494 (a) and 403—*Discharge of accused under S. 494 a) whether bars the entertainment of fresh complaint on same facts.* See S. 403, Cr. P. Code. 1924 P. H. C. C. 226.

—S. 494 (a)—*Withdrawal of prosecution—Order for—Reason to be stated.* 1924 Cal. 382.

—S. 495—*Pleader for complainant—Interference with choice.*

The first paragraph of S. 495 does not in any way limit the scope of the third paragraph. There is nothing in S. 495 to warrant the action of a

CRIM. P. CODE (1898), S. 497.

Magistrate in taking the prosecution out of the hands of the complainant's pleader and handing it to some other person who is not the public prosecutor. (*Kennedy, J.C. and Raymond, A.J.C.*) *GHADILLY v. EMPEROR* 25 Cr. L. J. 571 : 81 I. C. 59 : 1925 Sinch 99.

—S. 497—*Bail—Grant of—Consideration NAGENDRA NATH CHAKRABARTI v. EMPEROR.* 51 Cal. 402 : 1924 Cal. 476.

—S. 497—*Bail—Non-bailable cases—Powers of Magistrate—High Court—Grave offences—Practice.*

The amended section 497 of the Cr. P. Code seems, in the case of offences punishable with transportation for life and death, to limit, rather than enlarge the powers of Magistrates in granting bail in non-bailable cases. In deciding questions of granting bail to persons accused of non-bailable offences, Magistrates must follow the provisions of S. 497, Cr. P. Code, but the High Court is not limited within the bounds of that section. It has absolute discretion in the matter but it will not generally depart from the practice of refusing bail in cases punishable with death or transportation for life. (*Duckworth, J.*) *BONDVILLE v. EMPEROR.* 2 Rang. 546 : 1925 Rang. 129.

—Ss. 497 and 498—*Bail—Offence punishable with transportation for life—Discretion—Power of High Court.*

When the provisions of S. 497 are compared with the provisions of S. 498 of the Cr. P. Code and when the principle of interpretation that the two provisions should not be so read as to come into conflict with each other is borne in mind the High Court or the Court of Sessions will be found to be invested by S. 498 with jurisdiction in the matter of granting or refusing bail as a Court of superior appellate or revisional jurisdiction. The powers of the High Court or the Court of Session given by S. 498, Cr. P. C., are not controlled by the statutory limitation laid down in S. 497 of refusing to release an accused person on bail if there appear reasonable grounds for believing that he has been guilty of an offence punishable with transportation for life. The powers in S. 498 are not fettered by any rules defining the limits within which they would be exercised as the powers under S. 497 are. Though the exercise of the powers under S. 498 are entirely left to the discretion of the High Court without any fetters being imposed on the exercise of that discretion the High Court would not act arbitrarily and its exercise of the discretion must be based on judicial grounds. Where it was found (1) that the offence was not of kind where there may be danger of repetition thereof while the applicants are on bail as would be the case on a charge involving personal violence (2) that the defence counsel would constantly need the help of the accused persons to explain Hindi accounts and intricate Hundi transactions (3) that the trial would last for several months and (4) that the accused are willing to furnish substantial security the accused are entitled to be let on bail. (*Wazir Hasan, J.C.*) *BISHAMBHAR NATH TANDON v. EMPEROR.* 10 O. & A. L. R. 503 : 110. L. J. 527 : 1 O. W. N. 281 : 25 Cr. L. J. 1132 : 81 I. C. 956 : 1924 Oudh 435.

CRIM. P. CODE (1898), S. 498.

—S. 498—*Bail—Amount deposited in Court—Sentence of fine—Appropriation of deposit.*

Where money had been deposited in Court as bail, the Magistrate is bound to return the amount on the appearance of the accused to the person who made the deposit. It has no jurisdiction to attach this money in order to realise out of it the fine imposed on the accused. 19 A. L. J. 887 foll. (*Neave, A. J. C.*) *RAGHUNANDAN v. EMPEROR*. 11 O. L. J. 296 : 1924 Oudh 396.

—S. 498—*Case disposed of by High Court—Power to grant bail.*

A non-chartered High Court has no power under the Cr. P. Code or under its inherent powers to grant bail to a prisoner whose case has already been disposed of, merely because he wishes to appeal to His Majesty in Council.

Quære: whether a chartered High Court stands on a different footing. (*Kennedy, J. C. and Madhavkar, A. J. C.*) *PITUMAL v. EMPEROR*.

81 I. C. 160 : 25 Cr. L. J. 672.

—S. 512—*Incapable of giving evidence—Meaning of—Inability to remember details—Procedure.*

A witness who had been examined under S. 512 appeared in court at the trial but could not remember the details of the occurrence. *Held*, he could not be considered as incapable of giving evidence within the meaning of the section. What the court should do in such a case is to refresh the memory of the witness by reading out his deposition and then ask him if he remembered the details of the occurrence. (*Scott-Smith, J.*) *BHIKA v. EMPEROR*.

25 Cr. L. J. 95 : 76 I. C. 31 : 1924 Lah. 605.

—S. 513—*Surety for appearance—Agreement to indemnify surety—Bail.*

Sureties on a bail bond are required in order that the failure of the principal to appear may be at the peril of others besides himself and the whole object of that provision is defeated if the principal and surety are allowed to relieve the latter of the peril by a contract to indemnify him. Such a contract is illegal and unenforceable. (*Halifax, A. J. C.*) *JODHRAJ v. BISANLAL*.

20 N. L. R. 166 : 82 I. C. 1036 : 1925 Nag. 59.

—S. 514—*Bond for good behaviour—Conviction under S. 323, I. P. C.—Forfeiture—Recovery of amount.* 1924 Lah. 262

—S. 514—*Forfeiture of security—Initiation of proceedings—Expiry period.*

76 I. C. 826 : 25 Cr. L. J. 266

—S. 514—*Forfeiture of bond—Liability—Extent of.*

On a person being arrested under S. 55, Cr. P. Code, the usual security bonds were executed for his appearance. Some time after the person was suspected of having committed some other offence and the surety was directed to produce him. On failure to do so, his bond was forfeited. *Held*, the bond was only with respect to the offence for which the person was arrested under S. 55 and not any subsequent offence committed and as such the order of forfeiture was wrong. (*Martineau, J.*) *MANA v. EMPEROR*.

25 Cr. L. J. 131 : 76 I. C. 227 : 1924 Lah. 622.

CRIM. P. CODE (1898), S. 517.

—S. 514—*Security for good behaviour—Subsequent conviction—No order forfeiting security—Subsequent action.*

If a Criminal Court knowing that a person charged before it is under security to be of good behaviour, in sentencing him takes no steps to confiscate the security, it is not competent to that court or any other court in a subsequent and separate proceeding to take such steps. (*Moti Sagar, J.*) *MUNSHI v. EMPEROR*.

25 Cr. L. J. 4 : 75 I. C. 692 : 1924 Lah. 680 (2).

—S. 517—*Conviction for importing opium—Currency notes on the accused's person—Confiscation.*

The essential of S. 517 is that property or document must be proved to have been used in the commission of the offence. Where currency notes were found on the person of a man convicted for importing opium into British India in contravention of the Opium Act, but where it was held that no irresistible inference was possible that they represented payment of the imported opium.

Held, that they should not be confiscated, (*Mears, C. J.*) *GOVIND RAM, In re*.

1924 A. 618.

—S. 517—*Property forming the subject of dispute—Confiscation of—Power of Court—Conflicting claims.*

Before the amendment of S. 517 of the Criminal Procedure Code in 1923 a Criminal Court had no power to order confiscation of properties forming the subject of the offence or in respect of which an offence appeared to have been committed. Where rival claims are put forward to the property by different parties, the proper procedure would be to keep the property in court pending the decision of a Civil Court as regards the title to it. (*Sanderson, C. J. and Chotzner, J.*) *RAM KHALAWAN AHIR v. TULSI TELINI*.

28 C. W. N. 1094 : 1924 Cal. 1040.

—S. 517—*Restoration order—Bona fide purchaser—Remedy.* *NAINA MAL v. EMPEROR*.

1924 A. 189.

—S. 517—*Theft—Acquittal of accused—Property given to accused—Order reversed by Dist. Magistrate—Legality of.*

The trying Magistrate acquitted the accused who was charged with theft of a drum and directed the drum to be restored to the accused. The District Magistrate set aside the order and directed the drum to be delivered to complainant. *Held*, that the District Magistrate had no jurisdiction to pass the order in question. 42 B 664 foll. (*Daniels, J.*) *DEBI RAM v. EMPEROR*.

22 A. L. J. 505 : I. R. 5 A. 91 (Cr.) : 46 All. 623 : 81 I. C. 992 : 25 Cr. L. J. 1168 : 1924 All. 675 (2).

—Ss. 517 and 520—*Order for delivery of property not proved to have been taken at the dacoity or to belong to the complainant—Procedure.*

Where property produced before a criminal court is not proved to have been taken at an alleged dacoity or to belong to the complainant, the court ought to deliver it to the person who

CRIM. P. CODE (1898), S. 517.

produced it leaving the complainant to his remedy in the civil court. (*Broadway, J.*) SULEMAN v. EMPEROR.
6 Lah. L. J. 213 :
1924 Lah. 588.

———Ss. 517 and 520—Order for disposal of property—Power of Appellate Court—Application by accused who was acquitted on appeal.
1924 Lah. 75.

———S. 520—Appellate Court—Powers to order restoration. ONKAR v. EMPEROR.
L. R. 5 A. 14 (Cr.) : 1924 A. 213.

———S. 520—District and Sessions Judge—If a Court of Appeal, confirmation, reference or revision—Order of Second Class Magistrate—Appeal to Sub-Divisional Magistrate—Order if can be varied by Sessions Judge.

In a case of theft, a Second Class Magistrate convicted the accused and directed the subject-matter to be handed over to the complainant. On appeal the Sub-divisional Magistrate acquitted the accused but declined to interfere with the order directing return of the property. The Sessions Judge on appeal directed the subject-matter of the offence to be handed over to the accused. *Held*, the order of the Sessions Judge was unauthorised by S. 520 or any other section of the Criminal Procedure Code as he was not a court of appeal, confirmation, reference or revision with respect to the orders of the Second Class Magistrate or Sub-divisional Magistrate. (*Devadoss, J.*) SOMU PILLAI v. KRISHNA PILLAI.
20 L. W. 521 : 1924 M. W. N. 806 :
25 Cr. L. J. 1247 :
1924 Mad. 699 : 47 M. L. J. 481.

———S. 520—Trespass—Conviction—Finding as to cultivation of land by accused—Order for delivery of possession—Legality of.

Where the accused had been legally ejected but subsequently remained in possession of the land asserting the bare defence that he would not give up actual possession, his plea is a plea of guilty to a charge of trespass. The accused was a tenant under a Zamindar. On a complaint by the agent of the Zamindar that the accused had resisted him in ploughing a field from which the accused has been ejected some time before, the Court found that the accused had previous to that occasion cultivated the land and sentenced the accused under S. 447, I. P. C. *Held*, that there was no finding of criminal trespass on the occasion in respect of which the complaint was made and no order for possession in favour of the complainant could be made under S. 522, Cr. P. Code. (*Boys, J.*) GOVIND RAM v. NAMBAT.
L. R. 5 A. 147 (Cr.) : 1924 All. 762.

———S. 522—Power of Appellate Court to order restoration—No order by trial Court—Powers of High Court.
1924 A. 212.

———S. 526—Case sent to particular Magistrate at the request of complainant—Ground for transfer.

Where at the request of the complainant, his case is sent to a particular Magistrate for trial, the accused will be justified in asking for a transfer from that Court. (*Moti Sagar, J.*) GHARSI, MAL v. DEBI SAHAL.
25 Cr. L. J. 989 :
81 I. C. 637 : 1925 Lah. 121.

CRIM. P. CODE (1898), S. 526.

———S. 526—Criminal case—Transfer, grounds for—Apprehension of accused.

In cases where an application for transfer is made the law has regard not so much perhaps to the motives which might be supposed to bias the judge as to the susceptibilities of the litigant parties. If there is a real fear of injustice in the mind of the accused, having regard to the ordinary standard of honesty and fair dealing the case should be transferred, 35 A. 5 ; 19 A. 64 ; 33 C. 1183, 1188 Ref. (*Kinkhede, A. J. C.*) ANANT WASUDEO, v. EMPEROR.
7 N. L. J. 155 :
1924 Nag. 243.

———S. 526—Cross examining complainant's witnesses—Disallowing questions—If ground for transfer.

The mere fact that a trial Magistrate frequently cross-examined the witnesses of the complainant or disallowed questions as irrelevant is no ground for transfer of the case. (*Wazir Hasan, A. J. C.*) ABDUL AZIZ v. GANESH PRASAD.
25 Cr. L. J. 1185 (2) : 82 I. C. 49 (2) :
1925 Oudh 52.

———S. 526—Expression of opinion in connected miscellaneous proceeding—If ground for transfer.

While proceedings under Ss. 147 and 325, I. P. C., were pending in a court, proceedings under S. 144, Cr. P. Code, were instituted and based on the police report the same magistrate passed an order against the accused. *Held*, it was no valid ground for granting a transfer. (*Wazir Hasan, A. J. C.*) JANG BAHADUR v. EMPEROR.
11 O. L. J. 54 : 77 I. C. 721 : 25 Cr. L. J. 433 :
1924 Oudh 338.

———S. 526—Passing remark about another case if justifies transfer.

Where a Magistrate passed certain remarks regarding accused's guilt in another case before him while convicting him in one case, the other case should be transferred from his file. (*Wazir Hasan, J. C.*) CHOUDHRI ZAHIRUDDIN v. EMPEROR.
11 O. L. J. 556 : 1924 Oudh 433.

———S. 526—Prior expression of opinion—If a good ground for transfer.

A case having once been dismissed on the report of the police by a Magistrate was resurrected in the form of a complaint at the suggestion of the Revenue Assistant. The Magistrate subsequently noted that as he had expressed an opinion on the case he thought it better he should not try it. *Held*, that this was a good ground for transfer. Applications for transfer giving good reasons, if the allegations be correct, why a case should be transferred require to be seriously dealt with and should not be casually brushed aside as *fazul*. (*Harrison, J.*) BADAN SINGH v. EMPEROR.
1924 Lah. 257 (1).

———S. 526—Reasonable apprehension—Test of—Medical certificate—Rejection of.

In granting application for transfer the Court has to find out if there is a reasonable apprehension in the mind of the accused that otherwise he will not have a fair trial. Even if the acts complained of can be explained away, if their effect on a

CRIM. P. CODE (1898), S. 526.

person of the intelligence of the accused is to cause apprehension, it is a good ground for transfer.

Medical certificates by qualified doctors should be accepted as true, unless there is reason to believe they are not genuine. (*Moti Sagar, J.*) AHMAD DIN v. EMPEROR. 25 Cr. L. J. 638 : 81 I. C. 126 : 1925 Lah. 101.

—S. 526—*Refusal to admit document in evidence—Ordering party to deposit expenses for summons—If grounds for transfer—Complainant—Locus standi.*

The fact that a Magistrate erroneously refused to admit a document in evidence or asked a party to deposit the probable expenses for summoning a person as witness is no ground for transferring the case.

Quære: if the complainant in a case has a *locus standi* to apply for transfer of the case. (*Kulwant Sahay, J.*) NAND KISHORE MISRA v. KALKA MISRA. 1924 P.H. C. C. 196 : 77 I. C. 810 : 5 Pat. L.J. 487 : 25 Cr. L. J. 458 : 1924 P. 695.

—S. 526—*Transfer of a criminal case—Application by Crown—Procedure—Grounds for.*

Where a criminal appeal is pending against a conviction in a Sessions Court, the Crown is as much a party before the Sessions Judge as the accused person. Any motion that has to be made before the Sessions Judge should be through the Government Pleader and not by an official or demi-official letter from the District Magistrate as representing the Crown. It is not a sufficient ground for a transfer of a criminal case that the presiding Judge belongs to the Hindu or Moslem faith and cannot be expected to deal impartially with a communal dispute. (*Mookerjee, J.*) BHAGWAN DAS v. EMPEROR. 22 A. L. J. 1103.

—S. 526—*Transfer of criminal case—Grounds for—Complaint of murder before Sub-Divisional Magistrate—Speech by Deputy Commissioner in favour of accused.*

A complaint of murder had been preferred against the accused before the Sub-Divisional Magistrate. Subsequently during the pendency of the complaint, the Deputy Commissioner of the District made a speech in the presence of all the Magistrates of the District including the Sub-Divisional Magistrate in question that the rumours were baseless, that the accused was innocent, and that baseless charges had been imputed from malicious motives. *Held*, that under the circumstances the apprehension on the part of the complainant that he could not get justice at the hands of the Magistrate was reasonable and that there was sufficient ground for transferring the case from the file of the Sub-Divisional Magistrate. (*Kendall, A. J. C.*) RUP NARAIN BAKKAL v. ABDUL HAMID KHAN. 11 O. L. J. 657 : 82 I. C. 768 : 10 O. & A. L. R. 782 : 25 C. L. J. 1374 : 1925 Oudh 90.

—S. 526—*Transfer of criminal case—Grounds for—Reasonable apprehension on the part of the accused.*

It is difficult to lay down any hard and fast rule under which transfer should be made, for the circumstances of one case might differ from those of the other ; but the principle underlying the decisions of the various cases go to establish

CRIM. P. CODE (1898), S. 528.

that if there are circumstances in a case which raise a reasonable apprehension in the mind of an accused person that he would not receive fair dealing at his trial, the case should be transferred to a calmer atmosphere. 55 A. 5 ; 1 Pat. L. T. 522 ; 24 I. C. 951, Ref. (*Jwala Prasad, J.*) BINODE BEHARY BANERJEE v. EMPEROR. 5 Pat. L. T. 63 : 2 Pat. L.R. 69 (r.) : 81 I. C. 78 : 25 Cr. L. J. 590 : 1925 P. 115.

—S. 526—*Transfer of criminal case—Reasonable apprehension.*

Where an application is made for the transfer of a criminal case from the file of a Magistrate on the ground that he is biased in favour of the complainant, the Court has to consider whether the apprehension of the accused is reasonable and in so doing the court will try and place itself in the position of the accused person and look at the matter from his point of view. The matter does not depend on the way in which the Judge would regard it himself. (*Sanderson, C. J. and Cuming, J.*) PULIN BEHARY DEY v. ASHUTOSH GHOSE. 39 C. L. J. 330 : 25 Cr. L. J. 944 : 81 I. C. 560 : 1924 Rang. 981.

—S. 526—*Transfer of criminal case—Son appearing in the Court of his father.*

As there is no rule against a pleader appearing in the Court of his father, such a ground alone cannot be considered a valid ground for transfer of the case. (*Pullan, A. J. C.*) PEARY LAL v. PUTTAN. 10 O. & A. L. R. 784.

—S. 526—*Transfer—Reasonable apprehension—Prejudice against police sub-inspector.*

Under the new Code, when an application for adjournment is made with a view to apply for a transfer it is the duty of the Criminal Court to postpone the case at once. S. 526, sub clause 8, is imperative and it omits the former expression "before the accused is called on for his defence." When the District Magistrate has already formed a very strong opinion on the conduct of the Sub-Inspector as disclosed by a prior judgment, it would be unfair and unjust to the accused that the case against him should be tried by the same District Magistrate. (*Sulaiman, J.*) SARTAJ SINGH v. EMPEROR. 22 A. L. J. 430 : L. R. 5 A. 57 (Cr.) : 1924 A. 533.

—S. 528—*Transfer of case by additional Presidency Magistrate—Power of Chief Presidency Magistrate to retransfer the case.*

Under S. 528, Cr.P. Code, the Chief Presidency Magistrate has power to transfer to his own file a case which had been transferred to the Fourth Presidency Magistrate for disposal by the Additional Chief Presidency Magistrate who took cognizance of the offence 14 M. 399 foll. (*Greaves and Duval, JJ.*) MOHINI MOHAN ROY v. PINAM CHAND SETHIA. 28 C. W. N. 903 : 39 C. L. J. 595 : 51 Cal. 820 : 1924 Cal. 911.

—S. 528, (5)—*Order of transfer of a criminal case—Reasons not given—Effect of.*

Where an order of transfer of a criminal case is made under S. 528, cl. (5), of the Criminal Procedure Code without giving any reasons therefor as required by the section, the order is bad and

CRIM. P. CODE (1898), S. 530.

is liable to be set aside. (*Spencer, J.*) VENKATA REDDI, *In re*. 20 C.L. W. 384 :

(1924) M. W. N. 873 (1).

—S. 530—Summary trial by a Magistrate not authorised—Effect.

Where a Magistrate not empowered by law to do so tries a case summarily, the proceedings are void under S. 530, Cr. P. Code. (*Dalal J. C.*) BHAKHAR v. EMPEROR. 10 O. & A. L. R. 1196.

—S. 530—Trial by a Magistrate not having jurisdiction to try offence disclosed on evidence—Conviction for minor offences—Whether void.

Where a Magistrate has power to try the offence of which he has convicted the accused his proceedings will not be void merely because the facts disclose a more serious offence which is beyond his jurisdiction unless a clear rule of law has been disregarded. Held also that if a Magistrate intentionally ignores circumstances of aggravation which show that an offence beyond his jurisdiction was in fact committed as well as for an offence within his jurisdiction his action would be improper but his proceedings would not be void. 24 M. 675. 13 Bom. 501 Foll. (*Brown, J.*) DAWSON v. EMPEROR.

2 Rang. 455 : 1925 Rang. 45.

—S. 531—Commitment to Sessions—Power of High Court to quash—Want of territorial jurisdiction.

Where an accused person has been committed for trial to a Sessions Court which had no territorial jurisdiction at the place where the alleged offence was committed, the High Court can quash the committal. An order of committal to a Sessions Court is an order under S. 531, Cr. P. Code. It is not clear that the provisions of S. 531, Cr. P. Code, contemplate a case in which there has been an order by a court which had no territorial jurisdiction at all; such as in a case in which jurisdiction could only properly have been exercised by some court outside the territorial limits of the jurisdiction of a provincial High Court. (*Adami and Bucknill, JJ.*) MT. BHAGWATIA v. EMPEROR. 3 Pat. 417.

—S. 535—Failure to frame charge—Prejudice. 76 I. C. 568 : 25 J. Cr. L. . 0

—S. 537—Absence of sanction under S. 195—If a mere irregularity. See CR. P. CODE, S. 195 (4). 81 I. C. 209.

—S. 537—Charge—Defect in form—Prejudice.

A charge under S. 457 of I. P. C. "committing house trespass with intent to commit adultery or any other offence punishable with imprisonment" is improper as regards the latter part of it. But when the prosecution evidence was confined to the intent to commit adultery alone, the accused cannot be said to have been prejudiced and the defect is cured by S. 537. (*Greaves and Duval, JJ.*) BALARAM KUNDU v. EMPEROR.

25 Cr. L. J. 1186 (2):
82 I. C. 50 (2) : 1925 Cal. 160.

CRIM. P. CODE (1898), S. 540.

—S. 537—Failure to examine complainant—Error—No failure of justice.

25 Cr. L. J. 273 : 76 I. C. 865 : 1924 Rang. 87.

—S. 537—Sentence awarded before judgment recorded—Effect. See CR. P. CODE, Ss. 367 AND 537. 81 I. C. 193 (1).

—S. 537—Security proceedings—Omission to serve preliminary order—Effect.

The omission to serve on the accused a copy of the preliminary order is at the most only a defect curable under S. 537. (*Hallifax, A. J. C.*) NARAIN SAO v. EMPEROR. 25 Cr. L. J. 682 : 81 I. C. 170 : 1925 Nag. 33 (2).

—S. 537—Trial with less than requisite number of assessors—Defect if cured.

S. 537, Cr. P. C., does not cure the defect in a trial where a case triable with assessors is tried with less than the required number of them. The errors in such a case is a substantive error of law and not of procedure only. (*Prideaux and Kinkhede, A. J. Cs.*) JAIRAM KUNBI v. EMPEROR.

25 Cr. L. J. 459 : 77 I. C. 811 : 1924 Nag. 287.

—S. 537 (a)—Scope of.

S. 537 (a) does not apply to cases of disregard or disobedience of the whole of some mandatory provision of the Code but applies only to cases of failure to comply with some part of such a provision in the course of a general compliance with the whole. (*Hallifax, A. J. Cr.*) GANGADHAR v. BHANGI SAO. 81 I. C. 976 : 25 Cr. L. J. 1152.

—S. 539-B—Inspection by Magistrate—Non-compliance with terms of the section—Illegality.

The provision in the second clause of S. 539-B, Cr. P. Code, is mandatory and failure to comply with this express direction of the law is an illegality and not an irregularity which could be cured if there was no prejudice to the accused. (*Newbould and Mukerjee, JJ.*) HRIDOY GOVINDA SUR v. EMPEROR.

40 C. L. J. 149 : 82 I. C. 767 (1):
25 Cr. L. J. 1375 : 1924 Cal. 1035.

—S. 540—Power of Magistrate to examine Court witnesses after the close of the case.

Although it is true that proper discretion has to be exercised under S. 540, Cr. P. Code, still the terms of the section are extremely wide and any court may at any stage of an enquiry, trial or other proceedings summon any person as a witness, if his evidence appears to it essential to the just decision of the case. This power can be exercised even after the close of the case for the prosecution and the defence. (*Odgers, J.*) PERUMAL, *In re*.

(1924) M. W. N. 302 : 34 M. L. T. (H.C.) 165 :
77 I. C. 290 : 25 Cr. L. J. 354 : 19 L. W. 272 :
1924 Mad. 581 (2) : 46 M. L. J. 325.

—S. 540—Reception of evidence—Duty of Court. MAUNG PO HMYIN v. EMPEROR.

76 I. C. 649 : 25 Cr. L. J. 217.

—S. 540—Scope of—Examination of witnesses after reserving judgment. NATABAR GHOSE v. ADVA NATH BISWAS. 75 I. C. 541.

CRIM. P. CODE (1898), S. 545.

—S. 545—*Compensation—If can be directed to be paid.*

Where a person is dealt with under S. 562, and no fine is imposed on him, the court has no power to direct him to pay compensation to the other party. (*Wazir Hasan, J. C.*) MUNREY MIRZA v. EMPEROR. 25 Cr. L. J. 1116 (1) : 81 I. C. 940 (1) : 1925 Oudh 116 (1).

—S. 546 A—*Non-cognizable offence—Costs of complainant—If can be awarded.*

Costs of the complainant cannot be awarded where the offence is not a non-cognizable one. (*Kendall, A. J. C.*) NUR-UD-DIN v. EMPEROR. 25 Cr. L. J. 1161 (1) : 81 I. C. 985 (1) : 1925 Oudh 109 (1).

—S. 556—*Local inspection—Procedure in cases of.*

In cases when a court makes a local inspection, the Magistrate should record the result thereof and ask the parties if they desire to adduce evidence and hear arguments about the same. When after delivering judgment, the court makes a note of the result of such inspection, the procedure is irregular, but this is not sufficient to vitiate the trial unless the accused is prejudiced thereby. (*Greaves and Chotzner, JJ.*) BHOLA NATH NANDI v. KEDAR NANDI. 25 Cr. L. J. 705 (2) : 81 I. C. 193 (2) : 1925 Cal. 353.

—S. 556—*Sanctioning or directing prosecution—If incapacitates.*

A Court which sanctions or directs a prosecution is not thereby rendered incompetent to try the offence or to hear an appeal against a conviction for it. There might of course be special circumstances in a case which render it improper that the Judge or Magistrate who sanctioned or directed the prosecution should hear the appeal against the conviction obtained in that prosecution. (*Hallifax, A. J. C.*) PANDIA MAHAR, *In re*. 1924 Nag. 23.

—S. 557—*Pleader when can act as a Magistrate.*

76 I. C. 1031 (1) : 25 Cr. L. J. 311 (1).

—Ss. 561-A and 89—*Application for restoration of property attached — Application made beyond prescribed period—Power of Court to order restitution.*

The Court could not pass an order under S. 561-A, Cr. P. Code, which would conflict with the provision of S. 86 of the Cr. P. Code, in the exercise of its inherent power. A Court has no jurisdiction to make an order for the restoration of the property where the application is made beyond the period prescribed in S. 89, Cr. P. Code. (*Shah, A. C. J. and Fawcett, J.*) GURU-NATH NARAYAN BETGER, *In re*. 26 Bom. L. R. 719 : 82 I. C. 365 : 25 Cr. L. J. 1293 : 1924 Bom. 485.

—S. 562—*Orders under —Second Class Magistrate if can pass.*

It is incompetent to a Second Class Magistrate to pass orders under S. 562, Cr. P. Code, himself. He should submit the case to a First Class Magistrate or Sub-divisional Magistrate for orders with his report if he is of opinion that the case is a fit

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one for the exercise of powers under that section. (*Motisagar, J.*) EMPEROR v. JAWALI. 5 Lah. 36. 25 Cr. L. J. 1124 : 81 I. C. 948 : 1923 Lah. 454.

—S. 562—*Powers under—When to exercise.*

In exercising the special powers under S. 562, the danger to the public and to the accused himself have to be guarded against. If the offence indicates not mere thoughtlessness but criminality also, such as a combination of design, ingratitude and a general character of craft and deceit, resort should not be had to the powers under the section. (*Kennedy, A. J. C.*) DARVALAL v. EMPEROR. 25 Cr. L. J. 1224 (2) : 81 I. C. 152 (2) : 1925 Sind 75.

—S. 562—*Proper procedure, in cases of conviction and release on security.*

In a case where the Magistrate ordered the appellant to be released on security, under S. 562, and where the appellant failed to furnish security it was held that such a situation should not be allowed to arise and if it arises the proper course is for the Magistrate to pass sentence according to law. *Held*, also that the Magistrate should satisfy himself that security can be given, before passing the order.

Held, further that S. 123, Cr. P. Code specifically applies only to Ss. 106 and 118 and not to S. 562. (*Carr, J.*) NASUMEAH v. EMPEROR. 2 Rang. 360 : 1925 Rang. 42.

CRIMINAL TRIAL—*Amendment of proceedings—Notice to parties affected by.*

It is an elementary right of a party when criminal proceedings started against him are amended that he should have notice thereof, and in the absence of such notice, the trial is vitiated. (*Greaves and Panton, JJ.*) JANAKI NATH KUNDU PAL v. MONMOHAN DE. 25 Cr. L. J. 674 : 81 I. C. 162 : 1925 Cal. 263.

—Appeal — Acquittal — Interference by High Court—Defamation — No Justification—Interference justified. See PENAL CODE, S. 499, EXN. 9. 28 C. W. N. 579.

—Approver—Evidence of—Weight. 1924 Oudh 65.

—Charge—Date and place of occurrence to be proved.

In a case of assault where the charge mentions a certain date and place at which it occurred the prosecution must prove the same. It is not open to the judge to convict the accused for an assault which took place at a different place or time. (*Broadway, J.*) JALALUDDIN v. EMPEROR. 25 Cr. L. J. 471 : 77 I. C. 823 : 1924 Lah. 616.

—Complaint—Several accused—Withdrawal against same—Effect of.

The withdrawal of a complaint against one of several accused has not the effect of withdrawing the complaint against the rest of the accused as well. 9 O. L. J. 54 foll. (*Wazir Hasan, J. C.*) NANDA v. EMPEROR. 10 O. & A. L. R. 357, 1 O. W. N. 120.

—Confession—If can be accepted in part.

It cannot be said that a court is not justified in holding that a confession as a whole may be true,

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although a particular detail is false especially when the detail refers only to the motive. Courts of law cannot pick out different statements made by an accused and piece them together so as to make a new statement. (*Pipon, J. C.*) MOTI RAM v. EMPEROR. 75 I. C. 152 : 24 Cr. L. J. 904.

— in cases involving question of intention, if the facts are such as would cause a man of ordinary prudence and ability to infer a guilty intent the accused should rebut such inference.

Case which involves a question of intention really rests upon the facts which are found. If those facts are such that a person of ordinary prudence and ability would come to the conclusion that they point to a guilty intent on the part of the accused it is for the accused to rebut that guilty intention: and if he does not so rebut it, the guilty intent is as much found against him as his physical acts. 37 All. 395 foll. (*Boys, J.*) MANNI AND OTHERS v. THE KING EMPEROR. 1924 A. 764 : L. R. 5 A. 127 (Cr.)

— Cross cases—Joint trial—If bad.

The trial of cross cases simultaneously but separately does not vitiate the trial unless there was prejudice. (*Kulwan Sahay, J.*) SHAFAYET KHAN v. EMPEROR.

81 I. C. 794 : 25 Cr. L. J. 1018

— Cross cases—Simultaneous trial—Procedure improper.

As a result of a fight between two parties, both of them instituted criminal cases in court, having made reports at the Police Station soon after the occurrence on 21-11-22. The Police sent in two reports on the two complaints and the parties were asked to prove their respective versions of the two cases. The hearing of the two cases was taken up simultaneously by the magistrate and the evidence adduced in one case was considered in dealing with the case brought by the other party. One of the cases was dismissed under S. 204, Cr. P. Code, and in the other a charge was framed. Held, that the procedure was irregular. The case should not have been heard at one and the same time and the magistrate was wrong in considering the evidence in one case for the purpose of coming to a conclusion in the other. The order passed under S. 403, Cr. P. Code, must be set aside and the Magistrate should first finish the case in which a charge had been framed and after that case is finished, he should pass orders in the other. (*Ghose and Cuming, JJ.*) GARIBULLA AKANDA v. SADAR AKANDA. 25 Cr. L. J. 941 : 81 I. C. 557 : 39 C. L. J. 331 : 1924 Cal. 813.

— Cross cases—Cases instituted on police report and private complaints—Accused in each case being complainants in the other—Police case not to be given precedence—Simultaneous trial desirable. See CR. P. CODE, S. 344.

28 C. W. N. 487.

— Conviction and sentence—Leave to appeal to his Majesty in Council—Important question of law—Stay of execution of sentence. See LETTERS PATENT (CAL.) CL. 41. 39 C. L. J. 1.

— Charge—Offences under Ss. 430 and 114, I. P. C.—No acts alleged prior to offence—Prejudice.

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The charge against an accused was that he abetted by being present, in committing the offence of mischief under Ss. 430 and 114, I. P. C. No acts were alleged on his part prior to the commission of the offence and evidence was let in at the trial that he was present at the place when the offence was committed and instigated others to do it. Held, the charge has defective as he had no notice of the matter with which he was charged. (*Venkatasubba Rao, J.*) ANNAVI v. EMPEROR. 25 Cr. L. J. 262 : 82 I. C. 262 : 21 L. W. 19.

— Charge—Particulars not given Oates v. Emperor. 25 Cr. L. J. 177 : 76 I. C. 417 : 1924 Cal. 104.

— Circumstantial evidence—Guilt—Proof of. 1924 Lah. 62.

— Conviction—Error—Reference to repealed enactment. 25 Cr. L. J. 336 : 77 I. C. 192 : 1924 Oudh 32.

— Defence—Necessity for—Prosecution story found to be false—Effect. See PENAL CODE, Ss. 148, 149. 2 Pat. L. R. 217 (Cr.).

— Defence—Weakness of—Not to be used to support case for prosecution—Duty of prosecution to establish guilt.

Per *Wazir Hasan, J. C.*—It is a well established principle of law that the prosecution must not only establish the guilt of the accused but that it should be established beyond any reasonable doubt. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. (*Wazir Hasan and Neave, A.J.Cs.*) HIRA LAL v. EMPEROR.

27 O. C. 188 : 1925 Oudh 78.

— Evidence—Disbelief in essential details vitiates conviction based upon part of the same story.

Where the prosecution cannot be believed in its essential details conviction cannot be based upon a part of the story of the prosecution. Where the greater portion of the prosecution evidence is disbelieved, a Court cannot reconstruct a story and convict the accused on the story wholly inconsistent with that told by witnesses. (*Foster, J.*) JOHARMAL MAHWARI v. THE KING EMPEROR. 5 Pat. L. T. 635 : 1924 P. 813 : 81 I. C. 212 : 25 Cr. L. J. 257.

— Duty of counsel—Admission of guilt—Duty of Court. 25 Cr. L. J. 817 : 81 I. C. 353 : 1924 Cal. 257.

— Evidence—Duty of prosecution to adduce all available evidence. 77 I. C. 819 (2) : 25 Cr. L. J. 467 (2).

— Evidence—Map—Preparation of—For use in a Criminal trial—Precautions, necessary for.

A person who prepares a map for use in a criminal case ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted on the body of the map but on a separate sheet of paper annexed to the map.

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as an index thereto. (*Sanderson, C. J. and Chotner, J.*) *EMPEROR v. ABINASH CHANDRA BOSE.* 28 C. W. N. 995: 1924 Cal. 1029.

—Evidence—Appreciation—Benefit of the doubt.

The doctrine that the accused in a criminal case should be given the benefit of the doubt applies only to a real and reasonable doubt in the mind of the Judge. (*Walsh and Ryves, JJ.*) *LAKHAN v. EMPEROR.* L. R. 5 A. 101 (Cr.): 1924 All. 511.

—Evidence—Expert evidence—Chemical examiner's report—Weight due to.

Where in a trial for murder there was strong direct evidence of the place of a certain murder but no blood was detected by the chemical examination of the earth, leaves and grass taken from alleged place of occurrence. *Held*, that the value of the report of the chemical Examiner was merely negative and it was not sufficient to rebut the strong direct evidence as to the place of occurrence. (*Newbould and Ghose, JJ.*) *HASSENULLA SHEIKH v. EMPEROR.* 28 C. W. N. 561: 1924 Cal. 625.

—Evidence—Medical evidence—Duty of Magistrate to act on expert medical evidence and not on his own personal investigation into medical books. *See* PENAL CODE, S. 499. 28 C. W. N. 579.

—Evidence—Production of documents as containing his evidence—Admissibility—Value of evidence as to identification in a parade only hearsay.

In a dacoity case, the prosecution supported the case on the evidence of certain witnesses who professed to have recognised the appellants at the scene, and the Magistrate was called upon to prove the identification and the methods adopted, who submitted his evidence by referring to certain documents which are described as exhibits, with a view to be treated as evidence in the case. *Held* (quashing the conviction) that such a method of recording testimony would be applied to all the witnesses, reduce the trial to a mere travesty, and is opposed to the first principles of evidence. *Held*, further that the statement given by a witness at an identification parade, might be used as corroborative evidence of his evidence in court and if otherwise, the evidence of identification, furnished by a parade can only be hearsay, except as to the fact that a witness knew the accused by sight. (*Broadway and Fforde, JJ.*) *LAL SINGH v. THE CROWN.* 5 Lah. 396: 1925 Lah. 19.

—Evidence—Admissions made by counsel for prosecution and defence—Acquittal—Appeal by crown.

The accused were tried on a charge under S. 82 of the companies Act but the court acting on admissions made by counsel for the prosecution and the defence acquitted the accused. On an appeal by the Crown. *Held*, that though the court could not decide a criminal case on admissions made by counsel, yet the High Court would not remand the case for retrial so as to supple-

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ment the deficiencies of the prosecution. (*Scott-Smith and Fforde, JJ.*) *EMPEROR v. JASWANT RAI & Co.* 5 Lah. 404: 1925 Lah. 85.

—Evidence—Appreciation of—Police investigation unfair and tainted—Effect of.

When a police investigation with respect to any particular accused person is tainted, a court will have great hesitation in believing the prosecution evidence as it is very difficult to know where an investigating officer who has been detected in fabricating false evidence will stop in such fabrication. (*Dalal, J. C.*) *HASNUKHAN v. EMPEROR.* 10 O. & A. L. R. 1138.

—Examination of witnesses—Right of accused to cross examine prosecution witnesses before charge.

No magistrate or Court can refuse to allow an accused person to cross-examine prosecution witnesses, before charge is framed, and where the magistrate refused to allow the accused to do so, his procedure is most irregular and in contravention of law. (*Wallace, J.*) *MUTHIA CHETTY, In re.* 19 L. W. 391: 25 Cr. L. J. 556: 81 I. C. 44 (1): 1924 Mad. 735.

—First information report—Use of. 1924 A. 164.

—First information report—Prosecution if bound by.

The prosecution is bound to produce in court the First Information report made to the police, but it is not bound to refrain from leading evidence that the report is not accurate. To hold that the prosecution is bound by it is to recognize the recording officer as possessing an authority which he does not have. (*Campbell, J.*) *RAJA v. EMPEROR.* 25 Cr. L. J. 465: 77 I. C. 817: 1924 Lah. 591.

—Joint trial separate trials—Evidence taken in one used in another. *NARAIN SINGH v. EMPEROR.* 1924 Lah. 228.

—Joint trial—Objection as to—When to be taken.

An objection as to joint trial being prejudicial to the accused ought to be taken at an early stage and not after all witnesses have been examined and the trial is practically over. (*Kulwant Sahay, J.*) *AMJAD ALI v. EMPEROR.* 5 Pat. L. T. 129: 2 Pat. L. R. 79 (Cr.): 75 I. C. 723: 25 Cr. L. J. 35: 1924 P. 498.

—Jury trial—Evidence—How taken.—Reading over deposition given before.—If proper 1924 Lah. 17: 77 I. C. 425 (2): 25 Cr. L. J. 377 (2).

—Jury—Weight due to prosecution witness.—Factions—Effect of. 1924 Cal. 317.

—Jury charge to—Rediculing defence story.—Opinion of judge.

In a charge to the jury, the judge should not be dogmatic as to the view of evidence or redicule the defence story. Even when he expresses his opinion, he must warn them that it is not binding on them but that they are to form their own opinion. He must not make an appeal or exhortation to the jury. He is not bound to

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comment on all facts, but must direct their attention to the salient features.

Where the High Court finds the misdirection in the charge, was such as to vitiate the verdict, it can either order re-trial or dispose of the case on the evidence. Misdirection by itself does not justify the trial being set aside. (*Kennedy, J. C. and Raymond, A. J. C.*) TOPENDAS v. EMPEROR 25 Cr. L. J. 761 : 81 I. C. 249 : 1925 S. 116.

———Jury—Misdirection—Failure to read evidence—Benefit of doubt.

Failure to read material portions of the evidence in the charge to the jury is not a misdirection, justifying the reversal of the verdict. So also the omission to direct the jury to give the benefit of the doubt to the accused. (*Baker, J. C.*) RAHIMBEG v. EMPEROR. 7 N. L. J. 208.

———Murder—Conviction for—Retracted confession—Approver.

Where there is a conflict between the retracted confession of one of the accused and the evidence of an approver and they are the main heads of evidence on a charge of murder, the court will not convict the accused on the strength of that evidence without corroboration from outside testimony. (*Neave and Kendall, JJ.*) PARAMESHWAR v. EMPEROR. 11 O. L. J. 325 : 82 I. C. 135 : 25 Cr. L. J. 1207 : 1924 Oudh 369.

———Order directing—detention of property of stranger—Propriety of. 1924 Cal. 455.

———Previous conviction—Not to be let in till the end. MAUNG E. GYI v. EMPEROR. 1924 Rang. 91.

———Private Prosecutor—Locus standi. 5 Pat. L. T. 404 : 2 Pat. L. R. 165 (Cr.) : 2 Pat. L. R. 187 (Cr.) : 25 Cr. L. J. 446 : 77 I. C. 734 : 1924 Pat. 283.

———Prosecution evidence not believed as to main portions—Conviction on the rest.

Where in a criminal trial, the prosecution evidence is disbelieved in the main, it is unsafe to base a conviction or to rely upon portions of the same or reconstruct a story out of the balance which is not disbelieved. (*Foster, J.*) JOHARMAL MARWARI v. EMPEROR. 5 Pat. L. T. 635 : 25 Cr. L. J. 724 : 81 I. C. 212 : 1924 P. 813.

———Public prosecutor—Duty of.

There should be on the part of the Public Prosecutor no unseemly eagerness for or grasping at conviction. He is not to aggravate the case against the prisoner but has to perform his duties with that calmness and impartiality which should ever characterise the public prosecutor. He has to aid the Court in discovering the truth and also in the discharge of its duty to do justice as between the Crown and the accused. (*Kinkhede, A. J. C.*) ANANT WASUDEO v. EMPEROR. 7 N. L. J. 155 : 1924 Nag. 243.

———Punishment—Daily fine.

It is bad in law to impose a daily fine in anticipation of the commission of an offence, for at the time the charge was laid against him no such offence had been committed. (*Kulwant Sahay, J.*) PARCHAM SAO v. EMPEROR. 82 I. C. 717 : 25 Cr. L. J. 1357.

CRIMINAL TRIAL.

———Quashing of proceedings—Power of High Court.

Though the High Court has power to quash a Criminal proceeding in its early stages before evidence is recorded, the High Court would exercise this power only very sparingly in exceptional cases. (*Newbould, Ghose and Cumming, JJ.*) NRIPENDRA BHUSAN RAY v. GOBINDA BANDHU MAJUMDAR. 39 C. L. J. 236. 82 I. C. 266 : 25 Cr. L. J. 1258 : 1924 Cal. 1018.

———Sentence—Considerations—Public interest.

Appeals to the compassion of a Court on sentimental grounds have certainly been legitimately allowed as extenuating circumstances to warrant a lighter sentence, but the public interest in a case and its sensational character should be definitely excluded from consideration. (*Pipon, J. C.*) BODHRAJ v. EMPEROR. 76 I. C. 105 : 25 Cr. L. J. 105.

———Sentence—Conviction under two sections—Concurrent sentences.

Where a Magistrate convicts under two sections and intends to pass concurrent sentences, it is a very common though somewhat slovenly method of expressing the conviction to say, "I pass sentence under Ss. 326 and 148" or whatever the sections may be. Such a sentence must be interpreted as meaning that the Magistrate passed concurrent sentences under each section. (*Daniels, J.*) SOHAN AHIR v. EMPEROR. 22 A. L. J. 263 : L. R. 5 A. 88 (Cr.) : 25 Cr. L. J. 992 : 81 I. C. 640 : 1924 A. 492.

———Sentence—Previous convictions—Effect of.

Greater discretion should be exercised by the mofussil courts in making the penalty fit the crime and the practice of committing petty offenders to the Sessions Court after three or four convictions should cease. Even if such persons are committed there is no necessity for the sessions judge to inflict a vindictive sentence. A sentence of five years rigorous imprisonment for stealing purse containing Rs. 1-2-0 is highly excessive. (*Macleod, C. J. and Shah, J.*) EMPEROR v. GALA MANA. 26 Bom. L. R. 434 : 1924 Bom. 453.

———Sentence—Suspension of—Grant of bail.

When an appellate court or a court hearing a revision admits the appellant or the applicant to bail or orders that a fine should not be paid up till the disposal of the case, he thereby orders the suspension of the sentence. (*Mukerjee, J.*) BHAGWAN DAS v. EMPEROR. 22 A. L. J. 1103.

———Separate conviction—Offences under Railways Act and Penal Code—Propriety of.

Where a number of accused are charged of rioting and also forcibly molesting railway passengers, separate convictions under S. 127, Railways Act and S. 147, Penal Code, are justified. (*Moti Sagar, J.*) ALLAH DITTA v. EMPEROR. 25 Cr. L. J. 435 : 77 I. C. 723 : 1924 Lah. 585.

———Sessions case—Shorthand notes of proceedings. 25 Cr. L. J. 817 : 81 I. C. 353 : 1924 Cal. 257.

CRIMINAL TRIAL.

—Spy—Evidence of—Corroboration.

The evidence given by a spy requires the same amount of corroboration as that of an accomplice (*Wazir Hasan, J. C. and Pullan, A. J. C.*)
SURAT BAHADUR v. EMPEROR.

11 O. L. J. 640 : 1 O. W. N. 362 :
25 Cr. L. J. 1162 : 81 I. C. 986 :
1925 Oudh 158.

—Statement before Police—Retractions—Value of.

A statement made by a witness to the Police but subsequently retracted is not safe to rely on in a criminal trial. (*Kinkhede, A. J. C.*) GANPAT v. EMPEROR.

25 Cr. L. J. 356 : 77 I. C. 292 :
1924 Nag. 281

—Statement by accused—Probation value.

A person accused of a crime is not bound to speak the truth and cannot be pinned to any particular statement he may have made. (*Broadway and Campbell, J. J.*) KAKAR SINGH v. EMPEROR.

25 Cr. L. J. 733 : 81 I. C. 717 (2) :
1924 Lah. 733.

—Stay of—Pending civil suit—Suit for recovery of money—Cheating.

On an application for stay of a criminal case instituted against the petitioner under S. 420, I. P. C. it appeared that the complainant borrowed Rs. 200 from the petitioner on 31-5-1921. The complainant failed to repay this sum, according to the petitioner, and therefore he instituted a suit for the money lent which was due on a hand note. After the institution of this suit, the opposite party, complainant made a complaint to the effect that he had gone to the petitioner and repaid his debt but the petitioner had failed to return to him the pronote and therefore he had been cheated. Held, that the question in the civil suit was the same as had to be decided in the criminal case, viz., whether in fact the opposite party paid the petitioner and if so whether the hand note had been returned or not. This was a case in which the criminal proceedings should be stayed and it should be left for the civil court first to decide whether the complainant's plea of payment and refusal of the hand note is a genuine plea or not. (*Adami, J.*) BANAMBAR CHHOTORA v. NATHA BEHERA.

2 Pat. L. R. 201 (Cr.) : 1925 Pat. 193 (1).

—Summons case tried as warrant case—Cross-examination of prosecution witness on recall not allowed—Prejudice.

A summons case was erroneously begun to be tried as a warrant case and charge framed. The prosecution were recalled for cross examination when the mistake was discovered, whereupon the court cancelled the charge and refused cross examination. Held, the procedure was wrong and had prejudiced the accused. (*Pullan, A. J. C.*) RAM RATAN v. RAM SAGAR.

82 I. C. 279 (2).

—Test identification note—Admissibility.

A test identification note made by a Magistrate is not admissible in evidence as evidence of identification without examining the Magistrate as a witness. (*Kulwant Sahay, J.*) BHAGAWAT JHA v. EMPEROR.

81 I. C. 45 :
25 Cr. L. J. 557.

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—Identification of accused—Necessity for—First information—Police-officer refreshing memory.

The charge against the petitioners was that they formed an unlawful assembly and had entered the field of occurrence where the complainant's part, we e getting their paddy seedlings uprooted. There was no allegation of any assault at all against the petitioners. The story was that the defence party had assembled some Pathans from Kothli to help them in their attempt to take possession of the land and two of the petitioners were alleged to have been two of these Pathans. As a matter of fact one of them was not a Pathan. In the first information given in the case the names of the two petitioners were not mentioned. The witnesses examined gave ambiguous or evasive answers when questioned whether they had named these two petitioners to the police as having been present. The police sub-inspector was asked whether the witnesses had named the two petitioners to him and said that he could not remember. When asked to refresh his memory from the diaries he refused to do so and the Magistrate did not compel him to look into those diaries for the purpose of answering the question as he ought to have done. Held, that the evidence of identification of the two petitioners was absolutely unsatisfactory and the case should be sent back for rehearing. (*Adami, J.*) SYED SULTAN HUSAIN v. EMPEROR.

2 Pat. L. R. 202.
—Unsoundness of mind of—Plea—Inquiry into the fact of unsoundness—Burden of proof. See CR. P. CODE, S. 465. 51 C. 827.

—Witness—Costs of summoning—Party if can be ordered to pay.

All criminal proceedings being at the instance of the crown, expenses of summoning witnesses must be borne by the crown. It is open to a Court to refuse to summon a witness on the ground the application to summon him was frivolous or vexatious, but having once decided to summon him the court has no power to direct the applicant to deposit into court the expenses. (*Kulwant Sahay, J.*) NAND KISHORE MISRA v. KALKA MISRA.

1924 P. B. C. C. 196 : 77 I. C. 810 :
5 Pat. L. J. 487 : 5 Cr. L. J. 458 : 1924 P. 695.

CRIMINAL TRIBES ACT, S. 22—Conviction under Solitary confinement if can be ordered

46 A. 114 : 1924 A. 319.

CUSTOM—Abadi—Right of tenant to transfer house site—Custom—Right of landlord to enter.

According to the general custom prevalent in the North Western Provinces, a person agriculturist or agricultural 'tenant' who is allowed by a Zamindar to build a house for his occupation in the abadi, obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, that is, prevents it from falling down and so long as he does not abandon the house by leaving the village. As such occupier of a house in the abadi occupying under the Zamindar, he has, unless he has obtained by special grant from the Zamindar an interest which he can sell, no interest which he can sell by private sale or which can be sold in execution of a decree against him.

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except in the materials of the bulding. (*Wazir Hasan, A. J. C.*) MT AZMAT UN NISSA v. GANESH PRASAD. 10 O. & A. L. R. 1303 : 11 O. L. J. 515 : 1 O. L. J. 750.

— — — Adoption—Daughter's son — Eligibility for.

An adoption of the daughter's son is valid although the theory no doubt exists that to qualify for adoption a man must be the son of a woman, whom the adoptive father could have married. In this part of the Punjab, which adjoins the United Provinces the nomination of an heir on lines resembling the Kritrima Hindu adoption is unknown, that is to say even amongst people governed by agricultural custom the adoption that takes place is the full Hindu adoption by which a man is transplanted from his natural family to his new family and is entirely cut off from his past. (*Harrison, and Zafar Ali JJ.*) KIRPA v. RABI DATT. 5 Lah. 134 : 78 I. C. 74 : 6 Lah. L. J. 35 : 1924 Lah. 457.

— — — Adoption—Collateral—Succession—Onus—Ross of Sultana in Panipat Tansil of Karnal District. 76 I. C. 754 (2).

— — — Adoption — Effect of— Female heirs— Position of.

Under the customary law of the Punjab, adoption or appointment of heir is intended to make provision for succession. It is not necessarily equivalent to a gift of all the property to such person. The female heirs of such an appointed heir will be in no better position than the female heirs of a natural son. (*Scott-Smith and Fforde, JJ.*) NATHAL v. MT. DHAN KUAR. 79 I. C. 115.

— — — Adoption—Eligibility for— Hindu Rajputs—Adoption of agnate—Onus of proof.

As the adoption of an agnate is allowed by the Hindu law as well as by the custom prevailing generally among Hindus in the Province of Punjab, the initial onus is on the plaintiff prove that the custom did not exist in his tribe of Hindu Rajputs of the Salonar got of Mauzah saloh in Una Tahsil of the Hoshiarpur District. A statement made in the Riwayatnam of 1913 in answer to a question that no custom of adoption existed at all among Rajputs in Una Tahsil being (1) unsupported by instances (2) opposed to the general custom, (3) at variance with the Statement made in the Riwayatnam of 1869 and (4) contradicted by the answer given to question No. 69, was of no value and cannot have the effect of throwing the onus on to the defendant. 84 P. R. 1917 : 4 Lah. 99 : 2 Lah. 366 Re. (*Martineau and Moti Sagar, JJ.*) POHLO v. NANWARDHAN. 1925 Lah. 206 : 5 Lah. 409.

— — — Adoption—Jats—Sister's son—If could be taken in adoption.

Under the Punjab customary law among the Jats of the village of Lakraya in the Jhajjar Tahsil the adoption of a sister's son is valid. (*Harrison and Campbell, JJ.*) HIRA v. SHIBBU. 6 Lah. L. J. 442.

— — — Adoption—Kashmiri Brahmins—Upanayanam performed—Validity.

Kashmiri Brahmins in Amritsar are governed in matters of adoption by custom and not by Hindu Law. The adoption of a boy of 15 or 16

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whose upanayanam had been performed is valid.

Evidence to show that the community had recognized the validity of the adoption for 15 years and that the boy had performed the funeral of his adoptive parents is admissible to prove its validity. (*Sir John Edge.*) DURGA DEVI v. SHAMBHU NATH. 22 A. L. J. 394 :

26 Bom. L. R. 557 : 5 Lah. 200 .
34 M. L. T. 93 (P. C.) : 1924 P. C. 113 :
80 I. C. 965 : 29 C. W. N. 106.

— — — Adoption—Proof. MEHAN SINGH v. KEHAR SINGH. 75 I. C. 317 : Lah. L. J. 39.

— — — Adoption—Proof—Grand-daughter's son.

The burden of proving the validity of an adoption of a non-agnate like a son's daughter's son when near agnates are existing, is on the person setting up the adoption. There is no custom validating such an adoption among the Jats of Lehi Kburd, in the Hoshiarpur District, (*Shadi Lal, C. J. and Lumsden, J.*) BURSINGH v. DALIP SINGH, 1924 Lah. 532.

— — — Adoption—Rights of adopted son in natural family. NUR DIN v. ROSHAN DIN. 1924 Lah. 300.

— — — Adoption—Rai Brahmins of Mohra Bhattan—Adoption of uncle's daughter's son.

In the Punjab, the Hindu Law of adoption is in many respects modified by custom. Among the Rai Brahmins of Mohra Bhattan Tahsil, the adoption of uncle's daughter's son is recognized as valid. (*Martineau and Moti Sagar, JJ.*) BASHU RAM v. PIARA CHAND. 75 I. C. 938.

— — — Adoption—Sister's son — Hindu Jats—Hoshiarpur District. NAMAN v. BATAN SINGH. 1924 Lah. 37.

— — — Agricultural tenant allowed to build a house on a site in the village—His power to use and transfer the house—Onus.

Where an agricultural tenant is allowed to build a house on a site belonging to a Zamindari situate in an Abadi which, though included in a Municipal area, still retains the characteristics of a village, he has, in the absence of proof of some contract or custom to the contrary, only the right to use the house so long as he maintains it, without any right to transfer it.

Held also, that it is really on the agricultural tenant to show the existence of a custom under which he could transfer his house, and not for the zamindar to prove a custom of forfeiture or escheat if the house were transferred. 20 All. 248 ; 2 O. L. J. 305 followed. (*Kennaall, A. J. C.*) BHIKHAIT LAL v. HADI ALI 10 O. & A. L. R. 1159 : 82 I. C. 810 : 11 O. L. J. 738 : 1 O. W. N. 520.

— — — Ala malik and adna malik—Position of—Death of adna malik—No heirs—If land reverts to ala malik.

In some parts of the Punjab ala maliks are the real proprietors, the adna maliks having only rights of occupancy. In other parts, the latter are the real proprietors the former having a claim to a percentage of the revenue. The ala maliks cannot succeed to the adna maliks if he

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dies without heirs, unless there is a custom to that effect. (*Martineau and Moti Sagar, JJ.*) KHURSHID ALAM v. CHAUDHRI PHANGO.

5 Lah. 382 : 79 I. C. 91 : 1925 Lah. 34.

— *Alienation—Ancestral land—Burden of proof on those seeking to set aside alienation.*

The plaintiff respondents sued for a declaration that a gift of certain land, dated 22nd July 1918, by Mussammat Sobhi, widow of Kaula, to her daughter Mussammat Bishni, should not affect the reversionary rights of the plaintiff.

In the *kaiffiyat deh* of 1888 the proprietors of Patti Sudh Singh where the land in suit is situated, stated that Kuman, Sukhia and Dhuman were their ancestors, and that Dhuman's branch held one plough and Kuman and Sukhia half a plough each. Kaula was the descendant of Sukhia and the plaintiffs were the descendants of Kuman and Dhuman.

The *kaiffiyat deh* showed that Phanu was another proprietor in this Patti and that his share in the land was proportionate to two and a half ploughs. Held, that it was not legitimate from these facts to draw the inference that the father of Kuman Sukhia and Dhuman must have held the land. (*Scott-Smith and Forde, JJ.*) MT BASANTI v. KABUL SINGH.

6 L. L. J. 127 : 80 I. C. 329 : 1924 Lah. 465.

— *Alienation—Ancestral land—Rajputs of Ganachur—Onus.*

The powers of alienating ancestral land possessed by the Rajputs of Ganachur are restricted and in the presence of near collaterals they cannot alienate in favour of more distant ones. In all such cases of alienation, the onus is on the alienee to prove the validity of the alienation. (*Martineau and Moti Sagar, JJ.*) KYAS MUHAMMAD v. BANNA

78 I. C. 183 : 1925 Lah. 110

— *Alienation—Ancestral property—Tiruvanas of Shahapur District*

Under the customary law of the Punjab, Tiruvanas of Shahapur have absolute powers of alienation over ancestral property. (*Abdul Rasool and Moti Sagar, JJ.*) SHEER MUHAMMAD KHAN v. DOST MUHAMMAD KHAN.

78 I. C. 451.

— *Alienation—Ancestral land—Son's right.*

76 I. C. 592 : 5 Lah. 212.

— *Alienation—Awans of Talgang Tahsil—Power of disposal over ancestral property by gift or will.*

Ancestral property can be gifted without any restriction by sonless Awans of the Talgang Tahsil; consequently it can also be willed away. Such a presumption was, however, rebutted by an entry in the *riwaj-i-an* of 1901. (*Shadi Lal, C. J. and Le Rossignol, J.*) MT RAGHI v. BAZA.

5 Lah. 34 : 1924 Lah. 452.

— *Alienation—Brahmins—Borrowing money for trade.*

In the case of the Punjab Brahmins who have taken to agriculture only recently and not a sole source of living, there is no rule which prohibits an alienation of ancestral land for raising funds to carry on a trade. The case of Jats is different. (*Martineau, J.*) RAM KISHEN v. KHALI.

1924 Lah. 685.

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— *Alienation—Consent of reversioners—Effect.*

Where a widow alienates ancestral property with the consent of a near reversioner, it does not preclude a more remote reversioner from challenging the alienation, as he does not derive his right from the nearer reversioner. (*Le Rossignol and Harrison, JJ.*) SINGH RAM v. BHAGWANA.

1924 Lah. 656.

— *Alienation—Consent of reversioners—Sons of reversioners when bound*

1924 Lah. 213 (2).

— *Alienation—Exchange—Suits to set aside—Barden of proof.* MAGINA SINGH v. MOTA SINGH.

1924 Lah. 335 (2).

— *Alienation—Gift to daughter by a Sonless proprietor of a portion of his ancestral holding Gujar, Hoshiarpur Tahsil.*

A sonless Gujar of the village of Basi Kikran in the Tahsil of Hoshiarpur made a gift of 15 Kanals and odd of land out of his ancestral holding to his daughter in 1911. In the *Riwaj-i-an* of the Hoshiarpur Tahsil of 1914 there was an entry forbidding any Gift among gujars of property moveable or immoveable to a daughter but it was not supported by instances and was admittedly wrong, so far as the restraint on alienation of moveable property was concerned. Held that the burden of proving that the gift in question in the case was valid was a light one and the onus had been discharged. (*Shadi Lal, C. J. and Malin, J.*) UMRA v. MT RAH.

5 Lah. 473.

— *Alienation—Gift—Sister and Collaterals—Jats of Issan Mahar.*

1924 Lah. 195.

— *Alienation—Lohars of Jagadhari—Powers of male proprietors.*

The male proprietors among the Lohars of Jagadhari are not governed by agricultural custom and in the absence of proof to the contrary, have unlimited powers of alienation. (*Martineau, J.*) GHULAM SABIR v. TABA HUSSAIN.

1924 Lah. 552.

— *Alienation—Limited owner—Reversioner.* NAWAZ KHAN v. MT. LORA JAN.

1924 Lah. 187.

— *Alienation—Necessity—Marriage of daughter—Reasonable expenditure—Scale of.*

It is a well-recognized custom that a daughter should be given some jewellery on the occasion of her marriage, and it is also necessary that the guests who come to the bride's house on that occasion should be properly treated and entertained. As to what would be a reasonable expenditure by a widow, one test is to consider what would be reasonable for a marriage if the husband were living. The same amount would be reasonable on the part of the widow after death if the circumstances of the estate remained the same. (*Moti Sagar, J.*) MUNSHI v. GHANAYA.

6 L. L. J. 133 :

80 I. C. 332 : 1924 Lah. 500.

— *Alienation—Necessity—Money borrowed for the purposes of subsistence.*

1924 Lah. 41.

— *Alienation—Necessity—Proof of—Vendor a spendthrift.*

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In the case of alienation of ancestral property by a person of bad character who is a spendthrift, the onus is heavily on the alienee to prove necessity not only with regard to the debts due to him but those due to other persons also. (*Abdul Raoof, J.*) *NATHU RAM v. KARTA RAM*.

1925 Lah. 132 (1) : 6 Lah. L. J. 462.

— Alienation — Proprietors — Consent of — Necessity for. 1924 Lah. 246.

— Alienation — Occupancy rights — Suit to challenge — When maintainable

A collateral of an occupancy tenant impeaching an alienation by the latter of his occupancy rights must prove that he is entitled to succeed on the death of the occupancy tenant and that had the subject-matter been proprietary rights he could have maintained the suit. (*Shadi Lal, C. J. and Lumsden, J.*) *MT. SARDHI v. RALLA*.

1925 Lah. 157 (1)

— Alienation — Setting aside — Suit by remote reversioner.

The rule that where a nearer reversioner is precluded from suing or colludes with the alienor a more remote reversioner is entitled to maintain an action to set aside an alienation of ancestral property has no application to a case where the alienor has 3 sons who are minors and who are nearer in order of succession to the plaintiffs. (*Abdul Raoof and Moti Sagar, JJ.*) *GIRDHARI v. MAM CHAND*.

6 Lah. L. J. 224:

79 I. C. 442 : 1924 Lah. 646.

— Alienation — Setting aside — Minor reversioner — Suit on behalf of, for declaration — Limitation — *Punj. Lim. (Custom) — Act I of 1920*.

Though it is open to the court to grant a declaratory decree in a suit to contest an unnecessary alienation if the suit is brought honestly on behalf of a minor reversioner to protect his interest, it would not be proper to pass such a decree in a case where the minor is merely a figure-head and the real plaintiff is the alienor himself, who has caused the suit to be instituted for the purpose of undoing his own acts. Where a minor reversioner brings a suit to contest the sale of ancestral properties by a sonless proprietor a decree cannot be passed in favour of the plaintiff if the suit brought by the next major reversioner in his own name would have been barred by limitation. (*Martineau and Moti Sagar, JJ.*) *DAD v. LAL*.

6 Lah. L. J. 334 : 5 Lah. 389 : 82 I. C. 626 : 1925 Lah. 24.

— Alienation — Rights of grazing.

According to the *Wajibularz* the area in question was specially set apart for the sole use of the Labanas, it being clearly laid down that they and they alone could exercise these rights. The proprietors even appear to have been excluded from using this land for grazing purposes. *Held*, this amounted to an easement and speaking broadly, easements are generally inalienable apart from the property to which they are appurtenant. As the right to graze, etc., in these lands was specifically given to a definite set of persons every member of that set has a right to defend his rights against any infringements of them. The plaintiffs, are vitally interested in

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maintaining the exclusive right of Labanas to exercise these rights and have therefore a *locus standi* to sue in respect of such infringement. The right to use the land for grazing purposes cannot be alienated by one of the owners of the right, for by doing so he introduces (as in the present case) a foreign element in the class of persons to whom the right was specifically restricted. (*Broadway, J.*) *KIRPA v. GULABA*.

5 Lah. L. J. 546 : 80 I. C. 503 : 1924 Lah. 223 (2).

— Alienation — Sonless proprietor — Ancestral land, 1924 Lah. 102.

— Alienation — Will by sonless proprietor — Khot Sarang of Talagang Tahsil, Attock District, *MT. RAKHI v. BAZA*. 75 I. C. 659.

— Ancestral land — Burden of proof — Deserted site — Nature of rights.

Where the inhabitants of a village left the village and went away elsewhere, deserting the village-site and the lands and after 25 years some of their descendants came and occupied the same it must be held to be their self-acquisition and not ancestral land. This rule applies even if the descendants came and occupied what their ancestors owned. The onus of proving land to be ancestral is on the person who sets it up. (*Lumsden, J.*) *RAM SARAN DAS v. HARPHUL*.

1924 Lah. 677.

— Ancestral land — Houses — Appanages.

Where a person owns ancestral lands and a house in the Punjab, the house is to be considered an appanage to the lands. (*Martineau and Moti Sagar, JJ.*) *KYAS MAHAMMAD v. BANNA*.

1925 Lah. 110.

— Ancestral property — Attachment — If reversioner can sue for declaration of invalidity.

The attachment of ancestral property does not affect injuriously the rights of a reversioner who has only a contingent interest and hence he cannot sue for a declaration that the property was not liable to attachment. (*Broadway and Zafar Ali, JJ.*) *SHIB DEO SINGH v. UTTAM SINGH*.

1925 Lah. 84.

— Ancestral property — Descent through females — If alters nature of.

The fact that ancestral property descends through a female such as a daughter does not alter the nature of the property. It remains still ancestral in the hands of her descendants. (*Shadi Lal, C. J. and Lumsden, J.*) *MT. HUSAIN BIBI v. HAYAT*.

1924 Lah. 565.

— Ancestral property — Joshi Brahmins of Mallor Salauran — Ghar Shanhar thasil Hoshiarpur — Whether succession governed by custom or Hindu Law.

The plaintiffs appellants claimed their right to succeed J on his death, on the strength of custom and r which they as collaterals excluded J's daughters.

Held, that the onus of proving the existence of such a custom lay on the appellants and that the evidence in the record did not give a single instance of a daughter having been excluded.

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by collaterals so far Mauza Salla kalan was concerned. (*Broadway and Moti Sagar, JJ.*) ANANT RAM v. RAM RATTAN. 5 Lah. 547.

— — — — — *Ancestral property—Land purchased from collateral.*

Land ceases to be ancestral if it comes to a person otherwise than by descent or by reason merely of connection with the common ancestor. Hence land purchased from a collateral is not ancestral in the hands of the vendee. (*Broadway, J.*) GHANIA v. PHUMAN SINGH. 79 I. C. 170.

— — — — — *Ancestral property—What is.*

Land ceases to be ancestral if it comes into the hands of an owner otherwise than by descent or by reason merely of his connection with the common ancestor. (*Moti Sagar, J.*) NAGINA SINGH v. JIWAN SINGH. 79 I. C. 107 : 1925 Lah. 87.

— — — — — *Ancestral property—Property inherited from maternal grandfather.*

Land inherited through a daughter is regarded by custom as, ancestral property in the hands of the daughter's son so that his sons may control his disposition of that property. 32 P. R. 1895 foll.

Rossignol, J.—The principle underlying the Punjab custom of agnatic succession is the retention of the land first in the family and then in the tribe. In the case of endogamous tribes, the postulates are satisfied whether the succession is through a male or female for in either case the land remains if not in the family at any rate, within the tribe, and it is especially among such tribes that a daughter is allowed to succeed as an heir even in the presence of agnates. In such cases a daughter and her heirs cannot be conceded wider powers of disposal than lineal heirs in the male line. (*Shadi Lal, C. J. Scott-Smith, Le Rossignol, Broadway and Abdul Raoof, JJ.*) MT. ATTAR KUAR v. NIKKOO. 6 Lah. L. J. 216 : 5 Lah. 356 : 80 I. C. 534 : 1924 Lah. 538.

— — — — — *Ancestral property—Gift to daughter—Reverter—Onus of proof.*

Landed property gifted to a woman by her father reverts to the line of the father when she dies without male issue, as its character of ancestral property is retained throughout. The onus of proving that there is no reverter lies on the person who sets it up. (*Piton, J. C.*) GHULAM KHAN v. GHULAM HAIDER KHAN. 75 I. C. 214.

— — — — — *Ancestral property—Presumption—Self-acquisition to be proved.*

The evidence in a case showed that the village was originally founded by the common ancestor of the parties. Held, unless it could be shown the lands went out of the hands of the family and again later acquired by one of the claimants or his predecessor-in-title, it must be presumed to be ancestral land. (*Abdul Raoof, J.*) MAULA DAD v. ALI. 5 Lah. L. J. 449 : 76 I. C. 147 : 1924 Lah. 263 (1).

— — — — — *Applicability of—Inheritance—Pathans of village Kutal, Karnal district—Value of government notification including a tribe as agricultural.*

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In matters of inheritance, Pathans of the village of Kutal in the Tashil and district of Karnal are governed by Mahomadan law and not by custom. A notification by Government that a particular tribe is an agricultural tribe does not raise any presumption that it is governed by custom and not by personal law. 16 P. R. 1900 followed. (*Zafa Ali, J.*) KHAN MOHAMAD KHAN v. MT. NURJAHAN BEGAM. 6 Lah. L. J. 340 : 82 I. C. 609 : 1924 Lah. 731.

— — — — — *Essentials of—Rights of passage by boat—Legality of custom.*

The essential characteristics of custom are that it must be of immemorial existence, it must be reasonable, it must be certain and it must be continuous. Every custom must have been in existence preceding the memory of man and if the proof was carried back as far as living memory would go it should be presumed that the right claimed had existed from time of legal memory. Want of continuity or interruption or disturbance raises a strong presumption as to its non-existence. The reasonableness of custom is so very necessary that if it be against reason, it has no force in law. The commencement must be based on a reasonable cause for if an alleged custom is unreasonable in its origin, no usage or continuance can make it good; but by this, all that is meant is that it is sufficient if no good legal reason can be assigned against it. As to the element of certainty not only should its nature be certain, but there should be certainty in respect of the locality where it exists and also in respect of the persons affected by it.

A Customary right of boat passage may exist over the water of another by virtue of a custom, such rights existing by custom are to be distinguished from public rights of boat passage which arise from dedication or grant and from private rights of boat passage which are easements properly so called. A customary right of boat passage is one which may be enjoyed by any member of a body or class of persons, or may exist only for the benefit of a limited section of the public and it cannot be used under a claim of right by any person who is not a member of that body or class in whose favour it exists. Such customary rights may exist in favour of the inhabitants of one particular village or more villages than one sufficiently well defined. (*Mukerji, J.*) KRISHNA KUMAR DEB v. ATUL CHANDRA GROSE. 39 C. L. J. 61 : 1924 Cal. 998.

— — — — — *Evidence of—immemorial user—Proof of*

The length of time during which user or enjoyment of rights alleged to exist by custom, that is to say, the existence of a custom must be shown depends upon the circumstances of each case. General proof of the existence of a custom, as far back as living witnesses can remember, is treated in the absence of any sufficient rebutting evidence as proving the existence of the custom from time immemorial. Evidence of the existence of an alleged custom for a period of 20 years may be sufficient to warrant a Court in finding as to the existence of the custom from time immemorial. (*Dalal, J. C.*) MANNA LAL v. THAKUR JAI INDAR BAHADUR SINGH. 26 O. C. 386 : 76 I. C. 774 : 1924 Oudh 157.

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—Evidence of—Custom set up to be precisely proved—Proof of different Custom. *NATHUNNI RAI v. SIR RAMESHWAR SINGH BAHADUR.* 1924 Pat. 147.

—Gift—Gift to two donees without defining shares—Tenants-in-common. *MUSA v. GUL MAHOMED.* 1924 Lah. 289.

—Gift—Collaterals—Jats of Hoshiarpur.

The powers of alienation possessed by the Jats of Hoshiarpur district are extensive and a gift of land in favour of a near agnate for services rendered is valid by custom. (*Martineau, J.*) *POHLO v. DALIP SINGH.* 78 I. C. 995.

—Hindu Jats of chunni Kurd, Kharar Tasil—Adoption of a daughter's son in the presence of Collaterals—Validity—Onus.

The adoption of a daughter's son by a sonless Hindu Jat proprietor of chunni Kurd must have the sanction of custom and the onus of establishing that custom is upon the person who asserts that he is competent to adopt a daughter's son in presence of near agnates irrespective of their assent, the presumption at the outset being against that power. *N Ralla v. Budda* (Full Bench) 50 P. R. 1893 followed. 50 P. R. (1871) *Hari Singh v. Gulaba* (129 P. R. 1882 *Bhup Singh v. Nehal Singh* dissented from. (*Campbell and Zafar Ali, JJ.*) *HARI SINGH v. RATTAN SINGH.* 5 Lah. 519.

—Heirship—Persons of the same caste and Got—Inference. 1924 A. I. 225 (1).

—Istribant—What is.

According to the custom of *istribant* in certain families in Upper India, if a deceased Hindu has children by a number of wives, his property is divided according to the number of wives irrespective of the number of children and in such cases a uterine relation how low soever excludes a mere consanguine relation how high soever. But this does not apply as between persons of different degrees. (*Wazir Hasan, J.C. and Neave, A. J. C.*) *BRURAJ BUX SINGH v. BHAWANI BUX SINGH.* 1 O. W. N. 231; 11 O. L. J. 586; 1925 Oudh 173.

—Landlord and tenant—Custom entitling tenant to sell materials as well as sites of houses belonging to zemindar.

Though it is not impossible for a custom to exist in an agricultural village under which the ryots may be entitled to sell not only the materials of their houses but also the site thereof which belongs to the Zemindar, such a custom can, however be recognised only when there is absolutely clear evidence to that effect. (*Mukerji, J.*) *ALI HUSAIN v. SYED MAZAHIR HUSAIN.* L. R. 5 A. 115 (Rev.); 79 I. C. 134; 1924 All. 477.

—Local and family custom—Difference—Former must be pleaded with particulars as to area. Custom not to be extended by analogy.

A local custom is one binding on all persons in the local area within which it prevails, and differs entirely from a family custom, binding only on members of the family as to rules of descent and so forth. It is one which must be

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pleaded with particularity as to the local limits of the area of which it is alleged to be the custom, and the evidence must be evidence as to the prevalence of the custom in that area. Except so far as analogy may serve to explain anything that is in itself obscure, the custom of other localities are not relevant. 1 Cal. 186; 9 B. L. R. 274 and *Marquis of Anglesey v. Lord Hatherton*, 10 M. and W. 218, Ref. (*Lord Sumner*) *KUMAR SATYA NARAIN SINGH v. RAJA SATYA NIRANJAN CHAKRAVARTHI.* 3 Pat. 183; 28 C. W. N. 351; 34 M. L. T. (P.C.) 27; 5 Pat. L. T. 171; 79 I. C. 825; 51 I. A. 37; 1924 P. C. 5.

—Marwari Silawates—Females if excluded from inheritance.

Among Marwari Silawates there is custom in derogation of the Mahomedan Law by which they are governed excluding females from inheritance. (*Kennedy, J.C. and Raymand, A.J.C.*) *USMAN v. ASAT.* 78 I. C. 23.

—Mercantile usage—Proof of.

To prove a mercantile usage, the proof needs not either the antiquity, the uniformity or the notoriety of the custom which becomes a local law. The usage may still be in course of growth; it may require evidence for its support in each case but in the result it is sufficient if it appears to be so well known and acquiesced in that it may reasonably be presumed to have been an ingredient tacitly imported by the parties into their contract. The custom in order to be legal must be certain, immemorial, reasonable, and such as to render it fair to presume that, both the parties had knowledge of it and acquiesced in it. (*Madgovcar, A. J. C.*) *GOVERDHANDAS v. ROWJI HIRJI & CO.* 76 I. C. 62.

—Numerous instances before courts—Further Proof—Judicial decisions.

Where a custom or usage is repeatedly brought to the notice of the courts of a country, the latter may hold that it has been introduced into the law without the necessity of proof in each individual case.

Judicial decisions recognising the existence of a disputed custom in a particular community of one place are relevant as evidence of its existence among the same community at another place. (*Baker, O. J. C.*) *MT. SANO v. PURAN SINGH.* 78 I. C. 461; 1925 Nag. 174.

—Personal law—When to apply.

Among parties generally following customary law, if no definite rule of custom can be discovered on a given point, the gap can be filled up as a last resort by falling back on the personal law. (*Abdul Raof and Campbell, JJ.*) *MT. TABI v. SAUDAGAR SINGH.* 1924 Lah. 698.

—Pre-emption—Entry in wajib-ul-arz—Rebuttal of—No such custom in neighbouring mahal—Effect of.

An entry in the *wajib ul-arz* of the existence of a customary right to pre-empt with regard to a village is not rebutted by another entry in the *wajib-ul-arz* with regard to another neighbouring mahal carved out of the same original village

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recognising full rights of transfer. The latter entry may only be the result of the original custom having been abrogated in that *mahal*. (*Sulaiman and Kanhaiya Lal, JJ.*) *IMDAD HUSAIN v. HAIDER BEG.* 82 I. C. 196.

—Pre-emption—Mohala in a town—District, Karnai—Sub divisions of a town.

1924 Lah. 161.

—Pre-emption—Multan City.

The custom of a pre-emption does obtain in the sub-division Husain Agabi of the City of Multan. 24 & 57 P. R. 1906 Ref. (*Harrison and Jafar Ali, JJ.*) *AHMAD SHAH v. THE CHURCH MISSIONARY TRUST ASSOCIATION, LONDON.* 1924 Lah. 700.

—Pre-emption—Town of Chhapal.

There is no custom of pre-emption in the town of Chhapal, Amritsar District. (*Le Rossignol, J.*) *GHASITA SINGH v. BELI RAM.*

81 I. C. 740 (1) : 1925 Lah. 88.

—Proof of—Disqualification from inheritance—Opinion evidence—Value of.

In order to prove a custom excluding females from inheritance instances must be cited in which females set up rights which were denied. The mere fact that they did not claim rights is not enough. Where under the personal law of the parties *i.e.*, Mahomedan Law, females have rights of inheritance, custom in derogation of it must be proved by clear and unambiguous evidence. The opinion of members of a community cannot by itself amount to a proof of the custom. (*Kennedy, J. C. and Raymond, A. J. C.*) *USMAN v. ASAT.*

78 I. C. 23.

—Proof of—Family custom—English and Indian Law.

In proving family customs in India, the rules of English Law as to particular customs are inapplicable, 12 M. I. A. 91 ; 45 I. A. 14 referred to. (*Sir John Edge.*) *MT. DURGA DEVI v. SHAMBHU NATH.*

L. R. 5 P. C. 83 :

(1924) M. W. N. 434 : 20 L. W. 216 : 1 O. W. N. 569 : 46 M. L. J. 661 (P. C.).

—Proof—Oral evidence. *MT. CHANNI BIBI v. AHMAD KHAN.*

1924 Lah. 265.

—Punjab Will—Mahomedzais of Charsadda Tahsil—Disinheritance of sons—Effect.

Where a will among the Muhammadzais of Charsadda Tahsil, Peshawar District, completely disinherits the son, it is invalid under the customary law. (*Pipon, J. C.*) *MAZIYUDDIN v. HASSAN KHAN.*

75 I. C. 397.

—Right to bury dead in another's land—If can be acquired.

1 R. 702 : 76 I. C. 588 :

1924 Rang. 61.

—Shamilat—Nature of—Sale of proprietary land—Effect on Shamilat.

Rights of proprietors in the *Shamilat* of a village are not merely accessory to the land held by them and where the latter is sold the onus is on the purchaser to show *Shamilat* also was included. (*Scott Smith and Fforde, JJ.*) *GOBIND RAM v. ALI MUHAMMAD.*

79 I. C. 84 : 1925 Lah. 99.

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—Sikh Jats—Paternal uncle and grandmother.

Under the customary law, among the Sikh jats of Lahore District, a paternal uncle has priority over the grandmother for purposes of inheritance. (*Abdul Raof and Campbell, JJ.*) *MT. TABI v. SAUDAGAR SINGH.*

78 I. C. 932.

—Shamilat—Grazing rights—Cultivation—Permissibility of—Suit for declaration—Form of decree.

Where the plaintiffs, the inhabitants of a village enjoyed the right of grazing their cattle, took away fuel and cut grass in the *shamilat deb* till 1924 and the defendants who were proprietors of the land had the right of cultivation, the plaintiffs are entitled to have sufficient pasturage left for their cattle and an injunction restraining defendants from bringing the whole of the land under cultivation. The decree should state that the defendants' right of cultivation would extend only to so much of the land as will leave plaintiffs a sufficient amount of area for grazing purposes. (*Moti Sagar and Martineau, JJ.*) *KANSHI RAM v. MAHOMED ABDUL RAHMAN KHAN.*

6 Lah. L. J. 336.

—Succession—Ancestral property—Proof of.

Where it was clearly established by the production of the complete pedigree-table that the common ancestor of the parties, had founded the village, that the land in dispute was held at one time by the grandfather of the alienor. Held that unless it could be shown that the land had, at any time, gone out of the hands of the family and had been re-acquired by the alienor himself or some of his ancestors, the presumption is irresistible that the property must have come to them as descendants and therefore must be taken to be ancestral. (*Abdul Raof, J.*) *MAULA DAD v. ALI.*

5 Lah. L. J. 449 : 76 I. C. 147 : 1924 Lah. 263 (1).

—Succession—Ancestral—Presumption—Equal shares. *MT. MARYAN BIBI v. GHULAM MAHOMED.*

1924 Lah. 175 : 5 Lah. L. J. 446.

—Succession—Awans of Manza Nammal—Mianwali Dt.—Preference of whole blood to half blood—Murderer if entitled to succeed to property as heir.

In the case of collateral succession in a contest among the whole blood and the half blood, the court may presume until the contrary is proved, that when the property of the common ancestor was distributed *per capita* (*pagvand*) the whole blood and half blood succeed together, but where brothers of the whole blood subsequently form separate groups and so regulate succession among themselves as to alter the original rule of distribution, the presumption will cease to operate. Held that the presumption had not been rebutted among the Awans of Nammal, Mianwali Dt. It is contrary to public policy to allow a murderer to derive from his crime the benefit of succeeding to the property of his victim or to allow a murderer to oust a mere distant heir from possession of property to which his victim, if alive, would have

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succeeded. 74 P. R. 1900; 3 Lah. 103; 3 Lah. 242 Ref. (*Abdul Raof and Campbell, JJ.*) SHER KHAN v. MUHAMMAD KHAN. 5 Lah. 117 : 1924 Lah. 505.

———Succession—Cognates—Daughter's son—Rights of.

In the absence of all agnates of a childless proprietor any cognate is entitled to succeed in preference to the proprietary body of the village. A daughter's son is hence entitled to succeed in preference to a trespasser, (*Abdul Raof and Martineau, JJ.*) MT. CHAMBELI v. BISHNA. 78 I. C. 778.

———Succession—Collaterals—Sister—Competition—Preference—Khotis or pind dad khan—Jhelum District. 1924 Lah. 321.

———Succession—Co-widows—Survivorship on death of one widow—Unchastity—Effect of.

On the death of a childless male proprietor leaving behind him two or more widows, they succeed as joint tenants and on the death of one, the survivor takes by survivorship. Consequently the unchastity of the surviving widow does not affect her right. (*Le Rossignol and Harrison, JJ.*) MT. BHOTI v. RIHHEE. 5 Lah. 237 : 1925 Lah. 32.

———Succession—Kalasra Jat of Dogar Kalasra in the Surwam Tahsil, Mussafargarh District—Whether daughters lose the right of succession by marriage outside the family—Onus—Riwaj-i-am.

The question in dispute was whether a daughter of a sonless proprietor (Kalasra Jats) who had married a man in another family was entitled to her father's estate on her mother's death. The plaintiff—appellants who were the reversioners contended that she lost the right of succession by her marriage and relied upon certain entries in the Riwaj-i-am.

Held, in accordance with *Beg v. Allah Ditta*, (45 P. R. 1917 (P. C.)) there was a presumption in favour of the correctness of the entry in the Riwaj-i-am of 1880, and that the onus of proving the custom lay on the plaintiffs.

Held also, that the plaintiffs had discharged the onus by proving that by custom among Kalasra Jats of Dogar Kalasra, a daughter loses her right of succession by marrying outside the family in the presence of her father's agnate relation. (*Martineau and Moti Sagar, JJ.*) ALLAH WASAYA ZOHRAN. 5 Lah. 535.

———Succession—Jats—Sisters—Collaterals. 1924 Lah. 232.

———Succession—Joshi Brahmins of Hoshiarpur—Daughters. MT. BAL KAUR v. MT. DEOKI. 75 I. C. 109 : 6 Lah. L. J. 69.

———Succession—Kalwan Jats—Daughters if exclude collaterals.

According to the custom obtaining among Kalwan Jats of Mauza Wazirpur, Sialkot District, a collateral of the 6th degree does not exclude a daughter in her succession to her father's ancestral property. (*Moti Sagar, J.*) MT. JIWAN v. WADHAWA. 1924 Lah. 537.

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———Succession—Makwal Jats of Isan mahar Muzaffargarh District. 1924 Lah. 195.

———Succession—Stepmother—Rights of, as against sons Riwaj-i-am—Burden of—Proof.

On a question of custom as regards succession among Gujars of the Jeelam District the entry in the Riwaj-i-am was to the effect that a step-mother would succeed equally with a son. Held, that the burden lay upon the son to prove that this was not the custom and that he had not discharged the onus. It lies upon the plaintiff to dislodge the presumption arising in favour of such a custom by citing instances to the contrary. (*Abdul Raof and Moti Sagar, JJ.*) MAULA BUX v. MT. TILLO. 5 Lah. 274 : 1924 Lah. 556.

———(Punjab)—Succession—Kassabs of Dera Baba Nanak in Gurdaspur District—Adoption.

Kassabs of Dera Baba Nanak in Gurdaspur District follow Mahomedan Law and not custom in matters of succession, and no custom of adoption is recognised in the Kassab tribe. (*Martineau and Campbell, JJ.*) BARKAT ALI KHAN v. MUSSAMMAT KARAM BIBI. 1923 Lah. 228.

———(Punjab)—Succession—Pagwand and Chandwand—Partitioned estate follows its own system of law.

When a separate entity created by division or partition, comes into being, the full range of the succession to that entity is determined by whatever system is in fact proved to be in operation in that simple family. But where partition was a definite, an accomplished and a long recognised fact, it cannot be ignored. And accordingly the ambit of that system is confined to searching for the full-blood and half-blood within the divided and separated area. In that search it is not permissible to undo the distribution and search for the collaterals as if under the succession to the owner of the undivided property. That the portion allotted to a group should belong as an entirety to the members, who, for the time being, form or represent the group until the group is extinct, is no departure from the ordinary rule as to the devolution of shares. As to the re-distribution of the portion, and devolution of the shares into which the portion is re-distributed among the members of a group, that is a matter which concerns them alone, until the group is extinct, exactly as in the case of the share of an individual and his descendants *qua* other sharers and their descendants. On this view, there is not really, at any time, a competition between half-blood and whole-blood, for the sons have been separated once for all, at the original distribution, into several groups, such that all members of each are related *inter se* by the whole blood, and so far, each group resembles a single family. It is quite intelligible that when by reason of matters subsequent to a pagwand distribution the sons of several wives have arrived at a condition not distinguishable from the result of a chandawand distribution among groups of sons, the same customary rule should apply in cases of collateral succession, as applies when there has been a chundawand distribution. But the basis of the preference of the whole blood, when it exists in such a case, clearly is the association of the

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uterine brothers into distinct groups, the pagwand distribution notwithstanding. (*Lord Shaw*) *NABI BAKSH v. AHMAD KHAN*. 1924 M. W. N. 425 : 34 M. L. T. (P. C.) 106 : 5 Lah. 278 :

20 L. W. 599 : 80 I. C. 158 : 1924 P. C. 117.

— Succession—Rajputs of — Rohtak District—Self-acquisitions. 1924 Lah. 93.

— Succession—Sister—Khattars of Attock District. *MT. CHANNI BIBI v. AHMAD KHAN*. 1924 Lah. 265.

— Village sites—Development into town—Proprietorship.

Where a village has developed into a town, the ownership of sites is in the person who possesses the house on the site. In considering whether the village has become a town, the fact that it has been administratively included within the limits of a Municipality though not conclusive is strong evidence showing an alteration in its character. (*Pipon, J. C.*) *ALI KHAN v. MALIK MAIDAN*. 78 I. C. 552.

— *Wajib-ul-ars*—Entries in—Value of—Inheritance—Family custom—One single instance *contra*—Effect.

To prove a custom excluding daughters from inheritance, an entry in the *wajib-ul-ars*, entries in the *Khowat* going back to four generations and an unbroken series of instances in the family in question were proved, but there was one instance to the contrary. Held the custom had been proved. (*Pullan, A. J. C.*) *MAJID HUSAIN v. MT. SAFDARI BEGAM*. 81 I. C. 1033 : 1925 Oudh 55.

— Widow—Alienation—Suit to contest—Who can maintain.

Under the customary law a remote reversioner can sue challenging an alienation by a limited owner when the immediate reversioners are also holders of life estates. (*Le Rossignol, J.*) *JAWAHARA v. DATTA RAM*. 79 I. C. 497 : 1925 Lah. 156.

— Widow—Alienation—Consent of some reversioners—Effect.

Where some reversioners consent to an alienation by a widow, it does not bar the other reversioners from suing to set aside the same. Such consent does not in any way increase her ordinary powers of alienation. (*Pipon, J. C.*) *ZABTA KHAN v. SAID HABIB*. 75 I. C. 246.

— Widow by remarriage in the same family does not forfeit her rights in deceased husband's estate—Hindu Widows Remarriage Act applies to Sikh Jats in the Punjab.

Among the Sikh Jats in the Punjab a widow does not forfeit her life-estate in her deceased husband's property by reason of her remarriage in Rarewa form with her husband's brother whether he be the sole surviving brother or there are other brothers as well of the deceased. The custom would appear to be founded on the just and equitable notion that by the marriage with the deceased husband's brother a widow still continues to be a member of the same family. She is considered to have done the right and proper thing in a community where the notion of polyandry prevails and the widow is theoretically re-

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cognised not only as the wife of her deceased husband but as the wife of all his brothers (86 P. R. 1901, Ref.) Widow marriage was recognised by custom in the Jat community before Act XV of 1856 (Hindu Widows Remarriage Act) and the custom was also prevalent in this community before this Act that the widow by marrying the brother of her deceased husband did not forfeit her right to the estate she inherited from the latter and the provisions of Act XV of 1856 could not be taken to override this custom, by virtue of S. 7 of the Act IV of 1872 (Punjab Laws Act). (*Kennedy J. C. and Raymond, A. J. C.*) *SANT SINGH v. RARIBAI*. 1924 Sindh 17 :

— Will—Kahuts of Korchasham—Bequest to daughter.

Ancestral land cannot be bequeathed to a daughter while there are sons existing among the *Kahuts* of monya Korchasham in the Jhelum District. (*Martineau and Moti Sagor, JJ.*) *GHULAM HUSSAIN v. NUR*. 76 I. C. 123 : 1925 Lah. 71.

— Widow — Power of alienation. *MT. DURGO v. PREM SINGH*. 1924 Lah. 196 (2).

DAMAGES — Breach of contract—Illegality of contract—Damages and return of earnest money — Claiming the latter alone in appeal, when a fresh suit would be time barred.

In a suit for damages, for breach of contract, and return of earnest money the trial court dismissed the *plf.*'s claim on the ground of illegality, and the plaintiff, without amending the plaint for return of deposit money in the trial court, raised it for the first time in appeal, when a fresh suit for the same would have been time-barred. Held, relying on, *Janardhan K. Gore Lal v. Shib Pershad Ram* (43 Cal. 95) that a claim in appeal inconsistent with the relief asked for in the plaint, when a fresh suit for the new claim would be time barred on the day when it was made, should not be allowed to be amended, (2) where an executory contract is made for an illegal sale of goods, and if the contract remains unperformed, it is open to a party to repudiate the illegal contract and to recover any moneys deposited thereunder. *T. P. Petherperumal Chetty v. R. Muniandy Servai*, 4 L.B.R. 266; 35 Cal. 551, folld. (*Lentaigne and Carr, JJ.*) *HIRJEE DEVRAJ & Co. v. MAUNG NUYN SHEIN*.

2 Rang. 414 : 1925 Rang. 49.

— Contract, breach of.

Where vendor reasonably fixed the final date by which the vendee was required to complete the sale he can claim the market rate on that date and not on any later date. (*Fawcett, J.*) *SHAM-SUDDIN TAJBHAI v. DAYABHAI MAGANLAL*.

48 Bom. 368 : 26 Bom. L. B. 105 :

1924 Bom. 367

— Contract—Breach—Termination of contract.

A party to a contract cannot put an end to it simply by committing a breach of it. (*Lord Atkinson.*) *SRI RAJA VATSAVAYA VENKATA SUBHADRAYANMA v. SRI POOSAPATI VENKATAPATHI RAJU*. 20 L. W. 298 :

26 Bom. L.R. 786; 80 I. C. 807; (1924) M.W.N. 607;

36 M. L. T. 210 : L. B. 5 P. C. 147 :

26 G. W. N. 57 : 47 M. L. J. 93 (P. C.)

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———*Contract of marriage—Breach—Measure of damages—Costs.*

The defendant agreed to give his daughter, in marriage to the second plaintiff, the brother of the first plaintiff, but eventually got her married to a third person. In an action for damages for breach of promise of marriage, *held*, that the plaintiffs were entitled to recover money actually thrown away and also damages to credit and reputation by reason of the refusal.

7 H. C. R. 122, followed. 39 Bom. 682, 714 not followed.

Where the Court finds that the plaintiffs have grossly and intentionally exaggerated their claim for damages and decrees only a small portion of the claim, the defendants are liable to pay only a proportionate share of the Court-fees paid by plaintiffs. (*Schwabe, C. J.*) KANDASWAMI NAIDU v. KANNIAH NAIDU.

(1924) M. W. N. 373 : 20 L. W. 60 : 78 I. C. 573 : 1924 Mad. 692 : 46 M. L. J. 366.

———*Contract of marriage—Breach—Minor—Contract made by parents—Suit by minor for damages, maintainable. See CONTRACT ACT, S. 11.* 26 Bom. L. R. 1035.

———*Contract for sale of goods—Breach by buyer—Measure of damages—Delay in resale—Fall of market—Loss if recoverable. See CONTRACT ACT, S. 73.* 26 Bom. L. R. 921.

———*Divorce—Wife's adultery—Liability of co-respondent—Measure of damages—Practice.*

In a husband's suit for divorce on the ground of the wife's adultery with the co-respondent, the Court can, if the adultery is proved, award damages against the co-respondent. But the damages in divorce are not punitive. The means of the co-respondent are an irrelevant consideration except in so far as they were of assistance to him in seducing the wife. It is not the intention that a man should make a profit out of the dishonour of his wife. The only question is what the petitioner had lost in his wife.

When damages have been assessed, in the absence of an order to the contrary, they must be brought into Court and dealt with according to the well established principles. The sum may be ordered to be paid out to the plaintiff, but this is an exceptional course. The money may also be settled on the wife or her children. (*Schwabe, C.J., Coultis Trotter and Ramesam, J.J.*) JAMES RALPH FREER v. JOHNSON.

19 L. W. 374 : 34 M. L. T. (H. C.) 163 : 78 I. C. 120 : 1924 Mad. 446 : 46 M. L. J. 282.

———*Foreign currency—Decree in Indian coinage—Date of conversion. See FOREIGN EXCHANGE.* 51 Cal. 320.

———*Husband and wife—Adultery of wife—Excommunication by caste—Re-admission—Action against seducer.*

A wife committed adultery, for which she was excommunicated. Her husband lived with her even after that and so he too was excommunicated and had to spend money for getting re-admitted to caste. He then sued the seducer for damages for the loss suffered by him as well as for injury to reputation and feelings. *Held*, he

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was entitled to maintain the suit. (*Hallifax, A. J. C.*) GOKUL TELI v. BANIA CHAMAR.

1924 Nag. 157.

———*Suit for—Loss of goods from a wagon—Wagon sealed but not locked—Wilful neglect on the part of Railway Company.*

Where a Railway Company sealed the wagon carrying goods on one side but the seal was found broken and it did not appear how the property disappeared,

Held, that the putting of seal only and not of a lock did not amount to wilful neglect on the part of the Railway Company. (*Dalal, J. C.*) FIRM OF BHOGI RAM BAHADUR RAM v. B. N. W. RY.

1 O. W. N. 766.

———*Malicious prosecution—Malice—Proof of—Indirect motive—Advantage in civil dispute—Advice of Counsel—Effect of—Quantum of damages—Interference on appeal. See MALICIOUS PROSECUTION.* 46 M. L. J. 352.

———*Negligence—Dry cleaning of dress—Liability of person taking goods.*

Where a washerman receives a costly dress for dry cleaning and returns it in a torn condition caused by the use of sulphuric acid, *Held*, that there was evidence of negligence and the washerman was liable in damages. A clause in the contract to the effect that the property would not be claimed if it got torn during the cleaning was held not to safeguard the defendant against any tearing due to negligent or deliberately improper treatment. (*Lentaigne, J.*) HOLLANDIA PINMEN v. OPPENHEIMER.

3 Bur. L. J. 203 : 1924 Rang 356.

———*Railway—Injury to person and property—Negligence—Criminal acts of strangers.*

Although a Railway Company does not insure the safety of persons whom it undertakes to carry, the duty which it owes to such persons is of a highly onerous nature. For a Railway Company must needs take all such steps as skill, prudence and foresight can devise to keep passengers free from personal injury while travelling on its system. It must take care that its employees are honest and efficient and that the material equipment of the line is of proper quality, and, so far as a skilful mechanic can detect, in good working order. If a Railway Company neglects to take such steps, or to provide the best available apparatus to secure the safety of persons whom it has agreed to carry, it fails to fulfil the obligation which is imposed upon it by the law, and becomes liable to compensate passengers travelling on its system in respect of any personal injury which they may suffer by reason of such neglect. A Railway Company is under an obligation not only to protect passengers from dangers of which the Railway Company is aware, but also to take steps to forestall the risk of personal injury from any other cause to which it ought to anticipate that passengers may be exposed. The precautions taken must be commensurate with the anticipated risk, and exceptional measures may be necessary to obviate abnormal dangers. In considering whether or not in any particular case a Railway Company has exercised due care to preserve its passengers

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from personal injury, one must endeavour to view the circumstances prevailing at or shortly before the accident in their true perspective. It is easy enough to be wise after the event. Subsequent investigation, specially if conducted by skilful persons, may bring to light a number of untoward incidents which, coupled with the fact that the disaster took place, may tend to the conclusion that special precautions ought to have been taken to prevent its occurrence. But the question to be determined is whether the same inference ought to have been drawn before the accident occurred by the Railway Company having regard to the information which was then at its disposal. (*Page, J.*) **JEWAN RAM KHETTRY v. E. I. Ry. Co.** 51 Cal 861 : 1925 Cal. 108.

— *Wrongful attachment—Trespass to goods—Malice—Reasonable and probable cause—Right to damages.*

A judgment-creditor who attaches property which does not belong to his judgment-debtor but to a third person, commits a trespass for which he is responsible in damages, even though he may have acted without malice and mistakenly. 8 B. H. C. R. 177 : 3 Beng R. 413, Ref. 32 M. 170 : 35 M. 598 : 45 M. 227, Ref. (*Beasley, J.*) **K. A. ASSAN MAHOMED v. KADERSA ROWTHER.** 2 Rang. 181 : 1924 Rang. 302.

DECREE—Construction—Compromise decree—Execution.

In a suit on a mortgage a compromise decree was made by which the decree-holders were entitled to receive from the judgment-debtor Rs. 4,000 on account of principal and Rs. 400 on account of costs. The aggregate sum of Rs. 4,400 must be paid by annual instalments which were specified in the schedule. The decree then proceeded as follows :—"The defendants will pay to the plaintiffs Rs. 4,400 on account of the claim and costs as per instalments mentioned below. If default is made in payment of any one instalment, the plaintiffs will then be entitled to realise the whole amount due for all instalments at one and the same time by taking out execution. The properties mortgaged shall remain charged under the mortgage until the amount due for the 1st instalment has been paid." Nothing was paid under the decree. The decree-holder applied for an order absolute and the judgment-debtor contended that the remedy of the decree-holder was not by execution but by way of a regular suit to enforce the consent decree. *Held*, that the decree in question was not a money-decree but a mortgage-decree which could be executed against the mortgaged property without a fresh suit. When a consent decree has been made, as was made in this case, before execution is taken out, an order absolute should be obtained by the decree-holder on notice, so as to allow the judgment-debtor an opportunity to show cause, if possible, why the decree should not be made final. 34 C. 886 : 43 B. 631, Fol. 35 C. 61 : 24 C. L. J. 523, ref. (*Mookerjee and Newbold, JJ.*) **KASHI CHANDRA CHAKRAVARTHI v. PRIYANATH BAKSHI.**

28 C. W. N. 550 : 1924 Cal. 645.

— *Construction—Father's debt—Decree against son—Nature of—Personal liability.*

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A compromise decree was passed against a son on a debt due by his deceased father. In execution the decree-holder sought to proceed against the properties of the son. *Held*, the decree was merely against the estate of the father represented by the son and execution could proceed against that alone. (*Wazir Hasan, A. J. C.*) **KUNWAR JANG BAHADUR v. LALA GUR PRASAD.** 80 I. C. 600 : 1925 Oudh 113.

— *Construction—Compromise decree—Provision for sale of property—Whether a preliminary decree—Executability.*

Under a compromise decree in a suit on a mortgage it was agreed that the defendant was to pay a certain sum to the plaintiff by a certain date and in default the plaintiff was to recover the said sum and interest by selling the property mortgaged and other properties as well. Default having been made plaintiff sought to execute the decree and the defendant pleaded that the decree was a preliminary decree and was inexecutable without a final decree. *Held*, that the decree was a compromise decree and was executable without a final decree being passed. 27 C. W. N. 621, Fol. (*Schwabe, C.J. and Waller, J.*) **SIVA SUBRAMANIAM PILLAI v. RUKKUMUTHU MOOPPAN.**

19 L. W. 502 : (1924) M. W. N. 454 :

79 I. C. 418 : 1924 Mad. 645.

— *Construction—Mistake discovered in execution—Duty of Court.*

A suit for dower debt was brought by a widow against certain heirs of her husband but the plaintiff did not state the exact shares in which defendants were liable. But there was no dispute as regards the shares of the liability and the Court granted the relief as prayed for. In execution it was objected that the decree had made each defendant liable for the amount. *Held*, that the Court was bound to construe the decree in the light of the admitted fact that both parties were fighting over a dower decree and that the defendants were not jointly and severally liable. (*Walsh, C. J. and Ryves, J.*) **MAHOMED ASHIQ ALI v. MT. HAJRA BIBI.** L. R. 5 A. 467 : 82 I. C. 627 : 1924 All. 690.

— *Construction—Decree clear and unambiguous—Courts if can go behind—Judgment, etc.*

When a decree to be construed is clear and unambiguous it is not competent to the Court to go behind the decree and refer to the judgment or to any surrounding circumstances. (*Martineau and Moti Sagar, JJ.*) **KOKAN v. SOHAN.**

1924 Lah. 696.

— *Construction—Mortgage suit—Compromise decree—No personal liability—Payment in instalment—If only declaratory.*

In a suit on a mortgage a compromise decree was passed according to which the money was to be paid in instalments, a charge being retained over the hypotheca, but it expressly excluded personal liability. *Held*, it was not a mere declaratory decree, but a final decree which could be executed if the instalment was not paid. (*Raymond and Madgokkar, A. J. C.*) **MURAD v. DAYARAM.** 76 I. C. 49 : 1925 Sindh 156.

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—Construction—Provision for payment within specified time—Payment into Court by a third person—If legal and proper—Benefit of deposit.

In 1907, the widow of a deceased Hindu for herself and as guardian of her son Banemiya and her daughter Putlabai sold his land to one Poonamchand who in 1911 resold it to the appellant Banemiya and Putlabai subsequently in 1914 instituted a suit to set aside the sale, and the Court decreed in 1918, that upon their paying into Court within 6 months, a certain sum of money they should get possession of their shares in the property in partition, but that if they failed to pay, the suit was to stand dismissed with costs. Prior to that in 1915, one Dattatraya had obtained a mortgage from Banemiya and he paid the decretal amount into Court 4 days before the expiration of 6 months to save the suit from being dismissed. In the meantime Banemiya had sold the remaining interest in the property to the respondent. On 4th October 1918, Dattatraya's mortgage having been discharged, he applied to the Court to withdraw the deposit. The respondent opposed the application and claimed payment of it out himself. The Subordinate Judge allowed Dattatraya's application. The High Court at Bombay on appeal set aside this order holding that when this deposit money was produced by Dattatraya, it was paid in to the credit of the proceedings, and could only be dealt with on an application in the regular course by one of the parties and that the respondent was a person in whose favour the plaintiffs in the suit had created a legal interest entitling him to apply to benefit by the deposit.

Held, by the Privy Council affirming the judgment of the High Court, that (1) the mortgagee, having acquired the rights of the mortgagors in the mortgaged property had an absolute right for the protection of his security to make the deposit in Court under the decree; (2) the benefit of such deposit enured to all parties having an interest in the performance of the condition imposed by the decree. (*Lord Salvesen*.) MAHOMED RAHIMTULLA HAJEE JOOSAB v. ESMAIL ALLARAKHIA.

26 Bom. L. R. 549 : L. R. 5 P. C. 105 :
(1924) M. W. N. 422 : 34 M. L. T. 99 :
48 Bom. 404 : 80 I. C. 411 : 10 W. N. 313 :
10 O. and A. L. R. 753 : 1924 P. C. 133 :
46 M. L. J. 567 (P. C.).

—Construction—Reciprocal reliefs.

77 I. C. 776.

—Construction—Time for depositing decree amount—Last day a holiday—Deposit on next day.

Where the last day allowed to the plff. for depositing the price in a pre-emption suit expired on a holiday, the plff. complies with the decree by depositing the amount on the next Court day. 41 A. 47 overruled. 3 A. 850; 18 C. 631, Foll. (*Piggott Lindsay and Sulaiman, JJ.*) MAHOMED JAN v. SHIAM LAL.

22 A. L. J. 110 : 46 A. 328 :
L. R. 5 A. 88 : 78 I. C. 1014 : 1924 All. 218

—Effect of—Decree not put into execution—Lapse of time—Declaration.

1924 Pat. 165.

—Execution—Assets of deceased in the hands of defendants.

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Where the sale by the widow in favour of the vendor was set aside at the instance of the reversioner, the decree in a suit for return of purchase money by the vendee having been passed against such assets of the deceased vendor as had come into the hands of his representatives (defendants), if an attempt is made to execute the decree against inalienable property the defendant will be at liberty to object to such execution. (*Stuart, J.*) KALI DIN v. MADHO. 1923 All. 169.

—Execution.

77 I. C. 167.

—Execution—Executability of agreement embodied in decree outside the scope of the suit—Power of Court to enforce decree as a whole—C. P. Code, S. 151.

In a suit for specific performance of a contract of sale with regard to a certain share in a village, a compromise was entered into under the terms of which the plaintiff was to purchase not only, the share sued for but also another share not forming the subject-matter of the suit. A decree was passed on foot of the compromise, the decree-holder, in execution sought to enforce only a portion of the decree which related to the sale of one share but the Court below refused to execute the decree partially.

Held, that the compromise must be read as a whole and one portion could not be separated from the other and each part of the agreement was to be treated as consideration for the other. Consequently the order of the lower Court was correct.

Apart from all considerations of law and equity there is the inherent power of the Court under Section 151 of the Code of Civil Procedure to prevent the abuse of the process of the Court. By acting as the decree-holder desires the Court to act, the Court should be doing injustice and allowing the decree-holder to take advantage of a certain portion of the decree through the process of the Court and thereby to do damage to the judgment-debtor. If the decree-holder desired to execute the decree he must get both the sale deeds executed under the conditions and by making payments as laid down in the decree. (*Dalal, J. C. and Neave, A.J.C.*) MAHOMED YASIN ALI KHAN v. ALI BAHADUR.

10 O. L. J. 443.

79 I. C. 685 : 1924 Oudh 230.

—Execution—Who can execute.

After decree it is open to any party to a suit to whose interest it is that further proceedings be taken, to initiate the supplementary proceedings but in the ordinary case it is the plaintiff who moves (*Lord Phillimore*.) LACHMI NARAYAN MARWARI v. BALMAKUND MARWARI.

20 L. W. 491 : 35 M. L. T. (P.C.) 143 :
L. R. 5 P. C. 171 : 26 Bom. L. R. 1129 :
22 A. L. J. 990 : 5 Pat. L. T. 623 :
40 C. L. J. 439 : 1 O. W. N. 629 :
10 O. & A. L. R. 1033 : 51 I. A. 321 :
81 I. C. 747 : 1924 P. C. 198 :
47 M. L. J. 441.

—Joint possession under—Disturbance of—Remedy.

Where joint possession awarded under a decree is disturbed, the aggrieved party can maintain a suit for its restoration. (*Kotwal, A. J. C.*) JUGAN v. AMANSINGH.

1924 Nag. 345.

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— *Re-construction of—Nature of evidence to be let in.*

Where a decree has been burnt, and the decree-holder wants to execute it, he must prove the contents of the decree which can be only by means of secondary evidence. Statements of persons who merely heard judgment pronounced are not admissible in evidence. What is required is an oral account of the contents of the judgment or decree by some one who had read the one or the other. (*Maccoll, A.J.C.*) MAUNG CHIT U. v. MAUNG THA U. 77 I. C. 258.

— *Setting aside—Decree without jurisdiction—Pecuniary jurisdiction exceeded—Effect of.*

When a suit is filed in a civil court the pecuniary jurisdiction of the court is primarily determined by the valuation which the plaintiff puts upon the subject-matter of the suit. Of course it is open to a deft. when he appears to answer the suit, to raise the plea that the suit has not been properly valued and to show, if he can, that the court in which the suit has been brought has no jurisdiction to try it. But if no such plea is taken by a defendant when he has had the opportunity of raising it, it cannot be said that the court has acted without jurisdiction. Consequently where without objection to the pecuniary jurisdiction by the parties a court has tried and decided a suit, it is not open to one of the parties to subsequently sue to set aside the decree on the ground of want of jurisdiction. (*Lindsay and Sulaiman, JJ.*) KHUDAJATUL KUBRA v. AMINA KHATUN. 46 A. 250 : L.R. 5 A. 142 : 22 A. L.J. 122; 80 I. C. 413 : 1924 A. 388.

— *Setting aside—Consent decree—Effect of order setting aside.*

Where a consent decree passed in a suit was set aside by a subsequent suit on the ground of fraud, the parties are remitted to their original rights and the court is bound to proceed with the hearing of the original suit. (*Das and Ross, JJ.*) ASHARFI LAL MAHTA v. SURAJMAYA MISHRAIN. 1924 P. H. C. 253 : 82 I. C. 181 : 1924 P. 758 (1).

— *Setting aside—Ex parte—Suppression of summons—Incomplete statement in plaint.*

76 I. C. 767 (2).

— *Setting aside—Fraud—Decree obtained by insolvent concealing adjudication—Remedy by suit.*

Where an insolvent after his adjudication obtains a decree on a debt concealing the fact of his insolvency and adjudication, the decree is liable to be vacated in a subsequent suit for the purpose. (*Macleod, C. J.*) ANDREW ROZARIO v. MAHOMED IBRAHIM. 26 Bom. L. R. 695 : 1924 Bom. 460.

— *Setting aside—Fraud—Suppression of evidence—False claim,* 1924 Cal. 395.

— *Setting aside—Fraud—Nature of.* MUTHAN v. BABU MOHENDRA NATH SINGH. 1924 Rang. 119.

— *Setting aside—Fraud—Non-service of summons.* 5 Pat. L. T. 66.

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— *Setting aside—Grounds for—Perjury.*

1924 Bom. 100.

— *Setting aside—inconsistent relief.*

75 I. C. 165.

— *Setting aside—Minor—Negligence of guardian—Omission to defend—App al.*

Mere failure on the part of a guardian-ad-litem of a minor to defend a suit or to appeal against the decree passed against a minor is not of itself a sufficient ground for holding that there was gross negligence on his part. If the plaintiff has a good case against the minor, there is no reason why the guardian-ad-litem should incur additional expense in defending the suit. It would be gross negligence not to defend the suit if there was any valid ground of defence available to the minor. (*Scott-Smith, A. C. J.*) NAMAH SINGH v. GURBAKSH SINGH. 6 Lah. L. J. 346.

— *Setting aside—Minor—Negligence of guardian—Non-production of material document.*

Mere non-production by a guardian of a minor of a document and the omission to file it in evidence in the prior suit does not justify the Court in setting aside the decree passed in the prior suit in a fresh suit instituted for the purpose by the minor. (*Devadoss, J.*) THUMALAPALLI ANJANEYULU v. P. CHINA SUBBIAH.

(1924) M. W. N. 758 : 82 I. C. 952 :

20 L. W. 529 : 1924 Mad. 860.

— *Setting aside decree—Non-service of summons.* 75 I. C. 343 (2) : 5 Pat. L. T. 37.

DECEASED BROTHER'S WIDOW'S REMARRIAGE ACT (1921) 1 EDW. 7 C. 47—*Deceased Wife's Sister's Marriage Act, 1907—Marriage with deceased brother's widow before the Act—Act if retrospective—Rejection of application for letters of administration—Fresh application.*

The applicant for letters of administration, an English Lady, had married after the death of her first husband, his brother and on the death of the latter applied for letters of administration of his estate. The marriage being illegal under the then existing state of the English Law, letters were refused. Subsequently the Deceased Brother's Widow's Marriage Act was passed in 1921 and the lady again applied for letters of administration. Held, that the Deceased Brother's Marriage Act, 1921, was retrospective in effect so far as it declared that in English law the marriage between a man and his deceased brother's widow whenever and wherever they took place, should not be regarded as illegal simply on the ground of affinity and that as the legal status of the applicant had completely altered, she was entitled to apply for letters of administration. (*Bucknill, J.*) ADELAIDE CHRISTIANA LISH v. LISH.

1924 P. H. C. C. 138 : 2 Pat. L. R. 125 : 1924 P. 624.

DEED—*Construction—Assignment or fresh mortgage—Stamp duty—Liability for.*

In determining whether an instrument is liable to duty as a transfer only or the full duty of a mortgage, the Court will look at the substance of the transaction and not merely at the form of the instrument. But it may be taken as a general

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rule that the introduction of a new proviso for the redemption in the assignment of a mortgage is not by itself sufficient to constitute a new mortgage. In the absence however, of a statutory provision like that embodied in S. 27 of the Conveyancing Act, 1881, which prescribes the forms of statutory transfer of mortgage, there is no reason why a document should not be of a mixed character, namely, a transfer of a mortgage as also a new mortgage. (*Mookerjee and Rankin, J.J.*) *BANK OF BENGAL v. WILLIAM ARRATOON LUCAS.* 51 Cal. 185: 28 C. W. N. 497: 81 I. C. 471: 1924 Cal. 578.

—Construction—Benefit to party.

In considering whether a particular interpretation is beneficial or not to a party, circumstances not appearing on the face of the deed may be taken into account. (*Lord Blanesburgh.*) *MA SA BON v. MA GA TWE* 20 L. W. 884: 1924 P. C. 233.

—Construction—Boundaries and area—Conflict between—Land found to be of less area. *NARAIN DAS v. JAWAHIR SINGH.* 1924 Lah. 714.

—Construction—Charge—Creation of Allowance in perpetuity—Zamindari property.

A Zamindar sold his Zamindari property in 1864 and after the sale was completed the vendee agreed out of his own free will and consent to pay Rs. 48 per annum to the vendor and his descendants. The vendor and his descendants were to perform the village work. The annuity was to continue so long as there were descendants of the vendor in existence and the vendee was bound to pay the sum till then. In the Khewat of 1867 the allowance was entered as nankar. *Held*, that on the plain construction of the document no charge had been created on the properties sold and the court is not bound by a contemporaneous but incorrect construction. (*Ashworth, A. J. C.*) *CHHOTAN LAL v. IQBAL NARAIN.* 10 O. & A. L. R. 1203.

—Construction—Circumstances.

Surrounding circumstances such as are clearly required to show in what manner the language of the documents was related to existing facts are to be taken into consideration Foll. 27 I. A. 58. (*Lord Blanesburgh.*) *RAJA BAHADUR NARASINGERI GAJANA GERI v. RAJA PANUGANTI PARTHASARATHI ROYANIM GARU.*

20 L. W. 701: 1 O. W. N. 684: 51 I. A. 305: 10 O. & A. L. R. 1172: 82 I. C. 993:

40 C. L. J. 481: 27 Bom. L. R. 4:

47 Mad. 729: 47 M. L. J. 809: 1924 P. C. 226.

—Construction—Surrounding circumstances—Evidence of—When relevant.

In the construction of written or printed documents, it is legitimate in order to ascertain their meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply. (*Lord Atkinson.*) *SRI RAJA VATSAVAYA VENKATA SUBHADRAYAMMA v. SRI POOSAPATHI VENKATAPATHI RAJU.*

20 L. W. 298: 26 Bom. L. R. 786:

(1924) M. W. N. 607: 35 M. L. T. (P. C.) 210:

L. R. 5 P. C. 147: 29 C. W. N. 57:

80 I. C. 807: 1924 P. C. 162:

47 M. L. J. 93 (P. C.).

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—Construction—Conflict between area and boundaries. 1924 P. 226.

—Construction—Description of property—Conflicting description. 1924 P. 200.

—Construction—Rule of. 1924 Lah. 196 (2).

—Constructions—Conduct of parties relevant to explain a deed capable of several meanings.

The conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate a contract open to different meanings. (*Mr. Ameer Ali*) *MA THAUNG v. MA THAN.* 51 Cal. 374: 19 L. W. 477: 51 I. A. 1: 3 Bur. L. J. 333: 80 I. C. 1031: 1924 P. C. 88: 46 M. L. J. 618.

—Construction—Fixed rent. 76 I. C. 324.

—Construction of—General words following specific words—Ejusdem generis—Applicability of doctrine.

The doctrine of *ejusdem generis* applies where there is specific mention of a distinct category followed by general words in mercantile documents. (*Rutledge, J.*) *A. V. JOSEPH, In re.*

2 Rang. 272: 3 Bur. L. J. 265: 82 I. C. 702: 1924 R. 348.

—Construction—Gift to adopted son—Failure of adoption—Effect.

A deed of gift stated that to perpetuate the donor's line he was adopting a boy, that he would be clothed with all the rights of a natural son and that the property was given in full ownership to him—*Held*, the gift was not to him as a *persona designata* and would fail if the adoption failed. (*Macleod, C. J. and Crump, J.*) *KALLYANTAI v. SHIVAPPA.* 1924 Bom. 516.

—Construction—Gift to adopted son—Adoption invalid—Effect.

6 Lah. L. J. 82: 1924 Lah. 103.

—Construction—Gift or will.

A document which is throughout called a will which begins by reciting that the executant's death was drawing near and that he was weak and unable to go to the Registration Office indicates the intention of a testamentary disposition and the mere recital in one place that during his life, one property was to go to a certain person, does not make it a deed of gift. (*Kotwal, A. J. C.*) *ZUGLAI v. RATAN.* 1924 Nag. 236.

—Construction—Gift or will—No disposal of any immediate interest in property. See PROB. AND ADMINISTRATION ACT, S. 3.

46 M. L. J. 288.

—Construction—Gift or will. *MT. DURGO v. PREM SINGH.* 1924 Lah. 196 (2).

—Construction—Heirs and representatives—Meaning of. 76 I. C. 922: 10 O. L. J. 513.

—Construction—Intention of the parties—Ambiguity.

Where the document is not itself ambiguous the intention of the parties should not be taken into consideration and the mere delivery of a document of title does not constitute a transfer of

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the right to the property. There are certain well recognised rules relating to the mode of transfer of interest in immoveable properties and transfer of such interest can be effected in no other way. (*Suhrawardy and Graham, JJ.*) *PROHLAND CHANDRA DAS v. BISWAS NATH BERA.*

82 I. C. 411 : 40 C. L. J. 79.

—Construction—Lease—Payments under specified—Whatever else is payable—Principle of ejusdem generis.

Where in a lease deed the payments to be made are specifically dealt with and afterwards a general clause to the effect that whatever else is payable by law is to be paid, the general clause is taken to be referable to the subject matter specifically referred to before. (*Suhrawardy and Page, JJ.*) *SRISH CHANDRA PAL CHOWDHURY v. DEBENDRA NATH SINHA ROY.*

79 I. C. 369.

—Construction—Interpretation of similar documents—Value of decisions.

Per *Piggott, J.*—Any ruling as to the interpretation of a document can only be applied in its entirety to a document absolutely identical in language, and in a case the general circumstances of which are substantially the same. Where these conditions are not satisfied, a party relying upon previous rulings of the court and putting them forward as guides to the correct interpretation of the particular document on which the case under appeal actually turns, can do nothing more than ask the court to take into consideration the general principles which have been applied by other Judges in similar cases and to derive from them whatever assistance it can towards arriving at a correct conclusion. (*Piggott, Lindsay and Sulaiman, JJ.*) *ALKHU RAI v. LACHHMAN UPADHIYA.*

46 A. 274 : L. R. 5 A. 145 : 22 A. L. J. 137 : 80 I. C. 550 : 1924 All. 324 (F. B.).

—Construction—Lease or sale—Tests of—Right of pre-emption. See PRE-EMPTION.

10 O. L. J. 399.

—Construction—Lease for 11 months at monthly rent—Seven days notice for ejectment fixed—Effect.

Where a lease was given for 11 months at a fixed monthly rent and it was mentioned there that the tenant should quit on seven days' notice it does not become a monthly tenancy. The stipulation for the monthly payment of rent has no effect upon the condition by which the land lord could put an end to the tenancy at any time by means of a week's notice. (*Campbell, J.*) *BURE KHAN v. GHULAM MUHAMMAD.*

75 I. C. 1034.

—Construction—Letter of credit—Liability of banker—Object of instrument—Facilitating negotiation and not a guarantee. See BANKER AND CUSTOMER.

51 C. 43.

—Construction—"Malik"—Gift to wife. *MT. MAHOMMADI v. KARAM BAKSH.*

1924 Lah. 347.

—Construction—Maintenance or *Guzara*—Right of alienation—Effect.

A maintenance grant is generally construed to be only for the life of the grantee even though

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there are expressions like "for perpetuity" or "for ever." But when the grantee is expressly given powers of alienation it must be construed to confer an absolute estate. (*Wazir Hasan, J. C.*) *TEJA SINGH v. MOTI SINGH.*

1 O. W. N. 423 : 81 C. 918 : 10 O. & A. R. 1004 : 1925 Oudh 125.

—Construction—Months—How calculated.

When in a vernacular document "months" is used it means not a Lunar month as in English law, but a calendar month. (*Baker, J. C.*) *HARBHAGAT v. NARAYANAN RAO.*

1924 Nag. 208.

—Construction—Mortgage by conditional sale referring to earlier one with possession, stipulating that both would be redeemed together—Both should be read together.

Two mortgages were executed on the same property, the latter provided among other things "That just as the mortgaged property is liable for the money due under the mortgage deed, dated the 15th May 1869, similarly the same property is and shall be liable for the money due under this deed; that if I, the executant, pay in one lump sum within five years from to-day in a fallow season in the month of Jeth, the money due under this deed and the mortgage money of the mortgage deed as well as other amounts due, the mortgage property shall be redeemed; otherwise the consideration of this deed and the mortgage money of the deed of mortgage shall be deemed to be the consideration money and this deed shall be deemed to be the sale deed."

Held, that the mortgage deed of the 15th May 1869, and later mortgage deed of the 24th June 1878, must be read together and that the parties intended that the mortgagee should be treated as having held the mortgaged property from the 15th May 1869, as a mortgagee in possession under a mortgage in the form of a mortgage by conditional sale. (*Sir John Edge.*) *MIRZA ABID HUSAIN v. KANIZ FATIMA.*

46 A. 269 : 22 A. L. J. 284 : 10 O. & A. L. R. 281 :

34 M. L. T. (P.C.) 78 : 19 L. W. 703 :

29 C. W. N. 214 : 80 I. C. 1019 : (1924) M. W. N. 657 : 27 O. C. 72 : 11 O. L. J. 427 : 1 O. W. N. 33 : 1924 P. C. 102.

—Construction—Mortgage by conditional sale—Further charge—Redemption postponed.

A mortgage by conditional sale was followed by a loan of some more money which was to be included in the mortgage and to be repaid with it. Both were to be paid at the same time and not separately. *Held*, it was a deed of further charge and was to be consolidated with the mortgage. (*Kanhaiya Lal, J.*) *GAYA SINGH v. SURAJBALI SINGH.*

1924 All. 832.

—Construction—Mortgage—No provision for payment of interest—Redemption.

1924 Lah. 273.

—Construction—Principles—Clear words of grant—Custom varying—Proof.

Clear and unambiguous terms of a document conferring an absolute and irrevocable right on a grantee can be abandoned or controlled only by clear evidence of custom ancient, invariable, unambiguous and having acquired the force of

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law. (*Jwala Prasad and Macpherson, JJ.*)
GOPAL OJHA v. RAMADHAR SINGH.

82 I. C. 204 : 1925 Pat. 228.

———*Construction—Property title to which is subject matter of suit—Trust deed in respect of—Management of property, conduct of suit etc., vested in trustee for preservation of the property—borrowing for purposes of suit—Powers of trustee and settlor—Creditor's right to lien on property gained by litigation.*

R who was about to institute a suit to establish his title to the absolute interest in a zemindari subject to the life interest in C created by the will of the deceased zemindar, executed a deed of trust by which he appointed V (the original trustee) trustee of all the property in which he R, claimed to have a vested estate in remainder as heir of the deceased Maharajah in trust to administer the fifteen-sixteenths of the same for his, the settlor's benefit, and one-sixteenth of the same for the benefit of respondents 5 and 6. Powers were, by the trust-deed, conferred upon the trustee and upon the settlor respectively. The words conferring them were as follows—"Therefore you (the trustee) should not only manage the trust property subject to the arrangements I may make regarding the consideration for your trouble, etc. and other matters but also full authority is given to you to conduct suits, etc. either jointly with me or separately, and to manage it in such a way as you may think fit for the preservation of the properties." *Held* on a construction of the deed, that the trustee would have been acting within his express powers if having money of his own at his command he thought proper to advance it or some of it, to finance the contemplated litigation directed to secure and preserve the trust property for the purpose of the trust, by establishing that the settlor was the lawful heir of the deceased Maharajah, and in the event of that suit being successful would have been entitled to a lien on the property gained, for the sum advanced. *Held*, further that if the trustee not having money of his own available, borrowed money from a third party for the purposes above-mentioned and actually used it to promote these purposes, then, in case the litigation were successful, the person who advanced the money would be entitled to stand towards the trust property in the place of the trustee and be entitled to a similar lien on that property, while if the settlor, with the assent and concurrence of the trustee, borrowed money absolutely necessary to finance the suit from a third party for the purposes above-mentioned and so applied it, then, in the event of the litigation being successful, the person who advanced the money would be equally entitled, standing in the shoes of the settlor to a lien on the property preserved for the trust by his outlay. (*Lord Atkinson*.) SRI RAJA VATSAVAYA VENKATA SUBHADRAYAMMA v. SRI POOSAPATHI VENKATAPATHI RAJU.

20 L. W. 298 : 26
Bom. L. R. 786 : 35 M. L. T. 210 : 80 I. C. 807 :
L. R. 5 P.C. 147 : 29 C. W. N. 57 :
(1924) M. W. N. 607. 1924 P. C. 162 :
47 M. L. J. 93 (P.C.).

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———*Construction—Recitals in—Evidentiary value.*

It is well established that recitals in a deed cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. The recital is clear evidence of the representation and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital coupled with such circumstances would be sufficient evidence to support the deed. 44 C. 186 at p. 196 referred to. (*Kendall and Pellan, A. J. Cs.*) MT. RAJ KUNWARI v. MT. RANI MAHRAJ KUNWAR.
82 I. C. 832 : 1 O. W. N. 710.

———*Construction—Relation of principal and agent—How created.* MURARI PREMJI GOKULDA v. MULJI RANCHHOD KED & Co.
48 Bom. 20:
77 I. C. 266 : 1924 Bom. 232.

———*Construction—Reservation—General rule.*

If apt words are not used and if reservations are not made then it does not lie in the mouth of the grantor or contend that the grant is not so extensive as on an ordinary interpretation of the words used in the grant, it would seem to be (*Ghose and Panton, JJ.*) HARIPADA BANDOPADYA v. EQUITABLE COAL CO., LTD.
1923 Cal. 335.

———*Construction—Sale of building sites—Intended pathway—Right of vendees.*

The owner of a block of vacant land sold a portion thereof as a building site to A. In the conveyance in favour of A the parcel of land sold to him was described as bounded on its southern side by a pathway intended to be set apart by the vendor. Shortly after the sale to A, the vendor conveyed the remainder of the block including the site of the intended pathway to B, who refused to allow A a right of way over his land. *Held*, that A was entitled to a right of way on B's land along the intended pathway and that neither the vendor nor anybody claiming under him could dispute A's right of way. *Espley v. Wilks*, (1872) L. R. 7 Ex. 298 relied on. (*Venkatasubba Rao, J.*) KUPPAKKAL v. MATHAN CHETTIAR.
1924 Mad. 834 : 82 I. C. 430:
47 M. L. J. 477.

———*Construction—Sale—Discharge of debts binding upon property sold—If and when condition precedent to passing of property—Minor—Sale, in favour of—Validity—Tests—Transfer of Property Act—S. 55 (5) (d)—Buyer's duty under—Basis of—Implied contract.*

A sale deed was executed in favour of a minor, one of the terms of the deed being that the vendee's father should discharge certain debts binding upon the property sold. The portion of the deed relating to this point was as follows:—"the debts shall be discharged and the minor may hold and enjoy the undermentioned lands exclusively

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with power to alienate by way of gift, exchange sale, etc."

Held, on a construction of the deed, that the discharge of the debts was not a condition precedent to the vesting of the property in the minor; that even otherwise the discharge of the debts by the vendee himself was a sufficient compliance with the conditions; and that the sale was not void on the ground that it was in favour of a minor.

The minor is not a contracting party. On the other hand, it is his father who undertakes to discharge the encumbrances; the sale cannot therefore be treated as void.

The duty that is incumbent upon the buyer under S. 55 (5) (d) of the Transfer of Property Act is not a duty that arises from an implied contract; it is a statutory obligation imposed on the vendee. (*Venkatasubba Rao, J.*) *GANGI AMMAL v. GOVINDA PADAYACHI*, (1924) M. W. N. 324 :

34 M. L. T. (H. C.) 149 : 19 L. W. 644 : 1924 Mad. 544 : 46 M. L. J. 464.

—Construction—Sale or mortgage.

Where a document calls itself a sale deed and under which in lieu of a debt due, land is sold for a period of 50 years, it is in reality a mortgage and can be redeemed even before that period. (*B. B. Ghose, J.*) *DURGA CHARAN MAJI v. PORESH BEWA*, 76 I. C. 336 : 1925 Cal. 105.

—Construction—Sale certificate—Conflict between boundaries and area — Rights of purchaser.

Ordinarily when a piece of land is sold with definite boundaries, unless it is clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against the measurement. *Held*, on a construction of the sale certificate in the case, that the whole of the lands within the specified boundaries was meant to be sold notwithstanding an inaccurate statement of the extent. (*Krishnan and Waller, JJ.*) *SUBBAYA CHAKKILIAN v. MUTHIAH GOUNDAN*, 19 L. W. 245 : (1924) M. W. N. 203 : 34 M. L. T. (H. C.) 315 : 78 I. C. 414 : 1924 Mad. 493 : 46 M. L. J. 182.

—Construction—Sale certificate—Specification of area—Evidence of subsequent conduct.

Where the terms of a grant are ambiguous, evidence of subsequent conduct is admissible to prove the intention of the parties. A char mahal which had been diminished by diluvion was sold at auction by the Collector. The area was notified. *Held*, that the specification of the area did not limit the rights of the purchaser or prevent him from claiming an accretion to the estate. (*N. R. Chatterjee and Chitambar, JJ.*) *KUMAR SHANKER ROY CHOWDHRY v. SECY. OF STATE FOR INDIA*, 40 C. L. J. 322 : 29 C. W. N. 166.

—Construction—Security bond—Erroneous acceptance of bond different from what order required—Liability of sureties.

Pending appeal a judgment-debtor was released on sureties being furnished. The surety bond actually bound over the surety to produce him in Court when required and nothing more, the same being due to an oversight. *Held*, the bond having

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been accepted by the decree-holder without objection, the surety cannot be proceeded against except to the extent of producing the debtor in court. (*Sulaiman, J.*) *THAKUR MAHIPAL SINGH v. ATHAL SINGH*, 80 I. C. 446 : 1925 A. 5.

—Construction—Security bond—Attachment before judgment—Suit dismissed by first Court—Appeal allowed—Right of decree-holder to proceed against security. See C.P. CODE, O 38, R. 5. 47 M. L. J. 523.

—Construction—Title of deed is not conclusive of rights of parties.

The mere fact that the document of title held by the grantees is called a patta and that they executed a kabuliyat in similar terms is not conclusive of the question of whether they were mere lease-holders, i.e., farmers of revenue or were true proprietors paying a jamabundi to the overlord. (*Lord Dundedin.*) *NAYAK VAJESINGJI v. SECY. OF STATE FOR INDIA*, (1924) M. W. N. 694 : 26 Bom. L. R. 1143 :

22 A. L. J. 951 : L. R. 5 P. C. 199 : 40 C. L. J. 473 : 82 I. C. 779 : 48 Bom. 613 : 51 I. A. 357 : 21 L. W. 28 : 1924 P. C. 216 : 47 M. L. J. 574.

—Construction—Valuation for stamp duty—Weight due to. 75 I. C. 402.

—Construction—"With absolute rights"—Maintenance grant.

In maintenance deeds the words "with absolute rights, etc.," need not be construed in a manner different from the way in which they would be construed if those words occurred in other documents. (*Venkatasubba Rao, J.*) *NARAYANASWAMI DEVARAYAR v. THANGAVELU PADAYACHI*, (1924) M. W. N. 571 : 82 I. C. 67 :

1924 Mad. 800.

—Construction—Will—Postobit—Revocation. 1924 Bom. 135.

—Construction—Zamindar relinquishing his right to trees of occupancy tenant—Effect of—Successor—Right of.

A Zamindar in consideration of the good work done by his occupancy tenant gave up his interest in the trees planted by the latter and to be planted by him in future and addressed a letter to his estate officers not to interfere with the same. No claim was ever made by the Zamindar or his successors against the tenant for many years. In a suit by a succeeding Zamindar, *held* the document purported to relinquish all rights in perpetuity and bound his successors also. (*Miller, C. J. and Mullick, J.*) *MAHARAJ RAI v. JANKI KUER*, 1924 P. 655.

—Material alteration—Bill of exchange or promote—Proof of material alteration—Burden of proof.

An alteration which is not material does not affect the operation of the instrument by whomsoever it is made. Again if an alteration is made with the consent of all parties it does not avoid the instrument which takes effect as altered. In the case of promissory notes and bills of exchange there is no presumption that any alterations notified in them were made before they were executed. A writing which is intended to be under

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hand only can be altered by erasure, or interlineation or otherwise, before it is signed, but it lies upon the party who puts the instrument in suit to explain the alteration and show when it was made. An alteration in a material part of an instrument under hand made by or with the consent of one party, thereto but without the consent of the other party, makes the instrument void to this extent that the party responsible for the alteration cannot enforce the instrument against a party not responsible. (*Kishkha, O. A. J. C.*) KANHAYALAL v. SITA RAM. 20 N. L. R. 76 : 81 I. C. 647 : 1924 Nag. 250.

—Recitals — Value of — Considerations guiding.

Recitals in deeds cannot by themselves be relied on for the purpose of proving assertions of fact which they contain but when a long period has elapsed between the date of the document and the challenging of it in a court of law, and when all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probabilities and circumstances of a case assumes greater importance and cannot lightly be set aside. (*Moti Sagar, J.*) TARA CHAND v. RAHMAN SHAH. 1924 Lab. 689.

DEFAMATION—Liability for—Civil and Criminal law—Privilege—Statement made in the course of Judicial proceedings—Qualified privilege—Evidence Act, S. 105.

The liability of the defendant in a civil suit for damages for defamation in respect of statements made by him as witness or accused in a prior judicial proceeding must be determined, in the absence of specific statutory provisions by the rules of justice equity and good conscience, which have been understood to be the rules of the English Common Law. Consequently statements made by the defendant in his application for transfer of a criminal case in which he was accused are absolutely privileged and no action for damages for defamation is maintainable even though the statements were made maliciously. In cases of qualified privilege the burden lies on the defendant in a suit for damages for defamation to prove that the occasion was privileged. S. 105 of the Evidence Act applies only to criminal prosecution for defamation and has no application to a civil suit for damages. (*Lentaigne and Carr, JJ.*) MA MYA SHWE v. MAUNG MAUNG. 2 Rang. 333 : 1926 Rang. 15.

—Police report—False statements in—Qualified privilege—Extent of. See EVIDENCE ACT. S. 125. 22 A. L. J. 597.

—Slander—Privilege—Communication to person in authority—Malice—Presumption—Damages.

Communications addressed in good faith to persons in a public position for the purpose of giving them information to be used for the redress of grievances, the punishment of crime or the security of public morals are privileged, provided the subject-matter is within the competence of the person addressed. Where however it is found that information was given by defendant to a

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Magistrate, that the plff. was in the habit of unlawfully cutting the crops on his neighbour's fields and causing damages to neighbours in various other ways and that the information was false and unfounded. Held, that malice in law should be presumed and that the privilege disappeared. (*Kanhaiya Lal, J.*) BINDESWARI PRASAD TEWARI v. HANUMAN PRASAD TIWARI. 22 A. L. J. 65 : L. R. 5 A. 95 : 79 I. C. 640 : 1924 All. 445.

DECCAN AGRICULTURISTS' RELIEF ACT, S. 2—Agriculturist—Test of—Joint family. MULJI PURUSHOTTAM v. GOVERDHANDAS. 76 I. C. 148.

—S. 2—Agriculturist — Test of—Joint family.

NARAYAN BAPU LAL v. SONU SINGH. 76 I. C. 659.

—S. 2—Agriculturist — Definition of—Limitations.

The definition of "agriculturist" in S. 2 of the Dekhan Agriculturists Relief Act is not limited to the judgment debtor being an agriculturist at the date of the suit or of the decree, but includes any stage of the proceedings. (*Kennedy, J. C., Raymond and Bilaram, A.J.Cs.*) HIRIOMAL v. HAZARI SINGH. 78 I. C. 583 : 1925 Sind 49.

—(XVII OF 1879), Ss. 2, 10-A and 20—Applicability of—Who is an agriculturist—Transaction entered into before the Act came into force.

Where the Deccan Agriculturists Relief Act is extended to a particular district, S. 10-A of the Act applies to transactions entered into before that date by an agriculturist provided the question arises after the extension of the Act. Where the provisions of Ss. 2 and 20 of the Deccan Agriculturists Relief Act, 1879, are extended to a particular district, a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of the district or ordinarily engages personally in agricultural labour within those limits is an agriculturist within the meaning of S. 2 of the Act. (*Marten, Pratt, Coyajee, Shah and Crump, JJ.*) GANPAT CHANDRABHAN v. TULSI RAMCHANDRA. 48 Bom. 214 : 81 I. C. 284 : 26 Bom. L. R. 118 : 1924 Bom. 219.

—S. 3—Agricultural income—Jaghirdar—Income derived from assessment of lands.

The Deccan Agriculturists Relief Act never intended that a Jaghirdar relying entirely upon the income derived from the assessment which would be recovered by the village officers from occupants or tenants, should be considered as an agriculturist earning his livelihood from agriculture within the meaning of the Act. Consequently if a part of his income is derived from assessment that is not agricultural income. (*Macleod, C. J. and Shah, J.*) MUKUNDKRISHNA GOVIND KRISHNA v. MOHANLAL. 26 Bom. L. R. 620 : 1924 Bom. 514.

—Ss. 3 (Y) & (z) & 15 (b)—Consent decree—Execution—Instalment—If can be ordered.

In the case of suits falling under clauses (y) and (z) of S. 3 Deccan Agr. Relief Act, an agriculturist if the decree is a consent decree can apply

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to the court for an order under S. 15-B to grant instalments in execution not provided for in the decree. But the executing court cannot reduce the actual amount payable or rate of interest fixed. (*Kennedy, J. C. and Madgorkar, A. J. C.*) SANGATMAL LILARAM v. JAN MAHOMED.

79 I. C. 553.

—Ss. 3 (w), 7 & 12—*Suit against agriculturists—Plea of status not raised—Ex parte decree—If open to attack in the execution.*

When the defendants in a suit fail to set up they are agriculturists and an *ex parte* decree is passed against them, they cannot in execution raise the plea and challenge the decree. (*Bilaram, A. J. C.*) LAWRENCE PHILLIPS & Co. v. NAZARETH.

78 I. C. 806 : 1925 S. 86.

—S. 15-B—*Instalments—Ex parte decree—Subsequent order for instalments.*

Where an *ex parte* decree has been passed it is open to the defendant to show in execution proceedings that he was an agriculturist at the date of the decree and claim instalments. (*Macleod, C. J. and Crump, J.*) RUDRAPPA SANVIRAPPA v. CHANBASAPPA MALLAPPA.

26 Bom. L. R. 153 : 80 I. C. 162 : 1924 Bom. 305.

—S. 18-D—*Suit under—Existence of mortgage in dispute.*

A suit for accounts or for redemption under S. 18-D of the Bombay Dekhan Agriculturists Relief Act will not lie where the existence of the mortgage is in dispute between the parties. (*Macleod, C. J. and Shah, J.*) KRISHNAJI SONJI GAWADE v. SADANAD MAHADEV THAKUR.

26 Bom. L. R. 341 : 80 I. C. 763 : 1924 Bom. 417.

—Ss. 57, 61 and 63-A—*Document passed by agriculturists—Formalities—Registration—Rules under the Act, Rule 23.*

The Kabuliyat in question was passed in 1917 by three agriculturists. It was written and executed before the Sub-Registrar of the place as required by the Deccan Agriculturists' Relief Act, 1879. It was executed in favour of the plaintiffs who were represented by their vahiavadar before the Sub-Registrar. The vahiavadar alone signed the declaration required by Rule 23 framed under S. 61 of the Act. In a suit on the document, it was objected that the document was not validly registered as the persons in whose favour it was passed did not appear at the time of execution before the sub-registrar. *Held*, that the document was validly registered. Under S. 57 of the Deccan Agriculturists' Relief Act the persons in question were not all bound to appear before the Sub-Registrar. (*Macleod, C. J. and Crump, J.*) SHRIPATHI LAXMAN v. BALVANTRAO.

26 Bom. L. R. 149 : 80 I. C. 274 : 1924 Bom. 345.

DELAY—Defence to suit for specific performance—Nature of plea—When allowed. See SPECIFIC PERFORMANCE

82 I. C. 105.

DIVORCE—Adultery of wife—Liability of Co-respondent for damages. See DAMAGES.

46 M. L. J. 282.

—Decree for judicial separation and permanent alimony—Resumption of co-habitation—Effect.

DIVORCE, S. 2.

Where subsequent to a decree for judicial separation and permanent alimony, the parties resume cohabitation, the decree is annulled thereby and does not revive on subsequent separation. (*Beashy, J.*) ELLEN MA NOO v. WILLIAM PO THIT.

2 Rang. 163 : 1924 Rang. 314.

—Grounds for—Adultery—Proof of unknown respondent—Named Co-respondent—Non-access—Proof of—Domicile in India.

Unless it is shown that the parties to a divorce petition are domiciled in British India, the Indian Divorce Act gives the High Court no jurisdiction to hear the petition. That is an allegation which ought to be contained in every divorce petition. Where there is no evidence of adultery except the submission of the respondent that she had a miscarriage after she had become pregnant by some one other than her husband, a decree for divorce cannot stand.

Per *Marlon, J.* :—Where petition for divorce is founded solely on an allegation of adultery with the co-respondent which was held not proved, the petition must be dismissed. Where a petition for divorce is founded on adultery with some person or persons unknown, the ordinary practice is that leave to dispense with a named co-respondent must first be given by the Court before relief can be granted on such a petition. It is permissible for spouses to deny sexual intercourse when in fact they are living together but the Court will scrutinize that evidence with great care. (*Macleod, C. J. and Shah, J.*) HEWSON v. HEWSON.

26 Bom. L. R. 467 : 1924 Bom. 397.

DIVORCE ACT (IV OF 1869) S. 2—Christianity—Person professing—Meeting—Ex-communication by sect or church to which a Christian belongs—Effect—Hindu Law—Marriage—Dissolution—Conversion of either party to Christianity—Effect—Native Converts Marriage Dissolution Act XXI of 1886, PARKIAM SOLOMON v. CHELLIAH PILLAI.

1924 Mad. 18.

—Ss. 2 and 7—Persons domiciled in England—Power of Indian Courts to grant divorce.

76 I. C. 597.

—Ss. 2, 3, 7 and 10—Divorce—Jurisdiction of Indian Courts—Residence—Domicile—Powers of Indian Legislature—Divorce Act not ultra vires.

The Indian Legislature when enacting the Indian Divorce Act of 1869 conferred jurisdiction on Courts in India to dissolve marriages between persons not domiciled in India but who satisfy the conditions laid down in the Act. *Bona fide* residence in India confers jurisdiction on Indian Courts in the matter of divorce. The Indian Legislature had power under the Indian Councils Act of 1861 to confer such jurisdiction.

The expression "resides" in S. 2 of the Indian Divorce Act was used in its ordinary sense and was not intended to mean domiciled. "Residence" and not "domicile" is the test of jurisdiction in a suit for divorce under the Indian Divorce Act. *Keys v. Keys* (1921) P. 204 : 3 C. W. N. 250 : 40 C. 215 : 64 P. R. 1900 : 47 P. R. 1911, *Ref.* (*Shadi Lal, C.J., Scott-Smith, Le Rossignol, Harrison and Fforde, JJ.*) LEE v. LEE.

15 Lah. 47. 81 I. C. 686 : 1924 Lah. 513

DIVORCE, S. 7.

—S. 7—*Domicile of choice—Residence and intention*

A domicile of choice can only be acquired by residence coupled with an intention of permanent or definite residence. Mere residence by itself will not be sufficient. It takes far less to revile a domicile of origin than to acquire a domicile of choice. Where the domicile of the petitioner was English.

Held, the Rangoon High Court had no jurisdiction to grant divorce. (*Robinson, C. J., May Oung, and Bursley, JJ.*) JONES v. JONES. 1 Rang. 705 : 79 I. C. 719 : 1924 Rang. 193.

—S. 16—*Kachin Christian—Apostasy after marriage—Living with Shan woman treating first wife as lesser wife—Cruelty.*

A Kachin Christian after marriage apostasized and openly lived with a Shan woman and refused to allow his Christian wife to live in the house except in the capacity of a lesser wife. *Held*, it amounted in law to cruelty and when coupled with adultery was good ground for divorce. (*Young, O. C. J., May Oung and Park, JJ.*) NANG MUN v. LABYA NAW. 3 Bur. L. J. 9.

80 I. C. 79 : 1924 Rang. 262.

—S. 17—*Divorce—Christians at the time of marriage—Reversion of husband to animism—Cruelty—Taking of second wife—Discretion.*

The parties to a divorce proceeding were Kachins and Christians at the time of marriage. They were married according to Christian rites. Subsequently the husband proceeded to live with a Shan woman named Ma Tin. The petitioner (wife) went and stayed with the husband for nine days and the petitioner and Ma Tin quarrelled and the petitioner was assaulted and ill-treated. She however continued to live in the house and finding that she was expected to live as the lesser wife and being unable to bear the indignity, she left the house for good. It was found that there had been desertion by her husband prior to her return to his house.

Held (1), that the prior desertion by the husband had been condoned by her return to his house; that the mere change of religion subsequent to the marriage was not a ground for divorce nor was mere change of religion coupled with adultery; and that the husband must have changed his religion and gone through a form of marriage with some other woman to furnish a ground for divorce. Where the husband refuses to allow his wife except under the orders of his mistress and the wife lives apart, it amounts to desertion by the husband. (*Young, O. C. J., May Oung and Carr, JJ.*) MAUNG MUN v. LABYA NAW. 2 Rang. 193.

—Ss. 18 and 19—*Suit for nullity—Lunacy—Effect of—Proof required.*

Where a person wants to have a marriage declared null and void on the ground of lunacy, it is not sufficient for him to prove that he was eccentric or deficient to a certain extent merely in his mental capability but it must be shown his whole mental being was so affected that he was incapable of appreciating not necessarily the nature of the act but its validity. (*Kennedy, J. C.*) G. E. G. R. v. E. M. R. 79 I. C. 535 : 1925 S. 95.

EASEMENT.

EASEMENT—*Abandonment of—Right of way—Non-user—Lapse of time—Presumption.*

It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him and the intention in him which either the one or the other indicates, which are material in considering the question whether or not an easement has been abandoned. The presumption of abandonment cannot be made from the mere non-user. There must be other circumstances in the case to raise that presumption. A mere suspension of the exercise of the right is not sufficient to prove an intention to abandon it. But a long continued suspension may render it necessary for the person claiming the right to show that some indication was given, during the period that he ceased to use the right, of his intention to preserve it. The question of abandonment of a right is one of intention to be decided on the facts of each particular case. It may be taken as settled law that, while mere non-user is not sufficient to amount to abandonment, it is a fact to be taken into consideration with the other facts and circumstances of the case, and it is from all these facts that the Court has to decide whether or not the clear intention to abandon can be inferred, or is indicated. (*Robinson, C. J. and Brown, J.*) CHRISTOPHER v. J. A. COHEN. 3 Bur. L. J. 297 : 2 Rang. 534 : 1925 Rang. 137.

—Implied grant—*Portion of property conveyed—Effect.*

Where a portion of a property is sold away to another, the vendee will acquire all those easements over the portion reserved which are necessary for the reasonable enjoyment of the tenement granted. The doctrine of implied grant of easements upon severance of tenements is in accord with justice, equity and good conscience. (*Moti Sugar, J.*) FAIZ MAHAMMAD v. LATIF. 1924 Lah. 724 (2).

—*Light and air—Obstruction—When actionable—Infringement of right—Easement of necessity—Right of way.*

In the case of ancient lights the easement which has been acquired is not measured by the quantity of light which was enjoyed during the period of prescription and there can be no infringement of that right unless it is shown that the obstruction is such as would amount to a nuisance.

It often happens that property is so situated that, unless the owner is permitted to make use of his neighbour's land, the property would be unusable and worthless. In cases of this kind the law generally steps in and provides the owner of the otherwise useless property with the easement he wants, because of the necessity he has for it. But it is not in every case in which the property is useless without an easement that the law provides the owner with an easement of necessity, for such easements must arise under an implied grant of the right and if a grant of the easement cannot be implied, no easement of necessity is given by the law: the easement is not supposed to be given by the law, like a natural right, but by the owner of the land wherein it is exercised. *Held*, that in the case on hand the questions to be considered in determining whether plaintiff had made out a

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right to an easement of necessity were (1) whether it was absolutely necessary for the plaintiff to enter on the defendant's land to effect repairs to his wall, (2) whether on the date of the sale of the house to the plaintiff his vendors were the owners of the land on which the easement was sought to be imposed. (*Plumer, O. C. J. and Ramaswami Aiyangar, J.*) **RUDRAPPA v. SOMASEKHARIAH.**

2 Mys. L. J. 226.

——— Natural right—Trees—Damages caused by shade—Liability. 1923 Nag. 69.

——— Novel right—Right to rear fish in another's tank.

The right of one person to rear fish in another's tank seems to be quite a novel right which a Court of law cannot recognize. (*Newbould & Ghose, JJ.*) **CHAND MIA MUNSHI v. TUKAMIA.**

28 C. W. N. 516.

80 I. C. 805 : 1924 Cal. 667.

——— Obstruction to light and air—Injunction if proper relief.

There can be no doubt that any act by the defendants which results in obstructing the free access of the light and air to which the plaintiff is entitled is *prima facie* an injury of a serious character for which compensation in money would hardly be an adequate relief. In cases of this nature injunction is the rule and damages the exception. 9 I. C. 417 Foll. (*Moti Sagar, J.*) **JAWAHAR SINGH v. SEWA SINGH.**

5 Lah. L. J. 487 : 79 I. C. 572 : 1924 Lah. 97.

——— Origin of—Lost grant—Presumption from long user—Way of necessity—Inconvenience. 1924 Cal. 363.

——— Quasi easements—What are—Joint wall—Right of lateral support.

Where joint property is divided it carries under the law such easements as are necessary for the reasonable use and enjoyment of the premises allotted. One such is the right of support and it is applicable to the case of a partying wall which belongs entirely to one of the owners but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. Nature of quasi easements discussed. (*Suhrawardy and Chotsner, JJ.*) **BHOLA NATH DUTTA v. RADHANATH BISWAS.**

51 Cal 789 : 78 I. C. 908 : 1924 Cal. 844.

——— Right of burial on another's land—Not to be recognized.

By prescription a right to bury the dead in land belonging to other persons cannot be acquired. (*Martineau, J.*) **MANGAT RAM v. SIRAJUL HASAN.**

6 L. L. J. 130 : 78 I. C. 152 : 1924 Lah. 492.

——— Right to drain water on lower lands. **MOKSODALI v. MA HLI.**

1924 Rang. 86.

——— Right of way—Prescription—Proof of claim. 1924 Cal. 359 (2).

——— Right of way—Modes of acquisition—Nature of right.

An easement of way must be a definite right of way over the servient tenant. It can be acquired

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either by prescription by open user for a period of 20 years or independently of the Easements Act by the presumption of a lost grant. (*Kinkhede, A. J. C.*) **WASUDEO v. SHANKAR.**

7 N. L. J. 232.

EASEMENTS ACT, S. 7 (III. i)—Infringement of a natural right, by the occupier on lower level raising bunds to keep out water.

Where two adjoining occupiers erected continuous bunds to keep out flood water, for the protection of their lands, and on account of the neglect of one of them, the other raised a higher bund, to keep out the natural drainage as well as excess water coming through the breach, the party in default sued for an injunction restraining the other from raising the bund, *Held*, (1) that the plffs. not having caused more than the natural flow of water on the defendant's land, it is proper to direct the defendant to restore his bund to its original level.

(2) The owner of the higher land is entitled to let the water run off into the lower land, by whatever means nature intended, that it should, and his right is infringed by any means which prevent the water so doing which is recognised by Ill. (i) to S. 7 of Indian Easements Act. *Banoo Kohamed Husain v. Manssoolal Dowlat Chand.* 3 B. L. T. 77 followed. (*Lentaigne and Carr, JJ.*) **MA HLI v. MOKSODALI.**

2 Rang. 450 :

3 Bur. L. J. 217 : 1925 Rang. 58.

——— S. 13 (b) — Easement of necessity—Existence of vents—Continuous and non-continuous—Distinction. **MORLA GANGULU v. THATA JAGANNADHAM.**

76 I. C. 331.

——— Ss. 13 (b) and 19—Scope of—Use of door—Injunction—Right of way.

S. 13 (b) of the Easements Act relates to a continuous easement which a right of way is not, and under S. 19 it is only when the dominant heritage is transferred the easement passes to the transferee. That section has no application where no easement at all existed while the two tenements belonged to the same person before the sale of one of them. The mere fact that the defendant has expressed his willingness to permit the use of the door of his house whenever there was proper occasion, does not justify the court in granting an injunction that the defendant should not prevent the members of his community and other desirable persons occupying the house from using the doorway. (*Martineau, J.*) **GANGA RAM v. SITA RAM.**

6 Lah. L. J. 176 : 1924 Lah. 488.

——— S. 13 (b)—Sale of portion of land—Irrigation facilities—Easement of necessity.

Where a portion of land is sold, an easement apparent, continuous and necessary for enjoying the portions severed from the transferor's land will pass to the transferee unless a contrary intention is expressed in the instrument of the transfer. Where the lands sold are wet lands, and prior to the transfer they were irrigated by a channel passing over the lands still remaining with the transferor, unless there is a stipulation to the contrary at the time of the transfer, the transferee is entitled to the same facilities for irrigation that used to be attached before. Where

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such a right is claimed it is no answer to say that some other irrigation supply may be obtained. 45 M. L. J. 724 foll. (*Spencer, O. C. J.*) SOUNIRAJA NAIDU v. RAJAGOPALAN. 20 L. W. 245 : (1924, M. W. N. 678 : 81 I. C. 833 : 47 M. L. J. 302.

———S. 13 (f)—*Right of Easement—Rain water and sewage water—Continuous Easement.*

The plaintiff claimed an easement in respect of the flow of rain water from his courtyard and sewage water coming from a latrine. It was found that both the rain water and the sewage water joined and then flowed into a masonry drain passing through defendant's house. *Held*, that the drain was a continuous easement in so far as the flow of the rain water was concerned, no act of man being needed for the purpose. But so far as the flow of water from the latrine went, it required the act of man and to that extent the easement to the flow of such water was not a continuous easement. (*Mukerjee, J.*) SAJJID-UN-NISA BIBI v. HIDAYAT HUSAIN. 22 A. L. J. 425. L. R. 5 A. 291 : 60 I. C. 896 : 1924 All. 748.

———S. 15—*Government land—Acquisition of easement—Period.*

In order to establish a right of easement over land belonging to Government, a plaintiff must prove user of the kind mentioned in S. 15, Easements Act for a period of at least 62 years. If he fails to establish that, he cannot establish an easement against a person who is merely in occupation of that land, for a less period. It is not possible to have an easement over piece of land against A and not against B. (*Ryves, J.*) NARAIN DAS v. BEHARI KAHAR. 1924 All. 724.

———S. 18—*Customary easement—Right of way—Zemindar's right to close.* 1924 All. 159.

———S. 28—*Ancient window—Light and air—Extent of.*

The owner of the servient tenement could reduce the access of light and air to the window of a dominant owner provided he did not so diminish it as to make it less than what the owner of the dominant tenement required for the ordinary purposes of inhabitation or business according to the ordinary notions of mankind having regard to the locality and surroundings. (*Mears, C. J. and Piggott, J.*) GUR PRASAD MUKERJI v. BISHUN DAT. L. R. 5 A. 262 : 79 I. C. 349. 1924 All. 816.

———Ss. 33 and 35—*Easement—Right to free air and light—Windows—Injury to right when actionable.*

Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is considered substantial within the meaning of Sections 33 and 35 of the Easements Act unless it materially diminishes the value of the dominant heritage and interferes materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he might have done previously to the disturbance.

The plaintiff has, therefore, no absolute right to protect his window against obstruction. He has a right to the access of sufficient light and air

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through his window, but if there is already a sufficient access of light and air to his house through other openings therein and the obstruction caused to the window does not materially or in any measure interfere with the sufficiency of the access of such light and air, the plaintiff is not entitled to any relief. (*Kanhaiya Lal, J.*) DURGA PRASAD v. LACHMI NARAIN. 22 A. L. J. 314 : L. R. 5 A. 221 : 78 I. C. 563. 1924 A. 394.

———S. 52—*License, if transferable.*

A license is ordinarily only a personal right and carries with it the incident of non-transferability. The mere fact that the license had become irrevocable by the erection of buildings does not necessarily imply that the licensee acquired a right to transfer the license or the building. (*Walsh, A. C. J. and Ryves, J.*) KALLU SHAH v. RAHEEM BAKSH. L. R. 5 A. 582 : 1924 All. 825.

———S. 59—*Erection of buildings by licensee—Revocation of license by transferee.*

Where a licensee erects buildings of a permanent character on the land, it is not open to a transferee from the grantor of the license to revoke it. 28 A. 741 : 13 A. L. J. 1 *ref.* (*Neave, J.*) GAURI SHANKAR v. MITHAI. L. R. S. A. 5 A. 400 : 1924 All. 750.

———Ss. 59 and 60—*License—Revocation—Transfer of property—Compensation—Right to.*

Where a license to erect a hut is given and in pursuance thereof such structure is erected, a subsequent transfer of the property does not operate as a revocation of the license unless it is incompatible with the retention of the license by the licensee. The transferee can neither revoke the license nor claim compensation if in pursuance of the license a work of a permanent character has been erected. (*Predeaux, A. J. C.*) VITHALDAS v. GOMA. 20 N. L. E. 60 : 79 I. C. 173. 1924 Nag. 254.

———S. 60—*License when revocable—Licensee whether liable to ejectment on denying licensee's title.* MT. DURGA v. BABU RAM. 75 I. C. 596.

EJECTMENT—*Suit for—Identification of land.*

A suit in ejectment should not be dismissed simply because the whole of the suit land is not identified as pleaded in the plaint.

In a suit to eject the defendant from a certain area constituting a single number the portion in which the defendant had acquired occupancy rights was identifiable merely by a reference to the old map of the village. *Held*, that the res. of the suit should be decreed. (*Fremantle, S. M. and Burn, J. M.*) THAKUR PRASAD v. KOLAHAL TELI. L. R. 5 A. 43 (1) (Rev.)

———Proof of title—Effect. 77 I. C. 905.

———*Suit for—Proof of title.*

In an ejectment suit, the plaintiff should succeed on the strength of his own title and not be the weakness of the case of the deft. (*Mukerjee and Sukrawardy, JJ.*) LUKHAN CHANDRA MONDAL v. TAKIM DHALI. 80 I. C. 357.

89 C. L. J. 90 : 28 C. W. N. 1033 : 1924 Cal. 558.

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———*Suit for—Tenants in possession—Parties to suit.*

It cannot be said as an abstract proposition of law that where land was in the occupation of tenants, the landlord has no right to maintain a suit for possession against a trespasser or if land is in the occupation of the trespasser's tenants he cannot bring a like suit against him alone. The question whether a suit for possession is maintainable by a landlord against a rival claimant depends very much on the status of the tenants. The tenants of the latter need not be made parties in the suit, (*Suhrawardy and Choltner, JJ.*) KALI PROSANNA BHADURI v. RANI HEMANTA KUMARI DEBI.

1924 Cal 977.

———*Title—Legatee from Hindu widow having a limited interest in husband's property—Not entitled to eject trespasser. See HINDU LAW, Widow,*

46 M. L. J. 560.

———*Title—Proof of — Onus — Gora lands — Possession—Evidence of.*

In a suit in ejectment, the onus is on the plaintiff and he must make out both that he had title to the land in suit and that he was in possession within 12 years of the date when the suit was instituted and if he fails to prove his possession then, notwithstanding his title it being admitted that defendant was in possession at the date of suit his suit must fail. But the nature and quality of the proof required to satisfy the burden cast upon the plaintiff may vary in different classes of cases. For example where the land is jungle land or land under water where no evidence of actual user in the ordinary sense can be expected to be adduced, then no doubt the presumption that possession follows title may be called in aid to supplement the absence of evidence upon the question of possession because mere non-user does not in itself deprive a party of his title to his land. It is necessary both that he should have lost his possession and that somebody else should have come into possession and remained there adversely to him. In the case of *gora* lands (periodically cultivated once in four or five years) although proof of certain acts of user might reasonably be expected, the evidence upon the point must necessarily be more difficult to procure than in the case of lands continually under cultivation. (*Miller, C. J. and Mullick, J.*) RAMNATH SARANI v. GOBARDHAN PANDEY.

3 Pat. 258 : 81 I. C. 669 : 1924 P. 629.

———*Title—Proof of—Weakness of defendant's title—Not to be considered.*

In a suit for ejectment the plaintiff must succeed on the strength of his own title and is not assisted by any weakness, real or apparent, in the case for the defendant. (*Mookerjee and Suhrawardy, JJ.*) LAKSHAN CHANDRA MANDAL v. TAKIM DHALLI.

39 C. L. J. 90 : 28 C. W. N. 1033 : 80 I. C. 357 : 1924 Cal. 558.

———*Title—Proof of—Defence of permanent tenancy—Onus.*

When a plaintiff seeks to eject a defendant from possession on the ground that the latter is his tenant, whose tenancy has been terminated, he must prove not only that the defendant is his

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tenant as alleged, if that is denied but also his right to eject. In order to prove his right to eject he must necessarily show that the tenancy is a terminable one and has been validly terminated. This onus is unaffected by any defence of permanent occupancy that the defendant may set up but fails to prove. The plaintiff in a suit for ejectment must first prove his title to eject before the onus is shifted to the defendant to prove that he has a permanent right of occupancy. 1923 M. W. N. 755 Ref. (*Spencer and Kumaraswami Sastri, JJ.*) BOLLAPRAGADA SUBBARAYADU v. NARASIMHA RAO.

(1924) M. W. N. 553 :

82 I. C. 623 : 1924 Mad. 907 : 45 M. L. J. 558.

———*Trespasser—Possessory title.*

A person who ejects another from land in his possession forcibly and without any shadow of a title can himself be ejected by the latter even if the latter's title is defective. (*Hallifax, A. J. C.*) MAROTI KUNBI v. SITARAM.

78 I. C. 722 : 1925 Nag. 32.

ELECTION—Remedies—Suit against one set of persons—Subsequent suit against another set of persons on the same cause of action—When barred. See ESTOPPEL.

47 M. L. J. 85.

ELECTRICITY ACT (IX OF 1910) Sch I, Cl (6) (2) (c)—Seals of cut out not in good order—Discontinuance of electric supply.

6 Lah. L. J. 86 : 75 I. C. 456 : 1924 Lah. 142.

———S. 22, and Sch. Cl. (VI) Paras 4 & 5 — Transfer of electric connection — Written requisition—Substitution of new connection for old one.

A written requisition is necessary not merely where a consumer asks for supply of electricity in the first instance, but also where he is claiming the supply as a substitute for the existing supply. The fact that it was the practice of the Electric company not to insist upon such written requisitions cannot alter the law. (*Shah, A. C. J. and Fawcett, J.*) BHAGVANJI SANKLESHVAR v. THE AHMEDABAD ELECTRICITY CO. LTD.

26 Bom. L. R. 1206 : 1925 B. 120.

ENCUMBERED ESTATES ACT—*Estates in involved condition—Income not sufficient to pay interest on the debt—Government's policy.*

Though it is open to a proprietor to sell a portion of the Estate, there is no reason why the estate should be protected under the Encumbered Estates Act, if the debts can be paid by a sale.

The present policy of Government is to release all estates, the scheme of which are not satisfactory. It is impossible to protect under the Encumbered Estates Act any new estates unless satisfactory schemes can be framed for the payment of their debts. (*Foley, J.*) MADAN MOHAN SINGH. *In re.*

2 Pat. L. R. 225 (Cr.)

EQUITY—Grantor derogating—Applicability to B. T. Act. MT. SHEORAJI KUAR v. DHANI MIAN.

75 I. C. 790 : 3 Pat. 1 : 1924 P. 1.

———*Parties in pari delicto—Help of court.*

Where a person transfers his property to another for an illegal purpose and such purpose is not carried out, he or his heirs cannot get the property back without proving that the purpose never

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got beyond the stage of intention. The onus of proving it is on them, the maxim *in pari delicto potior est conditio possidentis* applying. (*Baker, J. C.*) MAN SINGH v. KARAN SINGH.

1924 Nag. 200.

ESTOPPEL—Admission made under a mistake of law.

An admission made by a thekadar in a previous case that he was an ex-proprietory tenant made on a misunderstanding of the law cannot create an estoppel against him. (*Fremantle, S.M. and Burn, J.M.*) SARJU RAM v. BHAROSA RAM.

L. R. 5 A. 43 (2) (Rev.).

— — — — — **Compromise — Title — Recognition of — Proceedings under S. 145.**

76 I. C. 527.

— — — — — **Conduct.** MATHURO PRASAD v. ANANDI KUNWAR,

1924 A. 63.

— — — — — **By conduct — Tenant-in-chief — Disappearance — Omission of sub-tenant to get himself recorded as tenant — Effect of — Conduct of zemindar.**

The tenant-in-chief of a holding disappeared and the recorded sub-tenant took no steps to have his name recorded as tenant-in-chief and thereby led the zemindar into a sense of security. Held, that the subtenant could not thereafter take advantage of his own neglect to correct the papers. (*Fremantle, S. M. and Burn, J. M.*) JAGDEO SINGH v. KAWALPAT CHAUBE.

L. R. 5 A. 9 (Rev.).

— — — — — **Contract — Consideration — Undertaking by parties.**

An undertaking may operate as an estoppel though in the absence of consideration it cannot amount to a contract. Situations may arise in which a contract should be held to be an estoppel, as in cases where only an inadequate right of action would exist in favour of the injured party if estoppel were not allowed. In such a case estoppel may sometimes be available to prevent fraud. (*Newbould and Ghose, J.J.*) SHAILESH CHANDRA GUHA v. BECHAI GOPE.

40 C. L. J. 67 : 1925 Cal. 94.

— — — — — **Contract for Sale of land — Conveyance not executed — Acceptance of advance whether creates title to purchaser.**

Where there is a contract for sale no decree for possession can be given unless the title is completed by a registered deed and an agreement between parties to sell the land cannot act as an estoppel so as to do away with the necessity for a registered deed of transfer where the statute expressly requires it *Dharam Chand v. Marji Sahu* 16 C.L.J. 436 ; *Ma-hara Mohan Saha v. Ramkumar Saha* 20 C. W. N. 370 foll. *Duckworth, J.*) MAUNG POYIN v. MAUNG TET TER.

2 Rang. 459 : 1925 Rang. 68

— — — — — **Execution sale — Purchaser — Bound by the same estoppel as the Judgment debtor.**

The purchaser at the execution sale acquires the right, title and interest of the judgment-debtor and does not consequently occupy a position of greater advantage than the judgment-debtor does in the application of the doctrine of

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estoppel. (*Mookerjee and Cuming, J.J.*) NANDI LAL AGRANI v. JOGENDRA CHANDRA DUTTA.

28 C. W. N. 403 : 39 C. L. J. 222 : 82 I. C. 297 : 1924 Cal. 881.

— — — — — **Execution proceedings — Endorsement of agent not to sell — Effect.**

An endorsement by an agent of a decree holder on a notice of sale that a property need not be sold does not estop the decree holder from executing the decree against the property. (*Jackson, J.*) PARTHASRATHY APPA RAO v. MAHAMMAD ABDUL WAHEB.

82 I. C. 434 : 1925 Mad. 270.

— — — — — **Election of remedies — Suit against one person when a bar to a suit against another on the same cause of action.**

Where a plaintiff has the choice of suing two persons on the same cause of action, it may happen that if he elected to sue only one of them and obtained a decree against him, he would be estopped from suing the other. But if he obtained a decree on a mortgage under the belief that his mortgagor acted in a personal capacity but afterwards finds he was acting in a fiduciary capacity, he is not debarred from suing the right person.

Per *Ramesam, J.*—A wrong suit followed by a wrong decree never bars a correct suit. (*Ramesam and Jackson, J.J.*) ANMAKANNU AVI v. MURUGAYYA ODAYAR.

20 L. W. 207 : 47 Mad. 850 : (1924) M.W.N. 623 : 1924 Mad. 716 : 47 M. L. J. 85.

— — — — — **Family arrangement — Person taking benefit under — Not entitled to impeach it subsequently.** See HINDU LAW, FAMILY ARRANGEMENT.

5 Pat. L. T. 375.

— — — — — **Foreign judgment — No service of summons — Execution of decree — Submitting to decree — Effect — Suit to declare sale null and void — Maintainability.** See FOREIGN JUDGMENT.

26 Bom. L. R. 392.

— — — — — **Gift — Donee if can question ownership.**

The donee of property is not estopped from contending that the property does not belong to his donor but was all along his own property. (*Martineau, J.*) RADHA KISHEN v. MOOL CHAND.

76 I. C. 128 : 1925 Lah. 27.

— — — — — **Inconsistent pleas — Different litigation — Party estopped from setting up inconsistent pleas.**

It is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent. 5 C. L. J. 95 : 27 C. L. J. 535 : 35 C. L. J. 58. Rel. This wholesome doctrine applies not only to successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided that the second suit grows out of the judgment in the first. (*Mookerjee and Suhrawardy, J.J.*) DWIJENDRA NARAYAN ROY v. JAGES CHANDRA DE. 39 C. L. J. 40 : 79 I. C. 520 : 1924 Cal. 600.

— — — — — **Inconsistent pleadings — Claim as mortgagee — Subsequent claim as tenant-in-chief.**

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Where the defendant, a mortgagee from an occupancy tenant pleaded that his status was that of a mortgagee in a suit in ejectment, he could not later on in a subsequent litigation allege that at the time of the former ejectment suit he was himself a tenant-in-chief and had acquired occupancy rights by reason of his occupation for twelve years. (*Fremantle, S. M. and Burn, J. M.*) *RAM PRATAP PANDEY v. SHEO LAL.*

L. R. 5 A. 243 (Rev.)

———*If can validate void transaction.*

The plea of estoppel being rule of equity, cannot have the effect of validating a void contract. (*Wazir Hasan and Neuze, A. J. C.*) *DWARAKA PRASAD v. NAZIR AHMED.*

11 O. L. J. 219 : 78 I. C. 850 : 1925 Oudh 16.

———*If can override specific provision of law.*

The general law of estoppel cannot be allowed to override specific provision of law such as that contained in O. 21, R. 2 (3), C. P. Code. (*Kennedy J. C. and Raymond, A. J. C.*) *MOTOMMAL v. TEOMMAL.*

79 I. C. 89 : 1925 S. 140.

———*Jurisdiction of Court—Small cause suit filed on the original side—Trial without objection—Plaintiff not entitled to object to Jurisdiction afterwards.* See JURISDICTION.

10 O & A. L. R. 1826.

———*Landlord and tenant—Standing by—What amounts to—Execution of buildings.*

1924 Cal. 156.

———*Landlord and tenant—Ejectment—See AGRA TENANCY ACT. S. 34. L. R. 5 All. 311 (Rev.)*

———*Landlord and tenant—When applies.*

A tenant by acquiescing in the payment of enhanced rent is not precluded from raising any objection under Sec. 29 of the Act. A claim for rent is a recurring claim and it is open to the tenant at any time to take an objection on the ground that the claim contravenes the provisions of the law. (*Dawson Miller, C. J. and Mullick, J.*) *W. H. MEYRICK v. DEEPA PANDAI.*

3 Pat. 825.

———*Lessor and lessee—Status of parties.*

39 C. L. J. 337.

———*Misrepresentation—Effect of—Proof of detriment if essential.*

Where the plaintiff was not induced to take any action, on the strength of a misrepresentation by the defendant, and the interest of the plaintiff did not suffer by such representation. Held, that estoppel did not arise. (*Fremantle, S. M.*) *LALTA PD. v. RAGHUNANDAN.*

L. R. 5 All. 321 (Rev.)

———*Nature of—When not allowed.*

1924 Mad. 177.

———*Plea—Nature of—When to be raised.*

Estoppel is a plea of mixed fact and law and must be raised in the trial court. (*Kinkhede, A. J. C.*) *HIRALAL v. TULSIRAM.*

80 I. C. 946 :

1925 Nag. 77.

———*Possession taken under a deed or with subsequent denial—Party estopped from impeaching deed or will.*

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If a man obtains possession of land claiming under a deed or will, he cannot afterwards set up another title to the land against the will or deed though it did not operate to pass the land in question, and if he remains in possession till 12 years have elapsed and the title of his testator's heir is extinguished, he cannot claim by possession an interest in the property different from that which he could have taken if the property had passed by the will or deed. (*Baker, J. C. and Hallifax, A. J. C.*) *JAGESHWAR v. PANDURANG.*

7. N. L. J. 82 : 78 I. C. 840 : 1924 Nag. 73.

———*By record—What constitutes—One of many points alone relied on by appellate court.*

When a case is taken from one court to another on appeal and is finally disposed of on a particular ground, that alone is a matter of estoppel by record, though in the court below many other grounds might have been relied upon. (*Rankin, and Mukerjee, JJ.*) *CHITPORE GOLABARI CO. LTD. v. GIRDHARI LAL SEROGI.*

78 I. C. 353.

———*Receipt of rent by successor in office*

———*No knowledge of nature of lease—Election. See T. P. Act, S. 35.*

78 I. C. 191.

———*Scope of—Clear proof essential.*

The estoppel must be very strictly interpreted and any point in doubt must be decided against the estoppel. (*Shadi Lal, C. J. and Le Rossignol, J.*) *NIHAL SINGH v. NARAIN SINGH.*

6 Lah. L. J. 45 : 80 I. C. 525 : 1924 Lah. 469.

———*Truth known to parties—Effect.*

75 I. C. 1022.

EVIDENCE.—*Admissibility—Objection to—Waiver—Objection on appeal.* *MT. BIBI KANIZ ZAINAB v. SYED MOBARAK HUSSAIN.*

1924 P. 284.

———*Account Books—Items entered by Munim before whom money was not paid.*

75 I. C. 812.

———*Admissibility—Suit different—Evidence in—Admission of, despite objection by defendant—Legality—Judgment based on such evidence—Setting aside of.*

Where on the application of the plaintiff the Court below used the evidence in another suit as evidence in the suit tried by it, though the application was opposed by the defendant, and passed a decree against him. Held, that the procedure was opposed to law and vitiated the whole trial. The decree was accordingly set aside and the suit remanded for fresh trial to be disposed of according to law. (*Ramesam and Reilly, JJ.*) *PERIGI VENKOBACHARLU v. RADHABAYAMMA.*

47 M. L. J. 640.

———*Admissibility—Admission of indebtedness by mortgage—Money decree—Purchaser—If bound.*

An admission of indebtedness by the mortgagor to the mortgagee is admissible as evidence against the purchaser in execution of a money decree against the former, as he is his representative in interest. (*Sulaiman and Gokul Prasad, JJ.*) *BIRBAL v. BEHARI.*

76 I. C. 815.

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—Admissibility—Objection to—Appeal.

Where a certain document is admitted in evidence without any objection in the trial Court, its admissibility cannot be questioned afterwards on appeal. (*Daniels, J.*) *BEHAN LAL v. AMIN CHAND*. L.R. 5 A 298: 79 I. C. 1029: 1924 All. 918.

—Admissibility—Failure to object in trial Court—Effect.

If no objection is taken in the trial court to the admissibility of evidence on the ground of improper proof, such objection cannot be raised in appeal. (*Baker, J. C.*) *THE ROHILKHAND AND KUMAON RY. CO. v. ZIHUS SYED ALVI*. 1924 Nag. 358.

—Admissibility—Omission to object—Effect.

Where a certain piece of evidence is not legally admissible, the omission to object to it, does not make it admissible. (*Mookerjee and Rankin, JJ.*) *JAGADISH CHANDRA DE v. HARIHAR DE*. 40 C. L. 39: 78 I. C. 219: 1924 Cal. 1042.

—Admissibility—Statement of age of witness in a deposition.

Statements of ages of witnesses at the head of depositions do not furnish evidence on the subject. 26 A. 108 ref. (*Mookerjee and Sukrawarthy, JJ.*) *LAKSHAN CHANDRA MANDAL v. TAKIM DHALL*. 39 C. L. J. 90: 80 I. C. 357: 28 C. W. N. 1033: 1924 Cal. 558.

—Agreement to pay dowry. *MT. HAFIZAN BIBI v. MT. SUBA BIBI*. 76 I. C. 948.

—Appreciation. *NABA KUMAR DAS v. RUDRA NARAYAN JANA*. L. R. 5 P. C. 25: 28 C. W. N. 559: 77 I. C. 141: 10 O. & A. L. R. 521.

—Approver—Corroboration—Accused seen in the company of approver before the offence—Lists of discovered articles—Production of stolen articles.

Evidence to the effect that the approver was seen in the company of the accused a few days before the dacoity cannot be regarded as material corroboration of the evidence of the approver to the effect that they joined him in the dacoity. Lists of articles discovered made by certain persons though admissible to refresh the memory of persons who made them are not themselves evidence to corroborate the evidence of the approver. It is necessary to prove that certain properties were produced by an accused person and that property was identified at the trial as having been stolen in the course of the dacoity. (*Scott, Smith, A.C.J.*) *HEZARA SINGH v. EMPEROR*. 6 Lah. L. J. 370: 82 I. C. 707: 25 Cr. L. J. 1347: 1924 Lah. 727.

—Confession—Extra judicial confession—Oral evidence as to—Weight of.

It cannot be said that in no case can an extra judicial confession, not reduced to writing, be held to be proved unless the court has before it

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the exact words used by the prisoner. The duty of the court, before which an extra-judicial confession, not incorporated in a document is relied upon, is to scrutinize the whole of the material before it, and then to decide whether there is sufficient evidence to prove the confession. A mere general statement to the effect that the prisoner had confessed is too uncertain a foundation to sustain a finding against him. The trial court ought to ascertain as far as possible, the very words spoken by an accused who is said to have confessed. There may be cases in which the evidence gives the substance, though not the actual words of the statement made by the accused and if that evidence is reliable, there is no rule of law which precludes the court from holding that the confession has been proved. (*Shadi Lal, C. J. and Fford, J.*) *NUR ALI v. EMPEROR*. 5 Lah. 140: 6 Lah. L. J. 208. 25 Cr. L. J. 914: 81 I. C. 530: 1924 Lah. 498.

—Conjectures not to be basis of judgment.

Conjectures do not take the place of evidence and a court of justice cannot base its decision on mere conjectures. (*Kinkhede, A. J.*) *TULSIRAM v. TUKARAM*. 1924 Nag. 363.

—Credibility—False entry in a register.

Where the question was as to the date of death of one L and the plaintiff appellants produced in support of their assertion, that L died on a certain day, an alleged private register in which the crucial entry was apparently interpolated among faded brown entries and was seen in bright blue ink.

Held, that the register was not of such a character as to enable the court to pronounce affirmatively that the entry in question was made at the date alleged. (*Lord Shaw.*) *RAMAKRISHNA RAO GARU v. SRIRAMULU*. 1924 P. C. 186. 46 M. L. J. 541.

—Credibility—Trial judge's opinion of witness when open to criticism in appeal. *MA THAN THAN v. MA PWA THAN*. 76 I. C. 63: 46 M. L. J. 334.

—Decree in favour of co-sharer—Partition between co-sharers and opponent. *NARESH NARAYAN ROY v. SECRETARY OF STATE FOR INDIA*. 77 I. C. 1048.

—Evidence—Witness—Credibility—Low status of witness is not sufficient to discredit him.

The mere fact, that the attesting witnesses to a will did not appear to be men of any status, is not sufficient to discredit their evidence, when nothing is suggested which would be sufficient to discredit them. (*Lord Carson.*) *WAMAN GANESH v. SARUBAI*. 19 L. W. 699: (1924) M. W. N. 445: 80 I. C. 641: 7 N. L. J. 126: 1924 P. C. 106.

—Handwriting—Court—Duty of—Signature—Dissimilarity.

A court of law ought not in the absence of any evidence, take upon itself the duty of comparing handwriting and pronounce judgment based

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merely on its own inspection. This is specially so in the case of signatures, where much depends on the position of the person, the way the paper was held, pen, ink and various other circumstances (*Newbould and Ghose, JJ.*) *GALSTAUN v. SONATAN PAL.* 78 I.C. 668

—Handwriting—Comparison of signature—Value of.

Comparison of handwriting is a hazardous and inconclusive proof and in the absence of expert evidence regarding the same should not ordinarily be the basis of a decision. (*Sanderson, C.J. and Chakravarty, J.*) *AMBIKA CHARAN BARNA v. NAKRESWARI DAS.* 29 C. W. N. 75 : 1925 Cal. 145.

—Hearsay—Loss of document—Proof.

To prove that a document had been lost, a party produced a registration copy and stated that another person had stated the original had been lost in a fire. That person was alive but was not examined. Held the statement was only hearsay evidence and was no proof of the loss. (*Devadoss, J.*) *KHELICHERLA KANDALA APPALACHARYULU v. VENKATRAMANUJACHARYULU.* 21 L. W. 67 : 47 M. L. J. 906.

—Identification parade—Evidence when admissible.

A witness's evidence of identification given in court should only be accepted if he identified the same persons whom he had previously picked out in the identification parade in jail. (*Scott Smith, J.*) *MOHNI v. EMPEROR.* 25 Cr. L. J. 1272 : 82 I. C. 280 : 1925 Lah. 137 (2).

—Identification parade—Lapse of time—Effect.

Evidence of identification of persons previously unknown after a number of months that certain persons took part in an attack is unreliable, unless there was a regular identification parade in which the witnesses picked out those persons from among others, especially where it is not stated that such persons bear any distinguishing marks by which they can be recognised. (*Marineau, J.*) *MAKHAN SINGH v. THE CROWN.* 1924 Lah. 722.

—Maps and surveys—Value of.

Maps and surveys made for revenue purposes are official documents prepared by competent persons with due publicity and after notice to parties interested. They are admissible as valuable evidence of the state of things at the time they were made. They are not conclusive but in the absence of evidence to the contrary are of much weight. (*Suhrawardy and Cholzner, JJ.*) *KALI PROSARNA BHADURI v. HEMANTA KUMARI DEBI.* 1924 Cal. 977.

EVIDENCE ACT, S. 3—Matters before it—Meaning of—Proof—What is.

The expression "matters before it" in S. 3, Evidence Act includes matters which do not fall within the definition of "evidence" as given in that section. Proof in strictness marks merely the effect of evidence. Difference of proof required in Civil and Criminal cases pointed out. (*Kinkhede, A.J.C.*) *BHAIRON PRASAD v. LAXMI NARAYAN DAS.* 1924 Nag. 385.

EVIDENCE ACT, S. 11.

—Ss. 6, 7, 8 and 34—Account books—Absence of entry if relevant.

The absence of an entry in an account book is a relevant fact, under either S. 7 or S. 8 or S. 11 of the Evidence Act, 10 Cal. 1024 Diss. 4 C. W. N. 207 Foll. (*Hallifax, A.J.C.*) *KASAM v. FIRM OF HAJI JAMAL.* 1924 Nag. 22.

—S. 8—Agent acting nefariously—Presumption.

It is a matter of common knowledge that brokers sometimes for the purposes of gain do resort to the nefarious system of entering into a transaction unauthorisedly in the expectation of its subsequent ratification, but it is a far cry that because an agent had been shown to be guilty of shady practice once, his evidence as to the circumstances under which the contract in suit was entered into should be entirely discarded. (*Raymond, A.J.C.*) *TYEBALLY ABDUL HUSSAIN v. MRS. JAMES, FINLAY & Co.* 1924 S. 105 (2) : 80 I. C. 969 : 17 S. L. R. 15

—S. 8—Raped girl—Statement to persons immediately after occurrence—If admissible.

A statement made by a girl in reply to inquiries made by by-standers that she had been ravished by the accused is admissible under S. 8. It is a strong piece of corroborating evidence also. (*Kinkhede, A.J.C.*) *SOOSALMAL BANIA v. EMPEROR.* 25 Cr. L. J. 124 : 82 I. C. 142 : 1925 Nag. 74.

—S. 11—Self serving statements are admissible where they make relevant fact highly probable or improbable or where they are res gestae (*Contra Mullick, J.*)—Evidence Act, S. 21.

Where the question is whether a person is a *benamidar* or real owner of property :

Per *Dawson Miller, C.J.*—Even self-serving statements made by the person are admissible under S. 11 if they render fact in issue highly probable or highly improbable.

Per *Mullick, J.*—Admissions made by the person in his own favour are not admissible.

Per *Foster, J.*—Where the statements are made by the person in the course of his instructions to his local agent who assists him in acquiring the property they are admissible as *res gestae* (*Dawson Miller, C.J. Mullick and Foster, JJ.*) *HARIHAR PRASAD v. KESHEO PRASAD.* 1925 Pat. 68 : 5 Pat. L. T. (Sup.) 1.

—Ss 11, 13 and 32 -- Documents between third parties—Recitals of boundaries—Admissibility in evidence.

A mere description of boundaries given in a document between third parties is inadmissible in evidence under Ss. 11 and 13 of the Evidence Act. Nor could the description of boundaries be said to be a statement against the proprietary interest of the person making it so as to bring it within the provisions of section 32 of Evidence Act. 14 C. L. J. 467 diss. (*Greaves and Chakravarti, JJ.*) *PRAMATHA NATH CHOWDHURI v. KRISHNA CHANDRA BHATTACHARJEE.* 28 C. W. N. 1092 : 1924 Cal. 1067.

—Ss. 11, 33 and 145 — Prior depositions — Admissibility — Evidence of third parties—Contradiction of.

EVIDENCE ACT, S. 13.

Neither under S. 11 nor under S. 145 of the Evidence Act is the prior deposition of a third party admissible to contradict the evidence or impeach the credit of a witness in a case. 25 C. 213; 16 B. 125 Ref. (*Phillips and Venkatasubba Rao, JJ.*) BOBBA BHAVANNA v. BOBBA RAMAMMA. (1924) M. W. N. 270; 34 M. L. T. (H. C.) 355; 78 I. C. 176; 19 L. W. 205; 1924 Mad. 537.

———S. 13—Assertion of right—Claim of permanent tenancy by tenant—Riots in Koba executed by tenant—Admissibility of. See LANDLORD AND TENANT, PERMANENT TENANCY. 39 C. L. J. 226.

———Ss. 13, 32 and 35—Family custom—Proof of—Opinions of living person—Statements of deceased persons—Custom—Misapprehension of law.

Where a supposed custom has followed the ordinary law as laid down by the Courts, though it was wrongly assumed to be the ordinary law that supposed custom which did not modify the understood general law and which had, therefore, not independently the force of law, cannot be recognised by courts as a custom having the force of law, even after it is established that the supposed ordinary law which it was alleged to have followed was not the ordinary law. 43 I. C. 871, 875 foll. Opinions of living persons as to the usages of a family will be admissible though grounded on statements of deceased persons. 23 A. 37 Ref. Statements made by deceased persons as to the usage after the controversy has arisen are inadmissible in evidence. Statements made by persons are not instances within the meaning of S. 13 cl. (b) of the Evidence Act but the whole litigation ending with the judgment may be an instance. Entries in settlement khewats even if not within S. 102 of the B. T. Act are relevant under S. 35 of the Evidence Act. (*N.R. Chaitarjee and Chotzner, JJ.*) SRI PROLAP CHANDRA DEO v. SRI RAJA JAGADISH CHANDRA DEO. 82 I. C. 886; 40 C. L. J. 331.

———S. 13—Judgments in previous case—Evidence in proof of title.

Judgments in a previous case in which a member of the family had brought a similar suit for possession and obtained a decree were held admissible and relevant on the question of the plaintiff's title to the property. (*Wazir Hasan, J. C.*) INDARPAL SINGH v. GHAKUR DIN SINGH. 10 O. L. J. 646; 78 I. C. 895; 27 O. C. 77; 1924 Oudh 266.

———S. 13—Judgment not inter partes—Admissibility in evidence—Weight due to.

The judgment in a previous suit to which one of the parties in the subsequent suit was not a party may be admissible in evidence for certain purposes in the subsequent suit. The legal effect of the judgment as between the parties to the previous suit has to be determined from the judgment itself and when determined, it becomes not conclusive as between the parties to the subsequent suit but a fact to be weighed in the balance like any other fact. (*Sanderson, C. J. and Richardson, J.*) GOPI SUNDARI DAS v. KHEROD GOVINDA CHOWDHURY. 28 C. W. N. 942; 82 I. C. 99; 1925 Cal. 194.

EVIDENCE ACT, S. 21.

———S. 13—Judgment—Possession case—Proceedings under S. 145, Cr. P. C.—Relevancy of—Suit for possession.

Where in a suit for possession of properties, the judgment in prior proceedings under S. 145, Cr. P. C., between the same parties is adduced in evidence, the judgment is admissible for the purpose of showing that the present parties were parties to those proceedings and that a particular party was maintained in possession as a result of the proceedings. (*Mookerjee and Rankin, JJ.*) HASIM ALI v. ABJAL KHAN. 40 C. L. J. 30; 82 I. C. 392; 1924 Cal. 1046.

———Ss. 13 and 50—Mutation application—Legitimacy. 1924 Oudh 19.

———Ss. 13 (6) & 21 (3)—Admissions—Admissibility in favour of persons making them—Direct evidence not available.

An admission may be proved on behalf of the person making it under section 21, Clause (3) of the Evidence Act if it is relevant otherwise than as an admission. In the case of a house said to have been built over half a century ago, direct evidence as to who constructed it may not be easily available; and old documents mentioning by whom it was built may be admissible in evidence under Section 11, Clause (2), and Section 13, Clause (b) of the Indian Evidence Act for what they may be worth. (*Kanhaiya Lal, J.*) RAGHUNATH v. BINDESHWARI NANDAN. L. R. 5 A. 231; 82 I. C. 582; 1924 All. 526.

———Ss. 14, 25 and 54—Offences under Ss. 400 and 401, Penal Code—Evidence of previous offences—Self exculpatory statements—Admissibility of. 75 I. C. 67 and 70.

———Ss. 17, 18—Admissions—Effect of.

An admission operates merely to shift the onus and raises only a rebuttable presumption. (*Prioleaux and Kinkhede, A. J. C.*) JUMILAL v. MR. HALKI. 1924 Nag. 387.

———S. 17—Erroneous admission. (*Gokal Prasad, J.*) MANGRU RAI v. SHIVANAND LAL. 77 I. C. 875.

———S. 18—Admission. 1924 Oudh 19.

———Ss. 20 and 31—Admission by person nominated by parties—Admissibility.

The parties to a suit and their pleaders filed a statement to the effect that a certain pleader should hear the whole case and they would accept any statement he might make. Held, that a statement made by the pleader so nominated was as conclusive and effectual as an admission made by the parties in their pleadings. The agreement amounted to an adjustment of the suit and the parties could not be allowed to resile from it. 42 M. 625; 21 A. L. J. 209 Ref. (*Sulaiman and Kanhaiya Lal, JJ.*) HIMANCHAL SINGH v. JATWAR SINGH. L. R. 5 A. 439; 80 I. C. 16; 46 All. 710; 1924 A. 570.

———S. 21—Purchaser at execution sale—Position of.

The purchaser at an ordinary execution sale is in privity with and the representative in interest of the judgment debtor within the meaning

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of S. 24, Evidence Act. (*Baker, J. C.*) *HARBHAGAT v. NARAYANA RAO*.

1924 Nag. 208.

———S. 24 *Confession—Retraction of—Value of corroboration.*

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to it must depend on the circumstances under which the confession was given and retracted including the reasons given for retracting. There is no statutory bar to a conviction on such evidence, but a confession must not be regarded in the same light as an admission in a civil court.

A retracted confession may be impugned on the ground it was not made voluntarily or was not true. (*Pipon, J. C.*) *MOTI RAM v. EMPEROR*.

75 I. C. 152 : 24 Cr. L. J. 904.

———S. 24 — Confession to panchayatdars—Admissibility. *MULIMAYANDI THEVAN v. EMPEROR*.

25 Cr. L. J. 269 : 76 I. C. 829.

1924 Mad. 230.

———S. 25—Confession to police can be used to contradict judicial confession. 6 Lah. L. J. 54 :

75 I. C. 693 : 25 Cr. L. J. 5.

———S. 25—*Kotwar in C. P.—If police-officer.*

The widest and most comprehensive extension of the term "police-officer" cannot make it include a Kotwar in the Central Provinces. He is popularly regarded as a subordinate police-officer and even that idea arises mainly from the fact that it is his duty to make, or rather to carry, frequent reports to the police. But the making of reports to a department of the government does not constitute a person who makes them, a member of that department even in the popular sense and therefore a confession made before him is admissible in evidence, 17 B. 4-5 : 26 Cal. 569 and 1 Cal. 207 Cons. (*Baker, J. C. and Hallifax, A.J.C.*) *SUKHWARIA CHAMARIN v. EMPEROR*.

25 Cr. L. J. 147 : 76 I. C. 291 : 1924 Nag. 29.

———S. 25—*Akhari officers—If within section.*

Akhari officers are not police-officers for the purpose of S. 25, Evidence Act. (*Kennedy and Bilaram, A.J.Cs.*) *TILLIBAI v. EMPEROR*.

25 Cr. L. J. 1223 : 82 I. C. 151 :

1925 S. 70.

———S. 25—*Village headman in Burma—If a police-officer*

A village headman in Burma who is authorized to arrest without warrant is not a police-officer so as to make a confession made to him inadmissible. But the weight to be attached to it will depend on the circumstances of the case and the part he has taken in investigating the crime. (*Young, O. C. J. Heald and May Oung, J.J.*) *NGA MYIN v. EMPEROR*.

2 R. 31 : 3 Bur. L. J. 11 :

81 I. C. 540 : 25 Cr. L. J. 924

———S. 26—*Confession made in the presence of the Police—Administrator in Portuguese territory—Admissibility.*

A confession made by an accused person before the Administrator in Portuguese territory, who

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is not a Magistrate is excluded by S. 26 of the Indian Evidence Act. It is immaterial that the Police-officer in whose presence the confession was made was not himself the person in charge of the investigation of the case. (*Maclean, C. J. and Fawcett, J.*) *EMPEROR v. MHABLI RAMA SAIL*.

26 Bom. L. R. 706 : 1924 Bom. 480.

———Ss. 26, 27—"In custody"—Meaning of.

As soon as an accused or suspected person comes into the hands of a Police-officer, he is, in the absence of clear and unmistakable evidence to the contrary, no longer at liberty and is therefore in custody within the meaning of Ss. 26 and 27, Evidence Act (*May Oung, J.*) *MAUNG LAY v. EMPEROR*.

25 Cr. L. J. 381 : 77 I. C. 429 :

1924 Rang. 173.

———Ss. 30 and 133—*Accomplice—Confession retracted—Value of evidence.*

A retracted confession is not the testimony of an accomplice within the meaning of S. 133 of the Evidence Act. A confession made by one accused person affecting himself and others, with whom he is jointly tried, may under S. 30 of the Evidence Act, be taken into consideration as against the said others. A retracted confession should practically carry no weight as against the person other than the maker, because it is not made on oath, it is not tested by cross-examination and its truth is denied by the maker himself who has lied on one or other of the occasions and the very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath. (*Newbould and Mukerjee, J.J.*) *MOYEZ SARDAR v. EMPEROR*.

40 C. L. J. 551 : 1925 Cal. 406.

———S. 30—*Confession—co-accused—Admissibility of statement.*

76 I. C. 1025 :

25 Cr. L. J. 305.

———S. 30—*Evidence of accomplice—Corroboration—Necessity for—Admissibility against co-accused.*

If *prima facie* evidence of the existence of a conspiracy is given and accepted, the evidence of statements made by any one of the conspirators in furtherance of the common object is admissible against all. The conviction of an accused based solely on the confession of another accused cannot stand and there must be independent evidence entirely outside, if the confession before it can be used. (*Coutts Trotter, C. J.*) *LILARAM GANGANMULL, In re*.

20 L. W. 202 : 25 Cr. L. J. 1041 :

81 I. C. 817 : 1924 Mad. 805.

———S. 30—*Confession—Co-accused—Admissibility.*

Merely because a confession by one of the accused is not a complete and detailed confession up to hilt, it cannot be rejected against the co-accused. (*Haish and Ryves, J.J.*) *LAKHAN v. EMPEROR*.

L. R. 5 A. 101 (Cr.) : 1924 All. 511.

———S. 30—*Co-accused—Confession—Evidentiary value of.*

The confession of a person accused of an offence can be taken into consideration and used as evidence not only against himself but against any person tried jointly with him for the same

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offence. (*Prideaux, A. J. C.*) *MT. RADHI v. EMPEROR.* 25 Cr. L. J. 13 : 75 I. C. 701 : 1924 Nag. 27.

—S. 30—*Confession during enquiry under S. 476, Cr. P. Code, if within the section.*

Where a person against whom enquiry is made under S. 476, Cr. P. Code, makes a confession, it is a confession within the meaning of S. 30 of the Evidence Act. (*Macleod, C. J. and Fawcett, J.*) *EMPEROR v. ANNAI VENKATESH.* 26 Bom. L. R. 614 : 1924 Bom. 445.

—S. 30—*Confession of a—Accused—When admissible.*

S. 30 renders admissible an incriminatory statement made by one accused as against the other only when it substantially implicates the former and not when it is an exculpatory statement. (*Kennedy, J. C. and Raymond, A. J. C.*) *TO-PANDAS v. EMPEROR.* 25 Cr. L. J. 761 : 81 I. C. 249 : 1925 S. 116.

—S. 30—*Co-accused—Confession of—When admissible.*

In order that a confession of an accused should be used against his co-accused, he must have implicated himself by such confession to the same extent as the co-accused. (*Kotwal and Kinkhede, A. J. C.*) *SHEIKH SHEROO v. EMPEROR.* 81 I. C. 891 : 25 Cr. L. J. 1067.

—S. 30—*Retracted confession—Evidentiary value.*

A retracted confession can be acted on without corroboration if the court thinks it was voluntarily made. (*Kincaid, J. C. and Raymond, A. J. C.*) *MAHOMED v. EMPEROR.* 81 I. C. 62.

—S. 32—*Dacoity—Offender captured in a seriously wounded state—Dying declaration.*

One of the dacoits engaged in a dacoity was captured in a seriously wounded state and before his death he made a dying declaration as to the circumstances of the dacoity before the Magistrate and also as to the circumstances causing his death. *Held*, that the statement of the declarant was admissible to prove his own participation in the dacoity but was not admissible against the other accused. (*Daniels, J.*) *DANNU SINGH v. EMPEROR.* L. R. 5 A. 201 (Cr.).

—S. 32—*Dying declaration—Mode of proof.*

6 Lah. L. J. 115 : 1924 Lah. 12.

—S. 32—*Dying declaration—Murder—Signs made by writing as to cause of death—Admissibility.*

Where in a case of murder the throat of the victim had been cut so as to prevent him from talking, questions put to the deceased and the signs made by him in answer might be taken together and properly regarded as verbal statements made by a person as to the cause of his death within the meaning of S. 32 of the Evidence Act and are admissible in evidence under that section. 7 A. 385 ; 49 C. 600 followed. (*Scott-Smith and Fforde, J. J.*) *RANGA v. EMPEROR.* 5 Lah. 305 : 1924 Lah. 581.

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—S. 32—*Evidence as to date of birth—Horoscopes—Admissibility of.*

In considering the evidence as to the date of the birth of a plaintiff, horoscopes tendered in evidence are not proof by themselves but they could be used for refreshing the memory or as statements of a deceased person under S. 32 of the Evidence Act (*Datal and Simpson, A. J. C.*) *AMBIKA PRASAD v. LAL BAHADUR.* 11 O. L. J. 164 : 1924 Oudh 353.

—S. 32—*Plaint in prior suit—Plaintiff alive—Admissibility—Extent.*

A plaint for rent filed by a landlord is admissible to prove that the landlord did sue for rent on the allegations made therein but not to prove statements therein so long as the landlord was alive and the conditions in S. 32, Evidence Act are not satisfied. The distinction between the admissibility of a document as evidence of a transaction and the admissibility of a document in proof of a statement contained therein is of a refined but of a fundamental character and is yet frequently overlooked. (*Mookerjee and Suhrwardy, J. J.*) *LUKHAN CHANDRA MONDAL v. TAKM DHALI.* 39 C. L. J. 90 : 80 I. C. 357 : 28 C. W. N. 1033 : 1924 Cal. 538.

—S. 32—*Statement in will that X left a certain house—If admissible to prove adverse possession.*

Statements of deceased persons under S. 32, Evidence Act, are admissible in evidence only if certain conditions specified therein are fulfilled. To prove adverse possession against a certain person a statement in the will of another that the former left the place more than 20 years before is not admissible under S. 32. (*Kincaid, J. C. and Raymond, A. J. C.*) *MT. BHAGBHARI v. MT. KHATUN.* 80 I. C. 118.

—S. 32—*Prior Statement—Plaint filed in previous litigation—Admissibility of.*

In the absence of the conditions prescribed by S. 32 of the Evidence Act a plaint filed in a prior litigation is not admissible to prove a statement by a superior landlord. (*Mookerjee and Suhrwardy, J. J.*) *LAKSHAN CHANDRA MANDAL v. TAKIM DHALI.* 39 C. L. J. 90 : 28 C. W. N. 1033 : 80 I. C. 357 : 1924 Cal. 558.

—S. 32—*Statements against interest—Attestation of a mortgage-deed—Admissibility.*

On the death of a member of a joint Hindu family, the other members sued the widow of the deceased for possession of certain properties on the ground that she had no right to them her husband having died an undivided member. The widow set up a division and relied *inter alia*, on a mortgage executed by her deceased husband and attested by the plaintiffs containing a recital to the effect that the mortgagor was in possession of the properties. *Held*, that the attestation by the co-sharers was an acknowledgment that they had no right in the property alienated and that it was admissible in evidence as a statement against interest under S. 32 of the Evidence Act. (*Odgers and Hughes, J. J.*) *GNANAMUTHU NADAN v. VEILU KANDA NADATHI.* 19 L. W. 494 : (1924) M. W. N. 451 : 79 I. C. 2 : 1924 Mad. 542.

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—Ss. 32 (2) and 67—Deed—Execution—Proof of—Statement of writer. *Mr. LAHIRI v. BALA.* 77 I. C. 798.

—S. 32 (2)—*Entries in purohit's books—Admissibility of—Date of death—Hindu widow—Suit for recovery of possession.*

The appellants (plaintiffs) sued the respondents (defendants) in the Court of the Subordinate Judge for the recovery of possession of certain ancestral property after the death of the widow. The respondents pleaded that the suit was barred by limitation the widow having according to them died in 1895 more than 12 years prior to action brought and not as alleged by the appellants in 1898. The principal evidence in support of the appellants' case was a private register purporting to be kept by the purohit and his son in the ordinary course of their business giving the dates of the anniversaries of his various clients and among them of the said widow as 14th December 1898. The Subordinate Judge in his findings held that though the entry wrongly gave the family name of the deceased widow as Katikaneni instead of Malraju, and appeared to be in a different ink than that of other adjacent entries, both the book and the entry constituted genuine records. On appeal the High Court upon inspection of the book held the book and the entry to be unreliable and reversed the judgment and decree of the Subordinate Judge.

• *Held*, by the Judicial Committee of the Privy Council that the register was not of such a character as to enable them to pronounce affirmatively that the entry in question was made in 1898 and in the ordinary course of the business of the purohit. (*Lord Shaw.*) *MALRAJU VENKATA RAMA KRISHNA RAO GARU v. KOPPURAVURI SRIRAMULU.*

26 Bom. L. R. 563 :

20 L. W. 1 (P.O.) : 46 M. L. J. 541.

—S. 32 (3)—*Executant of promissory note—Statement as to receipt of consideration—Admissibility.*

A statement by the executant of a promissory note that certain sum was due to him on account of the pronote is admissible under S. 32 (3), Evidence Act—*Quære* if it is not admissible under S. 32 (2). (*Stuart and Mukherji, JJ.*) *KALYAN RAI v. JAGANNATH.*

78 I. C. 1033 (1)

1925 All. 130.

—S. 32 (3)—*Recitals in consent decree—Admissibility.*

The recitals in a consent decree which do not embody statements of the parties as to their rights in the subject matter of litigation are not statements within the meaning of S. 32, Evidence Act, and are hence inadmissible. (*Mookerjee and Rankin, JJ.*) *JAGADISH CHANDER DE v. HARIHAR DE.*

78 I. C. 219.

—S. 32 (5)—*Relationship—Evidence relating to—Statements of deceased persons—Family pedigree—Admissibility of.*

Family bards have special means of knowledge regarding the facts of the relationship between the different members of the families of their yajmans. Consequently statements made by them as regards the relationship between members of the family would be admissible in evidence under

EVIDENCE ACT, S. 33.

S. 32 (5) of the Evidence Act. A family pedigree may be a pedigree kept by a member of the family or by another person on its behalf and it can be admitted in evidence, if it is written by a family bard for the purpose of keeping a record of the family events for his use and the use of the family. Such a record can be admitted even though not signed by the person making it. 46 B. 753; 30 A. 510; 37 A. 600 Rel. (*Kanhaiya Lal and Mookerji, JJ.*) *ANANDI v. NAND LAL.*

22 A. L. J. 657 : L. R. 5 A. 485 :

46 All. 665 : 1924 All. 575.

—S. 32 (5)—*Declaration by a son as to his parentage—Admissibility of.*

A statement made by a person in a mortgage deed as regards his paternity before any dispute arose is admissible in evidence under S. 32 (5) of the Evidence Act inasmuch as the son when he grew up would have had means of knowledge that his father was a particular person. (*Delal, J. C.*) *SANTU v. TARA.* 10 O. & A. L. R. 1226.

—S. 33—*Conditions before admitting evidence.* *NGA NYO v. EMPEROR.*

25 Cr. L. J. 257 : 76 I. C. 817 : 1924 R. 209.

—S. 33—*Statement made before committing magistrate—Witness shy and speechless in Session—If ground for transferring it to Sessions record.*

Where evidence was given before a committing magistrate but in the Sessions court the witness proves shy and speechless, S. 33 does not apply to the case and the evidence cannot *ipso facto* be treated as evidence at the Sessions. The proper procedure would be to give the prosecution the right to put leading questions under S. 154 and obtain the admission or denial of the truth of the evidence. (*Pipon, J. C.*) *MOTI RAM v. EMPEROR.*

75 I. C. 152 : 24 Cr. L. J. 904.

—S. 33—*Statements by living persons in previous judicial proceedings—Admissibility of—Objection to—Waiver.*

Even though the conditions required by S. 33 of the Evidence Act are not fulfilled it is open to the Court acting on the consent of the parties to admit in evidence in a subsequent judicial proceeding statements made by living witnesses in a prior judicial proceeding between the same parties. Any irregularity in the admission of such evidence is cured by the consent of the parties. Objections to the admissibility of evidence will not be entertained for the first time in Second Appeal unless such objections have been raised either in the trial Court or at any rate in the Lower Appellate Court. 24 Bom. 591; 43 M. 609 followed. (*Daniels and Neave, JJ.*) *RADHA KISHAN v. KEDAR NATH.*

22 A. L. J. 761 : L. R. 5 A. 536 : 46 A. 815 :

80 I. C. 874 : 1924 All. 845.

—S. 33—*Warrant of attachment—Report as to how process served affected execution—If admissible.*

Entries or reports as to how a process server effected the execution of a warrant entrusted to him are inadmissible against persons disputing the attachment (*Lentaigne, J.*) *HLA BAN U v. RAMANATHAN CHETTIAR.*

1925 Rang. 89 : 3 Bur. L. J. 287.

EVIDENCE ACT, S. 34.

———S. 34—*Entries in Settlement Records—Evidentiary value of.*

Where in the absence of a deed of mortgage, it was sought to be inferred by copies of certain extracts from the Settlement records relating to the said transactions. *Held*, that such entries could be used as evidence thereof. (*Hazir Hasan, A. J. C.*) BULAK DASANDHI v. DY. COMMISSIONER OF FYZABAD. L. R. 5 O. 161 (Rev.).

———S. 34—*Suit on accounts—Claim denied proof of items.*

Where a claim based on entries in account books is entirely denied, plaintiff must prove the various items of his account by independent evidence, as the entries cannot in themselves charge any person with liability. (*Campbell, J.*) GANESHI LAL v. THE FIRM OF MANGAT RAM ATMA RAM. 76 I. C. 157.

———S. 35—*Applicability of—Documents not made in the course of official duty—Entries in—Returns made by Zamindar—Admissibility against tenant.*

In a proceeding under S. 105 of the B. T. Act for enhancement of rent, the tenant relied on a presumption in favour of fixity of rent arising from payment at a uniform rate under S. 50 (2) of the B. T. Act. The Court below held the presumption rebutted by relying on an entry from the books of the collectorate made on the footing of a return submitted by the predecessor of the present Zemindar under Reg. VIII of 1793 and Reg. VII of 1799 to prove the fact that a certain taluk did not exist. *Held*, that the entry even if admissible in evidence was of very slender evidentiary value to prove the non-existence of the taluk. As it did not appear that either the tenant or his predecessor in interest was a party to the statement or that he was interested to see to its accuracy when it was made, its evidentiary value was slight and it did not suffice to rebut the presumption arising in favour of the tenant. Per *Mukerji, J.* The entry from the books of the collectorate not having been shown to have been made by a person in the discharge of an official duty or in the performance of a duty enjoined specially by law, it was inadmissible in evidence. (*Walmley and Mukerji, JJ.*) TARAK CHANDRA CHUCKERBUTTY v. PRASANNA KUMAR SAHA. 28 C. W. N. 679 : 39 C. L. J. 389 : 78 I. C. 719 : 1924 Cal. 654.

———Ss. 35 and 79—*Official Register—Entries in death register kept at police station—Presumption of correctness—Certified copy—Admissibility.*

Entries in a death register kept at a police station in accordance with the police regulations made under S. 12 of the Police Act (V of 1861) are legally admissible in evidence under S. 35 of the Evidence Act, even though the entries are made in chronological order and not in the prescribed form. 46 C. 152 : 22 O. C. 124 foll. A certified copy of the entry in the Register given by an authorised officer must be presumed to be correct under S. 79 of the Evidence Act. (*Sulaiman and Kanhaiyalal, JJ.*) SHIB DEO MISRA v. RAM PRASAD. 22 A. L. J. 690 : 46 All. 637 : 1925 All. 79.

EVIDENCE ACT, S. 41.

———S. 35—Revenue register No. VII, entry in—Relevancy—Presumption. MAUNG HLAING v. MAUNG CHITSU. 76 I. C. 449.

———S. 35—*Siyaha—Entries in—Admissibility.*

Entries in the Siyaha are made by the Patwari in the ordinary course of business and are good evidence as to the rent having been collected by a particular person. (*Fremantle, S. M. and Burn, J. M.*) RAGHUNATH v. KHUMAN. L. R. 5 A. 150 (Rev.).

———S. 35—Revenue registers—Extracts from—Admissibility. 1924 Rang. 135.

———S. 35—*Thak map—Revenue survey maps—Weight due to—Signature of revenue surveyor.*

There are three main kinds of thak maps in existence (a) eye sketches, in which no actual measurements were made; (b) maps in which rough magnetic bearings were used and rough linear measurements made, and (c) maps made from careful magnetic bearings and careful linear measurements. If the revenue survey map, which was carefully and accurately prepared by competent officers and the thakbast map do not agree it is quite impossible to rely on the thakbast map, unless indeed the demarcation pillars, put down on the ground by the thakbast authorities are still in existence, and they correspond with the boundary pillars as shown in the map or the field book and the materials collected by the thakbast authorities furnish sufficient data. The revenue survey map prevails over the thakbast map. The signature of the revenue surveyor on the thakmap does not mean that if the thak map is reduced to the same scale as the revenue survey map, then the two boundaries will necessarily agree but merely that the surveyor has satisfied himself that the boundary accepted and intended by the demarcation staff has been correctly picked up on the ground, and correctly surveyed on the revenue map.

The procedure followed by the Revenue authorities in preparing the thak and revenue survey maps pointed out. (*Das and Macpherson, JJ.*) SHASHI BHUSAN BANERJI v. RAMJAS AGARWALA. 3 Pat. 85 : 1924 Pat. 402.

———S. 36—Document referred to in a statement—Documents not produced—Admissibility of the statement. NARESH NARAYAN ROY v. SECRETARY OF STATE FOR INDIA. 77 I. C. 1048.

———S. 41—*Insolvency Court refusing to adjudicate person bankrupt—Partnership—Membership disputed—Legal character—If a Judgment in rem—Powers of review—Presidency Towns Insolvency Act, S. 8—Limitation Act, if applies—Time for review—If can be extended—Madras High Court Appellate Side Rules, Appendix, II, R. 41—Applicability—Insolvency appeals.*

An order of an insolvency Court refusing to adjudicate a person insolvent on the ground he was not a member of a firm which had been declared insolvent is not a final order which conferred upon or took away from him any legal character within the meaning of S. 41 of the Evidence Act and hence it is not a judgment in rem. Being a partner in a firm is not a legal character as contemplated by the section.

EVIDENCE ACT, S. 42.

An application under S. 8 of the Presidency Towns Insolvency Act to review an order made by the High Court in its insolvency jurisdiction can be entertained even when it is presented out of time as the Court can under S. 5 of the Limitation Act extend the period, if it is satisfied by the applicant that he had sufficient cause for not making the application within the prescribed period.

R. 41 of Appx. II of the Madras High Court Appellate Side Rules applies to insolvency appeals and in a case of special difficulty and importance, the Court hearing the appeal can allow a higher fee than would ordinarily be admissible.

Quære if the Limitation applies to all applications under S. 8 of the Presidency Towns Insolvency Act? (*Schwabe, C. J. and Ramesam, J.*) OFFICIAL ASSIGNEE OF MADRAS v. OFFICIAL ASSIGNEE OF RANGOON. 19 L. W. 316 :

34 M. L. T. (H. C.) 99 : (1924) M. W. N. 458 : 1924 Mad. 662 : 46 M. L. J. 580.

— S. 42—*Question of status—Judgment inter partes—Weight of.*

When a question of status is in issue, judgment and orders between the parties in mutation cases succession certificate cases, rent suits, suits for possession, etc. are admissible in evidence. They are of high evidentiary value and constitute proof sufficient to shift the burden. (*Prideaux and Kinkhede, A. J. Cs.*) JUMILAL v. MT. HALKI 1924 Nag. 387.

— S. 43—*Judgment between third parties.*

A judgment between the plaintiff and third parties is not admissible though the facts found therein may support plaintiff's title disputed in the present suit. (*Dawson Miller, C. J., Mulhck and Foster, JJ.*) HARIHAR PRASAD v. KESHEO PRASAD. 1925 Pat. 68 : 5 Pat. L. T. (Supp.) 1.

— S. 43—*Judgment of Criminal Court—Relevancy of in action for damages.*

In an action for damages caused to the plaintiff by fire negligently started on his land by the defendant, the fact that a criminal Court had found that the fire was accidental is not evidence and the judgment of the Criminal Court is inadmissible in evidence. (*Lentaigne, J.*) MAUNG FIM v. MA THE NGWE. 1925 Rang. 143 : 2 Rang. 549.

— S. 44—*Judgment—Validity of adoption—Evidence of.* 1924 P. 298.

— S. 45—*Expert opinion—When evidence.*

The report of a finger print expert is inadmissible in evidence unless he is called in as a witness and subjected to cross-examination in open court. (*Kinkhede, A. J. C.*) PITAIN v. BABOOSINGH. 1924 Nag. 183.

— Ss. 58, 91 and 92—*Partition admitted—Unregistered deeds—If admissible.* MAUNG PO KIN v. MAUNG SHWE BYA. 1924 Rang. 155.

— Ss. 60 and 63 (5)—*Scope of—Secondary evidence—Attesting witness—Oral evidence of.*

S. 60 says that oral evidence must be direct Section 63 Cl (5) of the Evidence Act does not overrule the general principle of law that hearsay

EVIDENCE ACT, S. 63.

evidence is ordinarily not admissible. Consequently the evidence of an attesting witness to a document that he has seen the document signed or heard its contents read out or explained to him is not admissible to prove the contents of the document. No person who has not seen the contents of a document can give oral evidence of its contents so as to constitute secondary evidence within the meaning of section 63 Cl. (5) of the Evidence Act. A person who professes to give secondary evidence of the contents of a document must himself have read the document. Otherwise he would be giving not direct but hearsay evidence. (*Young and Baguley, JJ.*) KALENTHAR AMMAL v. MA MI. 3 Bur. L. J. 172 : 2 Rang. 400 : 1924 Rang. 363.

— S. 60—*Statement by person as to what another reported—Evidence.*

A statement made by an accused person immediately after a murder of what the deceased told him is relevant as showing his state of mind, but to amount to proof of what the deceased said it must be the evidence of a witness who says he heard it. (*Broadway and Campbell, JJ.*) KAKAR SINGH v. EMPEROR. 25 Cr. L. J. 1005 (2) : 81 I. C. 717 (2) : 1924 Lah. 733.

— S. 63—*Certified copy—If secondary evidence of execution of document.*

A certified copy of a document is sufficient secondary evidence of the existence, conditions and contents of it, but not of its execution. (*Datal, J.*) KARIMULLAH v. GUDAR KOERI. 82 I. C. 306.

— S. 63 (3)—*Copy of will prepared by Sub-Registrar—If admissible as secondary evidence.*

Where in connection with disputes regarding the registration of a will, a copy was prepared by the Sub-Registrar and sent to the Registrar the same is admissible as secondary evidence, if the original is not forthcoming. (*Kinkhede, A. J. C.*) BABA v. BHURAO. 1924 Nag. 375.

— Ss. 63, 64 and 65—*No objection taken in the trial Court as to admissibility of a document which is a copy of a copy—Whether can be raised on appeal.*

Where the Plaintiff relied upon a copy of copy, in support of a claim to Dharkhast land, and objection as to its admissibility was not taken in the trial court, and that the contents could not be held to have been proved by the production of such a copy. Held, that the rules as regards production and proof of documents, as contained in the Evidence Act, can be dispensed with by consent of parties, and when the parties agree to treat a document as evidence, it is not open to one side or the other to object to such a document in appeal. (*Devadoss, J.*) LATCHAYYA v. SEETARAMAYYA. 20 L. W. 719.

— S. 63 (5)—*Mortgage deed—Original not forthcoming—Attestor not acquainted with language in which the original was written—Secondary evidence.*

It is only a witness who has himself seen a document that is entitled to give evidence of it under S. 63 (5) of the Evidence Act but this does

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not imply that the witness should have known the language in which the document was written. It is enough if the contents of the document in question were either explained, translated or read out to him in such a way that he was able to remember them. 12 A.L.J. 239 overruled. (*Hulsh, A. C. J. and Sulastana, J.*) *MEHI LAL v. RAMN DAS*.
22 A. L. J. 864 : 80 I. C. 939 :
L. R. 5 A 720 : 10 O & A. L. R. 1058 :
1924 All. 792.

— S. 65—Document lost—Certified copy—Custody proved—Admissibility.

Where the original of a document could not be traced, but a certified copy taken at a time when it had been filed in a court of law is produced, and its custody is satisfactorily proved, secondary evidence is admissible and there is also a presumption of genuineness. (*Abherjee and Sukrawardy, JJ.*) *LURHAN CHANDRA MONDAL v. TAKIM DHALI*.
39 C. L. J. 90 :
80 I. C. 357 : 28 C. W. N. 1033 : 1924 Cal. 558.

— S. 65—Secondary evidence of the contents of a deed—Admissibility—Loss of original deed not proved—Evidence admitted without objection in trial court—Objection in appellate court—Sustainability of.

Secondary evidence of the contents of a deed alleged to have been lost or destroyed by fire was given in the trial without any objection being taken by the other side. On appeal it was urged as an objection to the admissibility of the secondary evidence that the loss of the original had not been proved. *Held*, that the objection not having been taken at the trial court, the party who tendered the secondary evidence was misled into omitting to prove the loss of the original and that the objection could not be taken on appeal. (*Young, J.*) *MA THE NU v. MG. NI TA*.
3 Bur. L. J. 193 : 1925 Rang. 113 (1).

— S. 65—Secondary evidence—Extract from register of applications.

An extract from the Register of applications in respect of minors and lunatics is not admissible as secondary evidence of a statement as to the date of birth made in an application for appointment of guardian. (*Das and Ross, JJ.*) *GOKULCHAND v. BALDEN NARAIN*.
5 Pat. L. T. 403.

— Ss. 65 and 74—Income-tax returns—Certified copy given to persons other than assessee—Admissibility of.

The issue of a certified copy of income-tax returns to a person not entitled to inspect is forbidden by S. 54 of the Income Tax Act and consequently such a copy is inadmissible in evidence as secondary evidence of a public document. (*Carr, J.*) *ANWAR ALI v. FAZAL AHMED*.
3 Bur. L. J. 194 : 2 Rang. 391 :
1925 Rang. 84.

— S. 65 (g)—Mutation records—Entries in—Abstract admissible to prove alienability.

An extract from mutation records is admissible in evidence under S. 65 (g), Evidence Act, to prove that alienations of the lands in dispute have taken place in the past. (*Abdul Raoof and Moti Sagar, JJ.*) *SHER MUHAMMAD KHAN v. DOST MUHAMMAD KHAN*.
78 I. C. 451.

EVIDENCE ACT, S. 69.

— S. 66—Presumption from long and uninterrupted possession—Parabark how far evidence of mortgage.

In a suit for redemption by the plaintiff, which was opposed by the defendant on the ground of setting up a title of their own, the lower court admitted the claim on the strength of entries made in Parabark and overwhelming evidence. *Held*, reversing the decision that Parabarks produced has not come up from proper custody, and is not original but a copy, and under S. 66 (2) of Evidence Act should not be applied against a mortgage and notice to produce must be given before secondary evidence can be given and that there was no real secondary evidence of either the original mortgage or the subsequent advance. (*Duckworth, J.*) *MAUNG PO NI AND ONE v. MA SHWE KYIE AND THREE*.
2 Rang. 397 : 1925 Rang. 7.

— Ss. 67 to 73—Scope of.

Ss. 67 to 73 of the Evidence Act govern cases both of primary and secondary evidence. (*Dalal, J.*) *K RIMULLAH v. GUDAR KOERI*.
82 I. C. 306.

— S. 68—Document required by law to be attested—Proof of.

The direction in S. 68 of the Evidence Act is mandatory and there is no distinction drawn by the section between documents which are the basis of a suit and those whose production is required for a collateral purpose, so far as their admissibility is in question. (*Dalal, J. C. and Neave, A. J. C.*) *AWADH RAM SINGH v. MAHBUB KHAN*.
10 O. L. J. 525 :
79 I. C. 725 : 1924 Oudh 255.

— S. 68—One of the two witnesses not called, no presumption against mortgagee.

76 I. C. 772.

— Ss. 68 and 71—Application and scope of—Proof of mortgage—Secondary evidence.

In order to prove a mortgage an attesting witness must be called for the purpose of proving its execution under S. 68 of the Evidence Act. A certified copy is sufficient secondary evidence under S. 63 of the existence condition and contents of the deed but not of its execution.

S. 67 follows the mention of primary and secondary evidence, and would govern presumably both kinds of evidence. S. 68 of the Act applies both to primary and secondary evidence.

When a mortgagee suppresses an original document and wins over the attesting witnesses it will be impossible to prove a deed of mortgage if the provisions of S. 68 are insisted upon. This difficulty can be overcome by S. 71. If the witnesses deny execution either through collusion, or absence of recollection it is open to the plaintiff to prove execution by other evidence. (*Dalal, J.*) *SHEIKKARIMULLAH v. GUDAR KOFRI AND OTHERS*.
L. R. 5 A. 686 : 1925 All. 56.

— Ss. 69 and 71—Mortgage—Attestation—Proof of—Admission before Registrar.

A mortgage has to be proved in cases where the mortgagor does not admit execution. If no attesting witness can be found S. 69 applies, but if found and he denies execution, S. 71 comes into play.

EVIDENCE ACT, S. 70.

Where the fact of execution has been admitted before the Registrar, the court of fact can consider it, but not the High Court in second appeal. (*Kinkhede, A. J. C.*) *BALIRAM v. KAMALIA*

1924 Nag. 367.

———Ss. 70 and 69—Mortgage—Attestation—Proof of—Admission in pleadings—Execution it includes attestation. 76 I. C. 73.

———S. 71—Attestation denied—What is to be proved. 1924 A. 149.

———S. 73—Finger impression—Power of Court to direct accused to give—Admissibility 1924 Rang. 115.

———S. 73—Thumb impression of accused—Right to take—Examination of accused—Cr. P. Code, S. 342.

A Court has power under S. 73 of the Evidence Act to direct an accused person to make finger impressions and such impressions, being relevant, under S. 45 of the said Act, are admissible in evidence, as is also the evidence of the finger print experts concerning them. Per *Young, O. C. J.*—S. 342, Cr. P. Code, relates only to oral questioning of the accused and does not prohibit a direction to him to make a finger impression, any more than it prohibits a direction to him to face a witness in order that he may be identified. (*Young, O. C. J., Heald, and May Oung, JJ.*) *EMPEROR v. TUN HIAING*. 1 Rang. 759 (F.B.).

———S. 74—Public document—Delivery of possession by Court officer.

Delivery of possession in execution of a decree is an act of a tribunal and a report made to the Court by an officer of the Court that its order has been carried out which report is preserved as one of the Court Records is a public document within the meaning of section 74 of the Evidence Act. (*Neave, A. J. C.*) *BALKU v. EMPEROR*.

10 O. & A. L. R. 344 : 81 I. C. 533 : 25 Cr. L. J. 917 : 1925 Oudh 183.

———S. 74—Settlement Record—History of district—Public document—Proof.

The history of a district attached to a Settlement Record being compiled under the direction of a Settlement Officer is a public document and is provable by the production of a certified copy. (*Martineau and Moti Sagar, JJ.*) *MUHAMMAD KHAN v. SULTAN AZAM*. 1924 Lah. 699.

———S. 86—Compliance with, mandatory—Statement of persons recorded in a native state—Certificate of Resident.

The certificate required by law under S. 86 of the Evidence Act cannot be dispensed with merely because it can be obtained at any time. The mere fact that copies of depositions of a court of a native state were forwarded by the Resident in due course does not make them admissible without his certificate. (*Scott Smith and Forde, JJ.*) *MURLI DAS v. ACHUT DAS*.

5 Lah. 105 : 1924 Lah. 493.

———S. 90—Document more than 30 years old—Before T. P. Act—Absence of signature—Presumption.

A deed more than 30 years old and executed before the Transfer of Property Act, even if not

EVIDENCE ACT, S. 91.

signed by the executant but only by some scribe at his instance will be presumed to be genuine. (*Kanhaiya Lal, J.*) *GAYA SINGH v. SURAJBALI SINGH*. 1924 All. 832.

———S. 90—Ancient document—Presumption—Period how counted. 6 Lah. L. J. 97 :

75 I. C. 57 : 1924 Lah. 145.

———S. 90—Genuineness—Presumption—Computation of period.

In applying the presumption under S. 90, the period of 30 years is to be reckoned from the date on which it having been tendered in evidence its genuineness becomes the subject of proof and not from the date it was filed in court. (*Phillips, J.*) *GOSALA KONDA REDDI v. PULCHERLA PICHIREDDI*. 82 I. C. 487.

———S. 90—Mortgage deed more than 30 years old—Custody of Mortgagee—Presumption of execution.

Where a mortgage deed more than 30 years old comes from the custody of the mortgagee, the presumption of proper execution readily arises and it is proof of the mortgage. (*Mukerjee, J.*) *RAMACHARI v. SADHO SAPAN TEWARI*.

1924 All. 869.

———S. 90—Old document—Conduct of parties. 77 I. C. 472.

———S. 90—Old document—Presumption—Document more than 30 years old—Execution—Scribe—Authority of.

The presumption permitted by S. 90 of the Evidence Act in the case of a document purporting to be 30 years old, that it was duly executed by the party by whom it purported to be executed includes the presumption that when the signature of the executant purports to have been made by the pen of the scribe, the latter was duly authorised to sign for him, 13 A. L. J. 921 ; 15 A. L. J. 121 overruled. (*Walsh, A. C. J., Sulaiman, Mukerjee, Dalal and Neave, JJ.*) *HAFI SHEIKH BODHA v. SUKHRAM SINGH*. 22 A. L. J. 857 : 10 O. & A. L. R. 981 : 1925 A. 1.

———S. 90—Payment of consideration not satisfactory—Document cannot be said to be unreal when 35 years old.

If one is dealing with a document some thirty-five years old the mere fact that the proof of consideration is not at all satisfactory, is by itself a slender ground for holding that the document known to have come into existence was entirely unreal. (*Rankin and Ghose, JJ.*) *SAILAJA NATH RAY CHAUDHURY v. RAJA RESHME CASE LAW*. 51 Cal. 135 : 39 C. L. J. 380 :

81 I. C. 493 : 1924 Cal. 693.

———S. 91—Contract of Sale—Conveyance not registered—Evidence of prior Contract of sale admissible. See T. P. Act, S. 54.

3 Bur. L. J. 78.

———S. 91—Deposition of a witness—Omission to read over same to him as required by O 18, R. 5, C. P. Code—Prosecution for perjury—Oral evidence of contents of deposition inadmissible. See C. P. CODE, O. 18, R. 5. 51 C. 236.

———S. 91—Oral evidence inadmissible to prove a mortgage without registration.

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Where there is no registered document to prove the mortgage, there is no question of secondary or other documentary evidence. A mortgage which ought to have been by a registered instrument cannot be proved by other forms of evidence such as entries in the Revenue Registers and oral evidence, although the fact of the entries is no doubt a relevant fact under S. 23 of the Evidence Act but evidence of it in proof of the mortgage is inadmissible under S. 91 of the Evidence Act. *Miza U. & others v. Nga Fyaa*: 2 U. B. R. Referred. (*Godfrey, J.*) MAUNG TUN v. MAUNG KHAN. 2 Rang. 441 : 3 Bur. L. J. 231 : 1925 Rang. 61.

———S. 91—Partition—Absence of registration—Oral evidence—Part performance—Effect. *NAND LAL MAHTON v. DHANUKDHARI MAHTON*. 1924 P. 244 : 76 I. C. 42 : 2 Pat. L. R. 37.

———S. 91—Scope—Proof of fact of partition. *NARSINGH DAS v. UTTAM CHAND*. 76 I. C. 852.

———S. 91—Receipt for money—Oral evidence—Admissibility of.

A written receipt was produced to support a plea of discharge. The court below found the receipt to be not genuine but found on oral evidence that the payment had been proved. Held, that oral evidence was admissible to prove the payment. A receipt is not a contract or a grant or a disposition of property within the meaning of S. 91 of the Evidence Act and it does not preclude other Evidence of payment. (*Pullan, A. J. C.*) *SARDAR SINGH v. IQBAL NARAIN*. 80 I. C. 57 : 10 O. & A. L. R. 727.

———S. 91—Unregistered lease—Inadmissible in evidence—Other evidence of its terms prohibited by s. 91 of the Evidence Act. See REGISTRATION ACT, S. 17 (2). 1924 P. H. C. C. 185.

———S. 92—Bill of lading—Oral evidence to alter terms—Admissibility.

Where a Bill of Lading evidences a contract of shipping no evidence of any oral agreement varying its terms is admissible. (*Fawcett, J. C.*) *THE STANDARD OIL CO. v. HARIDAS VELH*. 79 I. C. 456.

———S. 92—Contract—Construction—Commercial usage—Evidence of, when admissible in construing the Contract. See CONTRACT—CONSTRUCTION. 51 C. 43.

———S. 92—Bond—Consideration for—Evidence to show other circumstances than those recited in the bond.

Where in a suit on a bond the defendant pleads no consideration for the bond and evidence is offered to show that the money due under the bond was meant to be the premium for a lease agreed to be executed by the creditor but which in fact was never executed, held that the evidence was not excluded by section 92 of the Evidence Act. (*Mukerjee and Dalal, J.J.*) *BALDEO PRASAD v. RUM AUTAR*. 92 A. L. J. 850 : L. R. 5 A. 731 : 82 I. C. 347 : 1924 A. 865 (1).

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———S. 92—Conduct of parties to show contract was not intended to be acted upon—If admissible. *NARENDRA LAL KHAN v. BHOLA NATH*. 77 I. C. 154.

———S. 92—Contract—Terms not reduced to writing—Oral evidence—Admissibility.

Where all the terms of a contract have not been reduced to writing oral evidence is admissible to prove the terms not embodied in the written instrument. (*Young and Carr J.J.*) *COALFIELDS OF BURMA, LTD. v. H. H. JOH SON*. 2 Rang. 575 : 3 Bur. L. J. 326 : 1925 Rang. 128.

———S. 92—Date for performing contract—Extension of—Oral evidence—Admissibility.

Where a date is fixed in the contract for performing the contract, oral evidence to extend the period is not so absolutely repugnant to the express terms of the contract as to make it inadmissible. But the onus of proving a date different from that specified is heavier than in a case where the terms of a contract are silent on the point. (*Madgavkar, A. J. C.*) *GOVERDHANDAS v. ROWJI HIRJI & Co*. 76 I. C. 62.

———S. 92—Evidence of subsequent conduct to prove contemporaneous agreement not admitted. 77 I. C. 523 : 5 Lah. L. J. 439.

———S. 92—Evidence varying terms as to interest, not allowed.

Evidence of subsequent oral agreement not to charge compound interest is inadmissible to vary the original contract which is a registered one. (*Chatterjee and Cuming, J.J.*) *JAGENDRA NATH BANERJEE v. KHODA BUKSHA BISWAS*. 1924 Cal. 380.

———S. 92—Extrinsic evidence—Patent ambiguity—Admissibility of evidence.

A mortgage document was very inartistically drawn up. It was ungrammatical and could not be read literally so as to give any clear meaning. In order to give the construction contended for by one party or the other some words had either to be supplied or removed. Held, that there was a patent ambiguity in the document and no evidence could be given to supply the defect. (*Daniels and Neave, J.J.*) *RAM GANESH RAI v. RUP NARAIN RAI*. 80 I. C. 944 : L. R. 5 A. 542.

———S. 92—Exclusion of evidence.

The view that there has been introduced into the law of India such a radical change in the laws of evidence as would have the effect of excluding from the class of mortgages many transactions which before the Evidence Act would have been held to be within that clause is not correct. (*Lord Blanesburgh*) *RAJA BAHADUR NARASINGERRI GYANAGERJI v. RAJA PANUGANTI PARTHASARATHI RAYANIM GARU*.

20 L. W. 701 : 1 O. W. N. 684 : 51 I. A. 305 : 10 O. & A. L. R. 1172 : 82 I. C. 993 : 40 C. L. J. 481 : 27 Bom. L. R. 4 : 47 Mad. 729 : 1924 P. C. 226 : 47 M. L. J. 809.

———S. 92—Gift—Evidence to prove that it was a gift for consideration—Inadmissible. See MAHOMEDAN LAW, GIFT. 6 Lah. L. J. 221.

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—S. 92—*Guarantee of promisor—Oral evidence.*

Where a promissory note is endorsed on the back by a person who is neither the maker nor the holder oral evidence can be let in to prove a contract of guarantee. (*Billaram, A. J. C.*) THAKURSEY HANSRAJ v. KISHENDAS REWACHAND.

76 I. C. 242 : 1925 Sindh 9.

—S. 92—*Oral agreement varying rate—If admissible—Conduct of parties.*

Where a mortgage deed provides for compound interest oral evidence cannot be let in to prove there was a contemporaneous agreement to realise only simple interest. Even the fact that only simple interest was levied all along does not affect the question. (*Newbold and Ghosh, JJ.*) ABDUL AZIZ MIA v. AMANMAL BATHRA.

78 I. C. 742 : 1925 Cal. 276.

—S. 92—*Oral agreement—Mortgagee and future purchaser of equity of redemption—Admissibility in evidence.*

Oral evidence is admissible to prove an agreement between the mortgagee and the would-be purchaser of the equity of redemption as regards the terms on which the mortgagee would release or assign his interest. The agreement between the purchaser and the mortgagee would amount to a contract which might be said to be contingent on the would-be purchaser's purchasing the equity of redemption. (*Newbold and Ghosh, JJ.*) SHAILESH CHANDRA GUHA v. BECARI GOPE.

40 C. L. J. 67 : 1925 Cal. 94.

—S. 92—*Oral evidence allowed.*

In a suit on a joint and several promissory note payable on demand executed by A. and B., A. can give oral evidence to prove that he joined in the loan only as security for B. But he cannot give oral evidence to prove contemporaneous oral agreement with plaintiffs, whereby plaintiffs agreed to recover the amount under the note in the first instance from B. (*Rupchand Billaram, A. J. C.*) CENTRAL BANK OF INDIA, LTD. v. NADIRSHAH R. MEHTA.

1924 S. 13.

—S. 92—*Sale-deed—Oral—Evidence—Admissibility as between parties on the same side.* MAUNG TUN GYAW v. MAUNG MO THWE.

77 I. C. 923

—S. 92—*Recitals in documents—Oral evidence to contradict—Admissibility.*

77 I. C. 195

—S. 92—*Sale of goods—Entry mentioning ship by which goods are to arrive—Oral evidence relating to time.*

An entry in certain account books evidenced a contract to sell goods and they were described as arriving by a certain ship. Held, oral evidence could not be let in to show that there was an agreement to deliver goods within a fixed time. (*Raymond and Billaram, A. J. C.*) FIRM OF JIWANJI & CO. v. FIRM OF MAHTABRAI.

1924 S. 127.

—S. 92—(proviso 1)—*Promissory note—Evidence that executant signed only as surety if admissible.*

When several persons have signed a promote jointly and severally it is not permissible for one

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of them to let in evidence that he signed only as a surety but if the promisee himself knew at the time of taking his signature that he signed only as surety, then proviso 1 to S. 92 of the Evidence Act would operate to let in the evidence. (*Young, J.*) MAUNG SEIN v. MA SAW.

3 Bur. L. J. 112 : 82 I. C. 816 : 1924 R. 360.

—S. 92 (2)—*Oral agreement written contract—Extrinsic evidence—Admissibility of.*

Under S. 92, proviso (2) the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. This proviso applies where the document is of an informal character. (*Drake Brockman, J.C.*) JODHRAJ v. BYRAM.

7 N. L. J. 25.

—S. 92, (Proviso 3)—*Admissibility of oral evidence to vary terms of contract in writing—Suit on a promote—Surety denying liability until settlement.*

The plaintiff brought a suit on a promote, executed by P N in respect of which P H stood surety without mentioning the terms of the contract in the plaint. P H contended that he was not a party to the contract and that his liability on the promote could only be determined after the settlement or account with the executant, which was upheld. Held, on appeal, (1) that under S. 92 (3) of the evidence Act, the oral evidence as to the surety's part in the transaction is admissible to supplement the terms of the contract, and that the written and the oral agreements together constituted a condition precedent to the attaching of any liability under the promote which was taken as a security and that it is not open to the plaintiff to treat the promote as a separate contract and to enforce it without taking the whole contract into account. Simon v. Husein Mohamed Sheriff. 19 M 368 followed. (*Carr, J.*) J. M. MANECKJEE v. MAUNG MO HAN.

2 Rang. 482 : 1925 Rang. 83.

—S. 92 (proviso 3)—*Promissory note—Oral agreement to set off—If admissible.*

Where in a suit on a promissory note, the defendant pleads an oral agreement at the time to set off moneys due to the executant under some other account, the agreement is contrary to the nature of the document and is not admissible in evidence. The case of a condition precedent to the performance of a contract in writing is different and evidence to prove such an oral agreement is admissible. (*Raymond and Billaram, A. J. C.*) RAM SINGH v. IBRAHIM.

78 I. C. 418 : 1925 S. 136.

—S. 92—(proviso 3)—*Promissory note—Suit based on Admission of execution Plea of want of consideration.*

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—S. 92 (Proviso 4)—*Lease in writing and registered—Subsequent oral agreement to surrender—Proof of.*

Where the agreement of lease on which plff's. suit is based is in writing and registered, it is not open to the defendant to prove by oral evidence that the lease was surrendered under a later oral agreement of the parties. Evidence of subsequent acts and conduct cannot also be adduced for the

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purpose of proving a surrender on the same principle on which such evidence is held inadmissible to prove that a transaction is not what it purports to be. (*Chandrasekhara Aiyar, C. J. and Plumer, J.*) DODDA SUBBA SETTY v. MUTTAYYA GOWDA. 2 Mys. L. J. 124.

——— S. 94—*Award—Construction—Oral evidence to explain meaning—If admissible.*

When a court is executing an award it is only in cases where the words are ambiguous or capable of more than one interpretation that oral evidence can be given as to their meaning. (*Harrison, J.*) KESHO RAM v. THAKUR DAS. 78 I. C. 80.

——— S. 97—*Sale certificate—Two irreconcilable descriptions—Decree can be looked into.*

Where in a sale certificate there are two descriptions of the property which cannot be reconciled, it is open to the court to look at the decree and decide which governs the sale. (*Daniels, J.*) MUKHTAR AHMAD v. KABIR AHMAD. 1924 A. 856.

——— S. 101—*Acquisition of permanent occupancy interest—Burden of proof on tenant.*

When a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such a right is upon the tenant, and proof of long occupation at a fixed rent does not satisfy that onus. 16 Cal 223 P. C. and 43 Mad 567 P. C. Ref. (*Sir John Edge*) NAINAPILLAI MARACAYAR v. RAMANATHAN CHETTIAR. 47 Mad. 337 : 10 O. & A. L. R. 464 : 28 C. W. N. 809 : 51 I. A. 83 : 22 A. L. J. 130 : 34 M. L. T. (P. C.) 10 : 1924 M. W. N. 293 : L. R. 5 P. C. 33 : 83 I. C. 226 : 19 L. W. 259 : 1924 P. C. 65 : 46 M. L. J. 546.

——— S. 101—*Burden of proof immaterial when evidence adduced.* 76 I. C. 891.

——— S. 101—*Consideration—Registered deed—Proof of consideration not received by him.* MANGLI v. BIDHA LAL. 76 I. C. 916 : 6 Lah. L. J. 457.

——— S. 101—*Execution—Onus of proof.* 77 I. C. 516.

——— S. 101—*Objectors to award must prove the objection—Civ. Pro. Code, Sch. II, Para 15.*

Any party wishing to set aside an award on the ground that the arbitrators in arriving at an unfair award either refused to hear somebody or heard the matter without giving notice of the hearing, undertakes the burden of satisfying the court that this is what really happened. (*Walsh, A. C. J. and Ryves, J.*) GOBIND SINGH v. BHIRGUNATH SINGH. L. R. 5 A. 405 : 82 I. C. 16 : 10 O. and A. L. R. 820 : 46 All. 686 : 1924 A. 788 : 22 M. L. J. 676.

——— S. 105—*Exception—Prosecution for an offence—Burden of proof.* 77 I. C. 819 (2) : 25 Cr. J. 467 (2).

——— S. 105—*Scope of—Plea not taken by accused—Facts proved by prosecution—Effect.*

S. 105 says nothing about pleas but places the burden of proof in certain circumstances on the

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accused. But if the prosecution has already performed the task for him by letting in evidence circumstances from which such a plea necessarily follows, it is the duty of the court to give him the benefit of it. (*Hallifax and Kolwal, A. J. C.*) MANGAL GANDA v. EMPEROR. 25 Cr. L. J. 1077 : 81 I. C. 901 : 1925 Nag. 37.

——— S. 106—*Special means of knowledge—Tenancy—Relationship of master and servant.*

In a suit for damages caused to the plaintiff by fire started on the first defendant's premises by the second defendant, the plaintiff alleged that the second defendant was the servant of the first defendant and that he was liable. The first defendant pleaded that the second defendant was his tenant and that he was not responsible for the actions of the latter. Held that the relationship between the first and second defendant was one peculiarly within the knowledge of the former and where he fails to give the fullest information about it, an inference adverse to him may be drawn under S. 106 of the Evidence Act. (*Lontaigne, J.*) MAUNG PAIN v. MA THE NGWE. 2 Rang. 549 : 1925 Rang. 143.

——— S. 106 and 114—*Servant giving a false account of the loss of goods entrusted to him—Presumption of Misappropriation.* See I. P. C. S. 408. 2 Rang 476.

——— S. 110—*Converse if true.* 77 I. C. 506.

——— S. 110—*Occupation of site in town—Ownership—Presumption.*

The occupation of a site in a town raises a presumption of ownership. (*Pipon, J.*) ALI KHAN v. MALIK MAIDAN. 78 I. C. 552.

——— S. 110—*Unregistered lease—Evidence of ownership.*

An unregistered lease is admissible to show the relation of landlord and tenant and under S. 110 Evidence Act it is evidence of ownership. (*Priddaiah, A. J. C.*) ANNAJI v. LAXMAN. 1924 Nag. 199.

——— S. 111—*Husband and wife—Good faith—Proof of.*

Where the husband stood in a position of active connivance to his wife and she entered into a transaction under his guidance, the burden of proving good faith is on him. To uphold the transaction, it must be shown she was given that care and advice which was due to her in her situation. (*Wazir Hasan and Nave, A. J. C.*) DWARAKA PRASAD v. NASIR AHMED. 11 O. L. J. 219 : 78 I. C. 850 : 1925 Oudh 16.

——— S. 112—*Legitimacy—Presumption—Conception during continuance of prior marriage—Birth after remarriage.*

Where at the time of conception of a child its mother had been lawfully married to A. and subsequently on divorce she remarried B. and the child was born within three months of the remarriage. Held that the child must be treated as the legitimate offspring of B. in the absence of proof that B had no access to the mother at the time when child would have been begotten. S. 112 of the Evidence Act refers to the point of time of

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the birth of a child and not to the time of its conception as the deciding factor in a case of disputed legitimacy 24 C. 216 not foll. (*Krishnan, J.*)
PALANI v. SETHU. 20 L. W. 69 :

(1924) M. W. N. 502 : 47 Mad. 706 :

81 I. C. 456 : 1924 Mad. 677 : 47 M. L. J. 155.

———S. 112—*Legitimacy—Presumption in favour of.*

There is no general presumption in favour of legitimacy without laying the foundation for it under S. 112 Evidence Act or a presumption that a valid marriage had taken place between the parents. (*Odgers, J.*) CHOCKALINGAM PILLAI v. SWAMI BATTAR. 79 I. C. 623.

———S. 114—Co-owner waiving claim—Presumption. MT. BEGAM v. JAFAR HASAN. 1924 Loh. 312.

———S. 114—*Possession of stolen property—Presumption of theft.*

Where accused persons are found in possession of stolen property soon after the theft and they are unable to explain their possession, they can be held guilty of receiving stolen property knowing it to be stolen under S. 411, I. C. (*Sulaiman, J.*)
YAMIN v. EMPEROR. L. R. 5 A. 81 (Cr.) 1924 All. 701

———S. 114—Non-production of account books—Presumption. 76 I. C. 553.

———S. 114—*Presumption in favour of marriage—When arises.*

The presumption in favour of marriage arises from the fact either that the persons have lived together for a length of time or been recognised as husband and wife by a certain number of persons. (*Odgers, J.*) CHOCKALINGAM PILLAI v. SWAMI BATTAR. 79 I. C. 623.

———S. 114—*Official acts—Presumption of regularity—Wajib-ul-arz—Entry in.*

A *Wajib-ul-arz* prepared during a settlement conducted under Regn. VII of 1823 as amended by Regulation IX of 1833 contained an entry about a mortgage. It was verified by one of the mortgagees and the general agent of the other mortgagees. Held that under the rules framed under the Regulation for the guidance of the settlement officers the verification must be deemed to have been made in acknowledgment of the correctness of the mortgage. The presumption was that the settlement court must have satisfied itself as to the authority of the general agents to make the acknowledgment and that the common course of business had been followed in the case. (*Kanhaiya Lal, J.*)
GANGA RAM v. LACHMAN SINGH. L. R. 5 A. 736. 1925 All. 176.

———S. 114, III. (a)—Presumption under—When arises. 76 I. C. 705 : 25 Cr. L. J. 241.

———S. 114, III. (b)—Approver—Corroboration of—Evidence of accomplice—sufficient.

The corroboration required to support the evidence of an approver is not satisfied by the evidence of an accomplice or a co-accused who makes a confession. (*Kotval and Kinkhede, A. J. C.*)
SHIKH SHEROF v. EMPEROR. 81 I. C. 898 : 25 Cr. L. J. 1067.

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———S. 114, III. (b)—*Section not imperative—Approver—Evidence of.*

Illustration (b) to S. 114 is not imperative but courts always insist on the corroboration of an approver's evidence on material points (*Kincaid, J. C. and Aston, A. J. C.*) KAURMAL v. EMPEROR. 81 I. C. 881 : 25 Cr. L. J. 1057.

———S. 114, III. (f)—*Orders of court—Carrying out—Presumption.*

Every Court is furnished with a machinery for giving effect to its orders and it would be unjust to think that the subordinate staff attached to each court fails in its duty of carrying out the orders of the Court. (*Kinkhede, A. J. C.*) BHAIKON PRASAD v. LAXMI NARAIN DAS. 1924 Nag. 385.

———S. 115—*Acceptance of rent—If creates under-proprietorship under Talukdar.*

There is no peculiarity in the law of estoppel in India as distinguished from that of England; the law of India is compendiously set forth in S. 115 of the Indian Evidence Act. Taking of a rent each year under a mistaken belief may bar by estoppel the owner from any claim for mesne profits during the particular year or years for which such rent was received. It would estop the owner from maintaining that the person who paid the rent possessed the property with a liability to account or possessed on any other or further terms than on payment of the rent made and taken. In cases of estoppel the onus of establishing the facts and circumstances from which estoppel arises rests upon the person pleading it. (*Lord Shaw.*) MIRTA SEN SINGH v. MT. JANKI KUAR. 20 L. W. 566 (P. C.) :

26 Bom. L. R. 1134 : 40 C. L. J. 468 :

35 M. L. T. 247 (P. C.) : 46 A. 728 :

51 I. A. 326 : 10 W. N. 426 : 82 I. C. 946 :

1924 P. C. 213 : 47 M. L. J. 591.

———S. 115—Acquiescence. MT. KOKLA KUNWAR v. KALIAN MAL. 76 I. C. 585.

———S. 115—*Alienation by Hindu father—Son not objecting to mutation—Estoppel.*

Where the alienee from a Hindu father applied for mutation of names and the son on being examined in the proceedings did not object to the alienation, he is thereafter estopped from challenging the same, as he must be deemed to have represented that it was a valid transaction. (*Daniels, J.*) SHEO DAN SINGH v. HABIB ULLAH KHAN. 1924 All. 721

———S. 115—*Attestation by interested near relatives—Presumption of knowledge of contents.*

Mere attestation by a person does not necessarily import knowledge of the contents of the document attested but there may arise circumstances from which an inference may be deducible that the attesting witness was aware of the nature of the document he was attesting. Where a sale deed executed by a Mahomedan was attested by his mother and sister. Held, such close relatives would have been aware of the nature of the document to which they were asked to append their signature; And as it is not usual for Mahomedan *purdanashin* women to attest documents, the attestation in the present case was in all

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probability insisted upon by the purchaser to bind the ladies by the sale. (*Raymond and Madgarkar, A. J. C.*) *AZIZULLAH KHAN v. GHULAM HUSSEIN*.

1924 S. 97 : 80 I. C. 994 : 17 S. L. R. 63.

—S. 115—*Conduct creates estoppel.*

No actual verbal representation is necessary to give rise to estoppel. It is quite enough that the conduct of the party leads another to act in the belief that he asserts no claim to the property. 19 I. A. 203 Foll. (*Raymond and Madgarkar, A. J. C.*) *AZIZULLAH KHAN v. GHULAM HUSSEIN*.

17 S. L. R. 63 : 80 I. C. 994 : 1924 Sind 97.

—S. 115—*Estoppel by conduct—Adoption—change of circumstances—Widow estopped from disputing adoption.*

Where a Hindu widow adopted a boy and on adoption the boy's name and house name were changed, he took the name of his adoptive grandfather and the house name of the adoptive father, his *upanayanam* marriage and *grahapravesam* were performed at the instance of the widow, the boy performed the Shradhs of his adoptive ancestors, and he was excluded from all rights in the natural family. *Held*, that the widow was estopped from denying the validity of the adoption on the ground of want of consent of the sapindas. 34 A. 398 (P. C.) foll. (*Phillips and Venkatasubba Rao, JJ.*) *VEDLA VENKATASUBBAMMA v. VEDLA VENKAMMA*.

19 L. W. 83 : 1924 M. W. N. 1 : 77 I. C. 214 : 1924 Mad 308

—S. 115—*Estoppel—Building on land—Silence—Duty to speak—Negligent omission.*

1924 Cal. 438

—S. 115—*Estoppel by representation—Tenants-in-common—Conduct of one how far estops others.*

It cannot be said that a Mahomedan tenant-in-common can be held to be represented by another Mahomedan tenant in common merely because their interests are identical. Per *Mukerji, J.* The rule of estoppel by substantial representation is based on broad principles. The rule applies with great force in the case of a Hindu family simply because of the constitution of it, but in other cases only if the facts are sufficient for its support. The object of this rule is this. The Court is to dispense justice and the rules of procedure should not be allowed to defeat the ends of justice. (*Stuart and Mukerji, JJ.*) *KARIM BAKHSI v. WAHAJ-UD-DIN*.

46 A. 214 : L. R. 5 A. 5 (Rev.) : 22 A. L. J. 73 : 78 I. C. 1035 : 1924 All. 427.

—S. 115—*Estoppel—Point of law—None.*

There is no estoppel by reason of a misrepresentation on a point of law and a transaction which is invalid can be declared to be such at the instance of either party thereto. (*Baker, J. C.*) *MT. KESARBAI v. JAMADAR*.

20 N. L. R. 162 : 82 I. C. 126.

—S. 115—*Estoppel—Rival claimants Truth of representation—Legal representatives and transferees of parties bound by estoppel.*

A Hindu testator left his estate in favour of his wife by will but the will was disputed by a

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rival claimant. Subsequently the parties compromised the dispute and the rival claimant acknowledged the widow as legatee under the will and she in her turn allowed him to retain $\frac{1}{2}$ of the estate during her life time. *Held* that neither the rival claimants nor any transferee from him could dispute the validity of the will. (*Dalal, J. C. and Nave, A. J. C.*) *SYED MD. HASAN v. SYED ALI HYDER*.

10 O. & A. L. R. 1229 : 1 O. W. N. 803.

—S. 115—*Compliance with Court's order.*

The fact that the plaintiffs paid without demur the small *ad valorem* Court-fee in pursuance of the order of an earlier date does not debar them from questioning the validity or illegality of the Court demanding *ad valorem* Court fee when subsequently the Court demanded a much larger fee since a fresh cause of action accrued to the plaintiffs on the later date when additional Court-fee was demanded. (*Jwala Prasad and Foster, JJ.*) *MANI LAL v. DURGA PRASAD*.

5 Pat. L. T. 425 : 3 Pat. 930 : 80 I. C. 667 (2) : 1924 P. 673 : 1924 Pat. 254.

—S. 115—*Mortgagor—If can plead want of title—Knowledge—Effect of.*

A mortgagor is estopped from pleading in a suit on the mortgage that he had no title to the property at the date of the document. But if the mortgagee is proved to be well aware of the actual facts as regards the mortgagor's title to the property, the plea of estoppel is not available to him.

Whoever wants to get out of the estoppel must establish knowledge on the part of the mortgagee of the defect of title, and the burden of proof is on him. (*Kinkhede, A. J. C.*) *TULSIRAM v. TUKARAM*.

1924 Nag. 363.

—S. 115—*Old coins—Stolen property—Accused if to explain possession.*

In the case of coins which are in common use where the allegation is they were stolen and were identified to be the ones which were stolen, the onus is on the accused to explain how he came to possess them. (*May Oung, J.*) *MAUNG LAY v. EMPEROR*.

77 I. C. 429 : 25 Cr. L. J. 381 : 1924 Rang. 173.

—S. 115—*Signing of award—Withdrawal of Suit in—Consequence—Estoppel.*

Where the parties to an arbitration sign the award and as a result thereof one of them withdraws a suit which he would otherwise have prosecuted, the other party is estopped from contesting the validity of the award. (*Baker, O. J. C.*) *MANOHAR LAL v. MT. AMANO*.

77 I. C. 41.

—S. 116—*Estoppel—Landlord and tenant—Third parties not affected.*

75 I. C. 495.

—S. 116—*Estoppel—Mortgagor and mortgagee—Mortgagee put into possession by mortgagor—Denial of title.*

Where a mortgagee is put into possession by the mortgagor in pursuance of the contract of mortgage, he is estopped from denying the title of his mortgagor during the continuance of the mortgage. The principle of estoppel between the mortgagor and the mortgagee works in

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favour of and against both of them. The mortgagor is estopped from denying his own authority to mortgage the property. On the other hand the mortgagee is estopped from denying the authority of the mortgagor to mortgage his property, 36 Bom. 185 followed. (*Hazir Hasan, J. C.*) *IBAD ASHRAF v. INAYAT ULLAH*.

10 O & A. L. R. 697 : 1 O. W. N. 346 :
80 I. C. 62 : 11 O. L. J. 722.

S. 116—Payment of rent—Estoppel.

Where rent is paid, but not under circumstances which would establish a relationship as between the parties of landlord and tenant, the tenant is not estopped from showing that the person to whom he paid the rent is not the landlord. (*Mukerjee, J.*) *ABDUL RAJJAK SIKDUR v. PROMADA SUNDARI DEVI*.

80 I. C. 22.

S. 116—Estoppel—Tenant.

10 O & A. L. R. 64.

S. 116—Landlord and tenant—Estoppel—Denial of title—Admission through mistake or ignorance. *Mr. LAXMIBAI v. DEVI*. 1924 Nag. 62.

S. 116—Tenant not let into possession—Estoppel—Possession prior to lease—Effect.

A tenant who has executed a lease but has not been let into possession by the lessor is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in the lessor's title or that the execution of the lease was procured by fraud, misrepresentation or coercion. The mere fact that the tenant was in possession prior to the execution of the terms does not prevent the doctrine of estoppel from being applied. (*Broadway, J.*) *MELA RAM v. MT. BHOLI*.

76 I. C. 47 :
1925 Lah. 60.

S. 116—Scope of—Title prior to tenancy—Title paramount—Eviction.

S. 116 Evidence Act, is no bar to a tenant showing that his landlord had no title at a date previous to the commencement of the tenancy or that since its commencement it has expired or has been defeated because the bar operates only during the continuance of the tenancy. In a case of eviction by title paramount actual and open surrender of possession to the intermediate landlord is not necessary 2 M. 556 Ref. (*Wallace, J.*) *RAMASWAMI THEVAN v. ALAGA PILLAI*.

79 I. C. 881 : 1925 Mad. 143.

S. 118—Minor—Evidence of.

A Judge can act on the evidence of a child of tender years if he is impressed by its intelligence and demeanour and the evidence given bears no marks of tutorage. (*Shadi Lal, C.J. and Lumsden, J.*) *GHULAM HUSSAIN v. THE CROWN*.

6 Lah. L. J. 474 : 1925 Lah. 94.

S. 125—Defamation—Police Report—Plea of justification—Privilege—Extent of.

Statements made in the course of a judicial proceeding are absolutely privileged. But information given or report made to the police does not come within this principle. The report may or may not lead to a judicial proceeding but it is a preliminary step taken before any judicial proceeding has been commenced. A report made

EVIDENCE ACT (I OF 1872), S. 132.

at a police station, though not within the rule of absolute privilege which covers judicial proceedings, is *prima facie* privileged, that is to say, the person making it has a right to make it if he honestly believes it, and the person receiving it has a duty to receive. But qualified privilege, as the term indicates, provides only a qualified protection, and the person charged with defamation must prove that he used the privilege honestly, honestly believing the truth of what he said, or in other words, having reasonable grounds for making the statement; and the onus of establishing that lies upon him. Where the statement is made with reference to something in which the person making the complaint was himself involved as a party, it is impossible for him to have had an honest belief in its truth if it is shown to be untrue. Therefore in a case of qualified privilege, where the defendant sets up in defence that the allegation is true to his own knowledge, the defence of qualified privilege becomes impossible. (*Walsh, C.J., Ryves and Dalal, JJ.*) *MAJNU v. LACHMAN PRASAD*.

L. R. 5 A. 478 : 46 A. 671 :
22 A. L. J. 597 : 1924 All. 535.

S. 126—Attorney and client—Duty of attorney to keep his client's instructions and documents secret—Extent of duty—Privilege of client.

An attorney cannot disclose any communication made to him in the course of his professional employment without the consent of both his clients, if he has been engaged by more than one person in the same matter. It may be that as between the two parties who engaged the same solicitor or attorney there can be no secrecy or privilege. At the same time as between a third party and any one of the two parties who engaged him his lips are sealed with respect to communications made to him in the course and for the purpose of his employment as a solicitor or attorney. If the engagement was given on behalf of two persons, whatever the position of the attorney may be with reference to these communications as between the two persons, he could not disclose these communications to any one beyond those persons without the consent of both. The obligations to keep undisclosed matters which ought not be disclosed has nothing to do with the question whether at the time when the communications were made there was any pending litigation or any prospect of it. (*Shah, A. C. J., Kaji and Kincaid, JJ.*) *IN RE AN ATTORNEY*.

26 Bom. L. R. 887 : 1925 Bom. 1.

S. 132—Witnesses for defence—Voluntary statements in court—Subsequent prosecution against witness.

"Compulsion" within the meaning of S. 132 of the Evidence Act is a question of fact. Where in a criminal trial for wrongful possession of cocaine, a witness for the defence made certain statements favourable to the accused with a view to convince the court of the innocence of the accused and subsequently a prosecution was launched against the witness for such statements which proved to be false. *Held*, that the statements were not excluded by S. 132 of the Evidence Act. 42 A. 257 ;

EVIDENCE ACT (I OF 1872), S. 133.

42 A. 92 Ref. (Walsh and Ryres, JJ.) EMPEROR
v. BANARSI. 46 A. 254 : L. R. 5 A. 73 (Cr.) :
77 I. C. 829 : 22 A.L.J. 144 : 25 Cr. L. J. 477.

—S. 133—*Accomplice—Corroboration of testimony—Conviction.*

It is the practice of all the courts to demand a certain amount of corroboration before they are prepared to accept the tainted evidence of an accomplice. The extent of the corroboration must vary according to the circumstances of the case, and although a conviction on the unsupported evidence of an accomplice is not illegal, it is safer as a rule, only to rely upon it when it has been corroborated by other evidence, either direct or circumstantial, which cannot be doubted. (Watson, R. M.) NARAYANA CHARI v. EMPEROR. 2 Mys. L. J. (B. and C.) 11.

—S. 133—*Accomplice—Uncorroborated testimony—Conviction—Direction to jury.*

There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. But it has long been a rule of practice, for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such confirmed evidence. (Richardson and Suhrawardy, JJ.) EMPEROR v. JAMALDI FAKIR. 25 Cr. L. J. 1009 : 81 I.C. 712 : 51 Cal. 160 : 28 C. W. N. 536 : 1924 Cal. 701.

—S. 133—*Approver—Conviction based on evidence given by—Legality.*

There is no positive legal bar to taking an approver's evidence as a basis for a conviction, but unless some reliable corroboration on a material point were superadded to it, it would, in almost all cases, be unsafe to accept it as conclusive. (May Oung, J.) MAUNG LAY v. EMPEROR. 25 Cr. L. J. 381 : 77 I. C. 429 : 1924 Rang. 173.

—S. 133—*Corroboration of accomplice—Extent of.*

76 I. C. 698 : 25 Cr. L. J. 234.

—S. 138—*Examination of witnesses—Interference by Court.*

Generally it is not the province of the Court to examine witnesses and as a rule the Court should leave the witnesses to the pleaders to be dealt with as is provided for in Section 138 of the Evidence Act. (Wazir Hasan, J. C.) JANKI v. THAKUR SHEO NARAIN SINGH. 10 O. & A. L. R. 342 : 11 O. L. J. 333 : 1 O. W. N. 208 : 82 I. C. 154 (1) : 25 Cr. L. J. 1226 (1) : 1924 Oudh 371.

—S. 145—*Documents tendered after evidence.*

L. R. 5 P. C. 25 : 28 C. W. N. 589 : 77 I. C. 141 : 10 O. & A. L. R. 521.

—S. 157—*Evidence before Committing Magistrate may be corroborated by statement during police investigation—Criminal P. C. S. 288.*

The object and effect of section 288 of the Criminal Procedure Code is to place the deposition in the committal enquiry on exactly the same footing as the deposition in the Sessions

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Court. Such a deposition is "testimonial" within the meaning of S. 157 of the Evidence Act, which, a prior statement by the witness during the police investigation is admissible in evidence to corroborate. 1923 Mad. 20 and 27 Cal. 295 Foll. (Scott-Smith and Fforde, JJ.) MAM CHAND v. THE CROWN. 5 Lah. 324 : 82 I. C. 129 : 25 Cr. L. J. 1201 : 1924 Lah. 609.

—S. 157—*Rape—Statement of victim to inquirers after offence—Admissibility.*

A statement of a raped girl that she had been raped in answer to enquiries by persons who saw her weeping is admissible under S 157 Evidence Act. (Kinkhede, A. J. C.) SO SALAL BANIA v. EMPEROR. 25 Cr. L. J. 1214 : 82 I. C. 142 : 1925 Nag. 74.

—S. 167—*Improper admission of evidence—Effect of.*

Under S 167 Evidence Act the improper admission of evidence is not ground of itself for reversal, if apart from it there is other evidence to support the decision. Ordinarily in such cases the case should be remanded to the trial court to exclude the evidence and give a fresh finding with reference to the rest of the evidence. (Venkatasubba Rao, J.) KUMBA SANKARA CHENNA BASAPPA v. KILLI MARAPPA. 82 I.C. 283 : 25 Cr. L. J. 1275.

EXCESS PROFITS DUTY ACT (X OF 1919) S. 18—*Proceedings for the recovery of duty—Limitation Rules framed under the Act—Rule 24, 1924 Lah. 54.*EXECUTING COURT—*Decree—Interpretation of—Power of executing court to question jurisdiction of court.*

It is impossible for a court executing the decree to go beyond the decree and to enquire whether the Court was entitled to pass that decree in view of what was actually alleged by the plaintiff in the plaint. (Das and Ross, JJ.) HAKIM MAHOMED IDRIS v. LACHMAN DAS. 1924 P. H. C. C. 25 : 5 Pat. L. T. 368 : 78 I. C. 303 : 1924 Pat. 504.

—*Decree—Legality of not to be questioned.*

The first and fundamental rule of law is that an executing Court cannot go behind the decree. The effect of entertaining the objection as to the legality and correctness of the decree would be to re-open the decree, while, as a matter of fact the Court executing the decree must take the decree as it stands. It has no power to go behind the decree, the reason being that a decree though it may not be according to law is binding and conclusive between the parties if it is not appealed from, and it is for these reasons that the Court executing a decree cannot alter, vary, or add to, the terms of that decree. (Kin Kaid, O. A. J. C.) BEHARI SINGH v. NAWAL SINGH. 20 N. L. B. 24 : 78 I. C. 136 : 1924 Nag. 81.

—*Decree—Validity of, not to be questioned.*

It is not competent to the executing court to set aside a decree passed in an erroneously framed suit against a wrong party. (Greaves and Graham, JJ.) KUDRATULLA SARKAR v. UPENDRA KUMAR CHOUDHURY. 40 C. L. J. 254 : 1925 Cal. 208.

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Decree—Validity of, not to be impeached.

Where an order of the privy council has been drawn up and has become final, the courts in India are bound to respect it and carry the same into execution and the mistakes, in the order if any, could only be rectified by the Privy Council. (*Jwala Prasad and Kulwantsahay, JJ.*)
SOMAR SINGH v. MT. PREMDEI KUER.

5 Pat. L. T. 21: 1924 P. 105: 3 Pat. 327 :
79 I. C. 794 : 1925 Pat. 40.

Duty of—Cannot go behind decree.

The executing court has to take the decree as it is and to enforce its provisions. It is bound by the terms of the decree and has no power to go behind it or to enter into questions beyond its scope. (*Campbell, J.*) FAQIR MUHAMMAD KHAN v. PIRDAD KHAN.
1924 Lah. 615.

Duty of, to execute decree as it stands—Minor—Decree against—Want of representation.

An executing Court has no jurisdiction to criticise or go behind the decree; all that concerns it is the execution of it. If the decree should be annulled as being obtained against a minor without proper representation, that is not the function of the executing court. (*Shadi Lal, C. J. and Le Rossignol, J.*) THE LAHORE BANK, LTD. v. GHULAM JILANI,
5 Lah. 54 : 78 I. C. 460 :
1924 Lah. 448.

Duty of—Proper parties before Court.

It is the duty of an executing court to see that the parties to the execution were properly before the court, and in the case of a debtor whose property is in the Court of Wards, the manager must be impleaded. (*Das and Ross, JJ.*) SIDHESWARI PRASAD NARAYAN SINHA v. DALHIN RADHA DULARI KUER.
80 I. C. 716.

Powers of—Validity of decree.

An executing court cannot question the validity of the decree provided there is a valid decree in existence which can be executed. (*Pearson and Graham, JJ.*) SKINATH CHATTERJEE v. KIDAR NAMB RAI.
82 I. C. 255 : 1925 Cal. 276.

Powers of.

An executing court cannot go behind the decree (*Jackson, J.*) PARTHASARATHY APPA RAO v. MUHAMMAD ABDUL WAHEB.
82 I. C. 434 :
1925 Mad. 270.

Powers of—Amendment of decree.

An executing court has no power to go behind a decree or entertain any objection to its legality or correctness (*Baker, O. J. C. and Pridcaux, A. J. C.*) GANPATRAO v. TULSABAI.
1924 Nag. 419.

Powers of.

An executing court must take the decree as it stands and cannot investigate the question whether the decree was obtained collusively or not. (*Kinkhede, A. J. C.*) BEHARISINGH v. NEWAL SINGH.
20 N.L.R. 24 : 78 I. C. 136;
1924 Nag. 81.

Power to modify decree.

In execution, the Court may modify the decree by directing payments by instalments. 8 B. 303 Ref. (*Macleod, C. J. and Crump, J.*) SIDAGAVADA v. RAMCHANDRA BALAJI.
1924 Bom. 118.

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*Powers of—Objection to legality of decree**—Excessive rate of interest—Contract Act, S. 74.*

An Executing Court cannot go behind a decree. It must take the decree as it stands and has no power to entertain an objection to the legality of the decree. The terms of S. 74 of the Contract Act are not applicable to a decree and a decree-holder is entitled to recover interest at the rate prescribed in the decree. There is no difference in this respect between compromise decree and decrees on contest. (*Daniels and Dalal, JJ.*) RAGHUNANDAN PRASAD v. GHULAM ALAUDDIN BEG.
46 A. 571 : 79 I. C. 916
22 A.L.J. 464 : L. R. 5 A. 356 : 1924 A.L. 689

Powers of—Award—Powers of—Penalty if can be relieved against.

A court when executing an award has no power to modify the award by granting relief against a clause which happens to be penal. (*Harrison, J.*) KESHO RAM v. THAKUR DAS.
78 I. C. 80.

EXECUTION—Court—Powers of—Construction of decree—Alienation from Hindu widow—Money decree against reversioners—Right to mesne profits.

An executing court has only to interpret the decree. It cannot go behind it or interpret it in a manner wholly repugnant to the tenor of the judgment.

Where a decree holds an alienation by a Hindu widow to be not binding on the estate but awards a money decree to him and in default possession is to remain with him, he is not entitled to mesne profits. (*Kinkhede, A. J. C.*) MT. BANI v. NAKSOO.
1924 Nag. 378.

Application—Verification—By person other than decree-holder—Person verifying well acquainted with facts—Application valid. See C. P. CODE, O. 21, R. 11. 28 C. W. N. 687.

Death of judgment debtor—Effect.

Execution cannot proceed against a judgment debtor who is dead and whose representatives are not on record. (*Baker, A. J. C.*) RAMSWARUP v. RAGHUNANDAN.
1924 Mad. 165.

Decree satisfied—Court if can alter arrangement.

Where a money decree is satisfied by the debtor giving a lease of some property for a fixed period and thereupon the execution application is consigned to the record room, the court becomes *functus officio* and cannot thereafter direct a cancellation of the lease on the proportionate amount of the decree being paid. (*Martineau, J.*) HIRA SINGH v. MADHO.
1924 Lah. 634.

Estoppel—Party aware of proceedings—No objection raised—Effect.

Where a party is aware of execution proceedings against him and does not object to the same, he cannot challenge the validity of a sale on the ground that no notice was actually served on him (*Oldfield and Devadoss, JJ.*) NAGAPPA CHETTY v. MUTHURAMAN CHETTY.
78 I.C. 12: 1925 Mad. 159.

Failure of judgment debtor to raise objection to sale—Position of purchaser.

Where the judgment debtor fails to object at the time of sale that the property is not liable to

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sale under S. 60 (c), C. P. Code, he cannot in subsequent proceedings raise that objection. A stranger auction purchaser is justified in believing that the court had done what it ought to do under the Code. (*Kanhaiya Lal, J.*) *MUKAT SINGH v. MISRA PARAS RAM.* 1924 All. 726.

—*Modes of—Arrest of Judgment-debtor—Power of Court to stay.*

It is for the judgment-creditor to elect his remedies in execution, subject, of course, to such rules as there may be, governing a particular case. Consequently where the decree-holder applies for execution of the decree by arrest of the judgment-debtor the court has no power to stay execution against the person of the debtor on condition of his paying a portion of the decree amount within a certain time (*Schwabe, C. J. and Waller, J.*) *SYED AGAJAN SAHIB v. ABDUL MAJID KHAN SAHIB.* 19 L. W. 164 : (1924) M. W. N. 265 : 77 I. C. 764 (1) : 1924 Mad. 512.

—*Mortgage—Preliminary decree.*

A preliminary decree in a mortgage suit is not capable of execution. (*Das and Ross, JJ.*) *SIDHES WARI PRASAD NARAYAN SINGH v. DULHIN RADHA DALARI KUAR.* 80 I. C. 716.

—*Mortgage decree—Order in which properties are to be sold—Power of Court—Rights of decreeholder.*

A mortgagee decreeholder is entitled to have all the properties mortgaged to him, put up for sale, but it is entirely in the discretion of the court to direct in which order the properties should be sold. All the properties must be advertised for sale and when they are actually brought into execution and become subject to sale it would be then for the court to decide on just and equitable principles which property ought to be first sold 15 C. W. N. 80 Ref. (*Das and Ross, JJ.*) *BHAGWAN CHANDRA DAS v. RAI SAHIB DHARAM NARAIN DAS.* 2 Pat. L. R. 242 : 3 Pat. 962 : 1924 P. 502.

—*Mortgage decree—Sale of properties in particular order—Application for—Maintainability—Application to that effect refused in suit itself—Effect—Purchase of some items by A without notice—Usufructuary Mortgage of other items to B with notice—Order of sale in case of.*

Of several items of property comprised in a mortgage, appellant purchased items 1 to 3 without notice of the mortgage and other items were usufructuarily mortgaged to persons who took with notice of the prior mortgage. In execution of the decree on the prior mortgage, appellant who was a party to the suit, applied that the other items might be sold first, and that those purchased by him might be sold only for the deficit, if any on the sale thereof. Held that the application was not liable to be dismissed on the sole ground that a similar application by him had been refused in the mortgage suit itself; that the decree-holder could not be prejudiced by the order of selling, and that in the circumstances of the case, the application should be granted (*Schwabe, C. J. and Waller, J.*) *RAGHAVACHARIAR v. KRISHNA REDDI.* 19 L. W. 23 : (1924) M. W. N. 134 : 1924 Mad. 509 : 46 M. L. J. 32.

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—*Set off—Not pleaded in suit or recognised by decree—Not to be pleaded in execution proceedings.*

Where the defendant in a suit had not pleaded any set-off in respect of the amount due to him from the plaintiff and the decree in the suit did not recognise the claim for set-off, it is not open to him to plead it in execution proceedings. (*Kendall, A. J. C.*) *NATIONAL BANK OF UPPER INDIA LTD. v. GOPAL DAS.* 10 O. & A. L. R. 399 : 11 O. L. J. 517 : 1 O. W. N. 290 : 81 I. C. 651 (2) : 1924 Oudh 434.

—*Validity of decree—If open to question—Compromise decree—If different from decree after contest.*

In the course of execution proceedings it is not open to a party to a decree to question the validity of a compromise decree which, until it is set aside, is binding just as much as if it had been passed after contest. (*Phillips and Odgers, JJ.*) *KOTHANDARAMASWAMY NAIDU v. PAPPAMMAL* 79 I. C. 891 : 1925 Mad. 218.

EXECUTION PROCEEDINGS—Dismissal for default of execution application—Rest ration. See C. P. CODE O. 9, R. 9. 47 M. L. J. 269.

EXECUTION SALE—*Bona fide* purchasers—Protection to. 1924 Mad. 144.

—*Legality of—Property in the hands of Receiver—Leave of Court—Necessity for*

The objection that properties were sold in execution without the consent of the court by which the Receiver was appointed is not such as would render the sale void : at most, it was merely an irregularity by which the judgment-debtor not having been prejudiced, the sale could not be set aside. (*Richardson and Suhrawardy, JJ.*) *KARIMUNNESSA KHATUN v. FAZLAL KARIM.* 40 C. L. J. 78 : 1923 Cal. 1055.

—*Legality of—Property sold on different date from the date fixed—No notice to Judgment debtor—Sale a nullity.*

In execution of a decree certain property had been ordered to be sold on 1-7-1922 which day being a holiday, the sale was adjourned. Subsequently in a suit by the sisters of the judgment-debtor claiming title to the property, an injunction was asked for restraining the sale of the property in execution. The injunction petition was posted to 7-7-1922 and the execution case was posted also to that date. On that date the injunction petition was dismissed and the property was put up for sale without any previous notice to the judgment debtor that the sale would be held on that date. Held that the sale was a nullity and not binding on the judgment debtor. (*Greaves and Chakravarty, JJ.*) *MOTAHAR HOSSAIN v. MOHAMMAD YAKUB.* 40 C. L. J. 311 : 1925 Cal. 201.

—*Minor—Not properly represented—Effect on sale.*

An execution sale held under a decree properly obtained against a minor is not a nullity owing to the improper representation of the minor during the execution proceedings 25 Bom. 337 : 35 C. 226 : 15 C. L. J. 3 : 44 A. 525, 49 C. 635 Ref. (*Mookerjee and Rankin, JJ.*) *JINNAT ALI v. KAILAS CHANDRA CHOUDHURY.* 39 C. L. J. 284 : 81 I. C. 870 (2). 1924 al. 847.

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———Objection to—When to be taken.

1924 Pat. 182.

———Purchaser—Rights of—Equities.

A purchaser at a sale in execution of a decree takes the property subject to all the equities of the judgment-debtor and he cannot take up the position of a *bona fide* purchaser for value without notice. (*Newbould and Ghose, JJ.*) GALSTAIN v. SONATAN PAL. 78 I. C. 668.

———Rent decree—No warranty of title—Suit for recovery of purchase money on the ground of want of saleable interest in the judgment-debtor.

There is no warranty of title in sales in execution of a rent decree and it is not open to the purchaser to maintain a suit for the recovery of the purchase money against the decree-holder and the judgment debtor on the ground that they had no saleable interest in the land. 22 C. W. N. 760 Ref. (*Rankin and Ghose, JJ.*) BANKU BEHARI DAS v. GURU DAS DHAR. 40 C. L. J. 157.

———Rights of purchaser—Mortgage decrees against same person—Sale of property—Decree on prior mortgage satisfied—Execution of second decree—Sale if free of prior incumbrances—Sale by Collector.

Two decrees were passed in favour of two mortgagees against the same mortgagor. The decree on the puisne mortgage ordered the sale of the property included in the prior mortgage decree. The puisne mortgagee satisfied the prior mortgage decree and claimed that the amount of the prior decree should be added to the decree on his own mortgage. This was refused and the decree on the puisne mortgage was sent to the Collector for execution. The puisne mortgage decree-holder applied to the Collector that the property should be sold free from the incumbrance. The property was sold and the proceeds brought into Court. *Held* that the property sold was free from the incumbrance created in favour of the prior mortgagee and the money realised must be credited towards the satisfaction of the decree on the prior mortgage and the balance towards the decree on the puisne mortgage. 16 All. 1; 37 B. 32 Ref. (*Stuart and Mookerjee, JJ.*) ABDUL SHAKUR v. MAHOMED MATIN. 22 A. L. J. 202; L. R. 5 A. 93; 78 I. C. 429.

46 A. 414; 1924 All. 307.

———Sale certificate—Construction—Ambiguity—Extrinsic evidence.

If a sale certificate is ambiguous the court is entitled to look into the surrounding circumstances and its conclusion upon those facts would be binding on the High Court in second appeal. If however there is no ambiguity the court cannot go into extrinsic evidence. (*Das and Ross, JJ.*) LACHMI PRASAD TEWARI v. BALUNANDAN SINGH. 1924 P. H. C. C. 271; 1924 P. 805.

———Validity of—Order releasing property from attachment—Order not communicated to officer holding sale.

By an order of court certain property which had been ordered to be put up for sale in execution was released from attachment but before the order could reach the officer holding the sale, the

EXTRADITION ACT (XV OF 1903), S. 10.

sale had been concluded *Held*, that the sale was invalid and ineffective. (*Kotwal, A. J. C.*) JITMAL v. HUMBERLAL. 20 N. L. R. 168; 1925 Nag. 60.

EXECUTOR—Acceptance of office—If can subsequently renounce—Liabilities of. See WILL—EXECUTOR. 6 Lah. L. J. 454.

———Renunciation—Effect—If a necessary party to suit relating to estate—Executor *de son tort*—Position of.

It is a well established principle that an executor who has once acted cannot evade his liabilities by afterwards renouncing his duties and that any such renouncement is void. This principle applies also to an executor *de son tort* and having taken upon himself the duties of an executor in connection with the estate of the deceased he continues liable to be sued in the character of executor; he is a proper and necessary party to any proceedings in which the estate of the deceased is sought to be affected, and if he is not impleaded the estate is not bound. (*Scott-Smith and Fford, JJ.*) KESAR SINGH v. INDAR SINGH. 76 I. C. 172; 6 Lah. L. J. 454; 1924 Lah. 543.

———Renunciation—Retraction of—Application for probate—English and Indian Law See PROB. AND ADMN. ACT, SS. 16 AND 17.

61 Cal. 745.

———Title of—Derived from will and not from probate—Representation of estate.

Every executor derives his title from the will and not from the probate. The probate is indeed the only proper evidence of the executor's appointment, but notwithstanding this, it is clear the executor represents the estate of the testator from the time of his death. There is clear provision to this effect in S. 179 of the Indian Succession Act which declares that the executor is the legal representative of the deceased for *all purposes*, and all the property of the deceased person vests in him as such. (*Lindsay and Sulaiman, JJ.*) MEGHRAJ v. KRISHNA CHANDRA. 46 A. 286; 22 A. L. J. 193; L. R. 5 A. 193;

78 I. C. 243; 1924 All. 365.

EXTRADITION—Applicability—Berar.

The Extradition Act does not apply to a case of extradition from Berar to the Hyderabad State, which is governed solely by the treaty between the State and the Government of India. (*Baker, O. J. C.*) DADDIPRASAD v. DT. MAGISTRATE, YEOTMAL. 77 I. C. 234; 25 Cr. L. J. 346; 1924 Nag. 313.

EXTRADITION ACT (XV OF 1903) S. 7—Warrant of extradition—Validity.

A warrant of extradition signed by an officer who has not been empowered to do so is invalid. (*Adami and Bucknill, JJ.*) SADHAK GIR v. EMPEROR.

25 Cr. L. J. 687; 81 I. C. 175; 1925 P. 112.

———Ss. 10 (4) and 23—Person arrested by police without warrant—Detention by magistrate under S. 23 of the Extradition Act—Power of Magistrate to release on bail. See CR. P. CODE SS. 54 AND 497.

26 Bom. L. R. 984.

FACTORIES ACT (XII OF 1911), S. 18.

FACTORIES ACT (XII OF 1911) Ss. 18 (2) and 41 (g)—*Order issued by inspector for fencing—Disobedience—Prosecution—Essentials of*

The accused owned a factory for stamping metal in Bombay. On 30-7-1923 the Inspector of Factories visited the factory and made the following entry in the visit-book :—" Press guards or guards automatic in operation to be fitted within five months". Nothing was done within the time allowed. The Inspector again visited the factory on 7-1-1924 and made a note in his book to the effect that if the guards be not put up, prosecution will be instituted. The guards were not put up and one of the workmen sustained an injury. On 27-2-1924 the Inspector filed information against the owner and manager of the factory under S. 41 (g) for breach of S. 18 (3) of the Indian Factories Act, with respect to the guarding of power presses. The owner was convicted. *Held* that the conviction was illegal. A mere entry of the Inspector's order in his visit book even with the knowledge of the manager of the manager of the family is not an order issued under S. 18 (2) of the Factories Act. It must be shown that the order in writing was brought to the specific notice of the individual affected. The order should specifically state the measures to be taken by the manager and it should be served definitely on the manager. (*Marten and Fawcett, JJ.*) **EMPEROR v. NARAYEN ANANT.**

26 Bom. L. R. 1245 : 1925 Bom. 143.

FAMILY ARRANGEMENT—Actings of parties—Document not registered—Effect.

Where disputes between the parties are settled by a family arrangement which has been acted upon for some time but the document which is compulsorily registerable is not registered, a court of equity will uphold such an arrangement, even though the legal forms have not been complied with. (*Baker, J. C.*) **BAKARAM v. NARAYAN.**

1924 Nag. 373.

— — — Compromise of disputed claim—Registration unnecessary. See REGISTRATION ACT, S. 17 (2) (vi).

L. R. 5 A. 736.

— — — Division of property—Unregistered deed—Parties put into possession—Part performance.

Where parties being members of a family, agreed not to go to law and not to fight out their disputes, but by a mutual arrangement, frequently described as a family arrangement, carry into execution their mutual promises so that the original contract by which they decided to terminate the disputes becomes an executed contract on both sides and nothing remains to be done, the parties continuing each in the enjoyment of the interest which the other agreed that he should take, the Courts in India, applying the rule of equity and good conscience, will not permit either party who has bound himself both by the contract and by its performance, to repudiate what he has done, and will also prohibit any person claiming under him from attempting the same thing. 45, All. 277 ; 40 All. 487 ; 24 C. W. N. 105 ; 42, Cal. 801, referred to. (*Walsh, A. J.*) **C. and Ryves, J.** **KUNTI v. GAJRAJ TEWARI.**

22 A. L. J. 779 : L. R. 5 A. 568 : 1924 All. 826

FOREIGN COURT.

— — — *What is.*

A family arrangement presupposes a claim by some member of the family to part of the family property which is settled by an arrangement between the members of the family recognising the claimant's real or supposed rights. (*Baker, O. J. C.*) **LALLU PRASAD v. BABULAL.**

1924 Nag. 214.

FISHERY—Grant of—Navigable river—Exclusive right—Proof of—Right to levy tolls—Sayer—Grant of, if conveys exclusive fishery.

Where at the time of the Decennial Settlement in Bengal the right of fishery over a Jalkar was recognised as valuable and the revenue derived by the zemindars in the form of a toll on fisherman was taken into account in fixing the jama and the revenue was left to the zemindars it cannot be said that it was intended by the East India Co. to affirm the right of exclusive fishery in the sense that the zemindars could refuse to let anybody fish or insist upon having the exclusive right of fishing.

The evidence upon which a person claims an exclusive right of fishing in navigable river must be plain and clear. It is no doubt in the power of the Government, in right of the Crown as successor to the East India Company to grant such exclusive right of fishing in a navigable river. Since about 1860, the policy of making such grants has been greatly doubted. But such grants were not uncommon in Bengal in earlier times and if proved, they are perfectly legal. But they have to be proved. Mere grant of rights to tolls are not rights of exclusive fishery. A mere mention in the revenue documents that certain classes of revenue are not being interfered with is not to be construed as granting exclusive right in navigable waters if other adequate and sufficient meaning can be found for them. *Prima facie* the waters of a navigable river are *public juris* and everybody has a right in India to fish in any navigable river whether tidal or not and it requires very strong and clear evidence to support a grant in exclusion of this right of the public.

Per *Ghose, J.* (*Dubitante*) : whether after the abolition of sayer, any zemindar has got any right to levy tolls or taxes with regard to the right of fishing by fishermen in a public navigable river. (*Rankin and Ghose, JJ.*) **MIDNAPORE ZEMINDARY CO., LTD. v. TRILOKYA NATH HALDAR.**

51 Cal. 110:

40 C. L. J. 238 : 81 I. C. 501 : 1924 Cal. 562.

FOREIGN COURT.—Submission to jurisdiction of—What amount to—Power of attorney empowering agent to represent principal in litigation in that Court—Execution of—Effect—Foreign judgment obtained on merit—Judgment delivered ex parte if and when a—Notice of suit to the defendant—Irregular in service of, not a ground for attaching decree—Decision of foreign Court as to sufficiency of service—Conviction of—Presumption.

The first defendant and his brother, who were trading in partnership in Ceylon executed a power of attorney to R, empowering him to represent the principals in litigations either as plaintiff or as defendant. Under the provisions of that power, R appointed G as his sub-agent

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during his absence from Ceylon. A suit was filed on promissory notes against the first defendant, and notice thereof was served on G as first defendant's agent. No appearance at all was put in on behalf of the first defendant, the case was allowed to proceed *ex parte*, and the suit was decreed.

In a suit brought in British India against first defendant upon the judgment of the Ceylon Court. *Held*, (1) that the first defendant must, by reason of his having executed the power of attorney in favour of R be deemed to have submitted to the jurisdiction of the Court of Ceylon; (2) that the judgment sued upon though delivered *ex parte*, was one obtained on the merits; (3) that the decision of the Ceylon Court that the notice of the suit to the first defendant was sufficient must be taken to be correct in the absence of any evidence to the contrary; and (4) that, if there was any irregularity in the service of the notice, that point could not be raised in British Indian Courts as a ground for questioning the validity of the foreign judgment. (*Phillips and Mudhavan Nair J.*) JANOO HASSAN SAIT v. MAHOMED OHUTHU.

47 Mad. 877; 82 I. C. 425; 1925 Mad. 155;
47 M. L. J. 356.

FOREIGN EXCHANGE—Rate of—Suit on bills of exchange stated in foreign currency—Decree in rupees—Date of conversion into Indian currency.

Plaintiff obtained a decree for the value of eight bills of exchange, the value of six being stated in the dollar currency of the United States and the value of two in sterling. *Held* that the decretal amount in rupees was to be calculated in accordance with the rate of exchange prevailing on the respective dates when the bills matured for payment and not at the rate of exchange prevailing at the date when the decree was passed. In the absence of an agreement between the parties to the contrary, the decretal amount in the case of a bill is to be calculated in accordance with the rate of exchange prevailing on the date when the cause of action arose. The same rule is to be applied whether the cause of action is for a debt or for damages, and whether it sounds in contract or in tort. 48 C. 886. 890 Ref. (*Page, J.*) MULLER MACLEAN & Co. v. ATAULLA & Co.

51 Cal. 320; 81 I. C. 561; 1924 Cal. 778.

FOREIGN JUDGMENT—Defendant not served—Execution—Submission to decree—If defendant can afterwards challenge decree.

A decree was passed against a person in a foreign court though the defendant was not served with summons. It was transmitted to a British Indian Court for execution and then the defendant submitted to the decree. He later filed a suit for declaring the decree null and void and that the sale in execution of his property was also null and void. *Held*, having submitted to the execution proceedings, he cannot prejudice the rights of the auction-purchaser by means of such a suit. (*Macleod, C. J. and Shah, J.*) MALHAR NARAYAN v. VISHNU SONU GOVINDA.

26 Bom. L. R. 392; 1924 Bom. 351.

—Ex parte decree—Absent defendant—Decree not to be enforced.

FRAUD.

A decree passed *ex parte* by a foreign court against an absent person who at the time is a resident of the Mysore State and had not submitted himself to the jurisdiction of the foreign court, is a nullity which the court to which it is transferred may refuse to execute. 22 M. C. C. R. 186; 22 M. C. C. R. 188; 23 M. C. C. R. 299; 25 M. C. C. R. 269 Ref. The fact that the defendant was once represented by a lawyer does not show submission to jurisdiction. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) GURUMURTHIACHARI v. THIMMAH CHETTY.

2 Mys L. J. 78.

FOREST ACT, Ss. 29 and 32—Protected forest declared to be reserved forest—Notification when it had ceased to be reserved forest—Effect of.

A particular area had formerly been "protected forest" within the meaning of chapter IV, Act VII of 1878; and in 1916 it had been removed from the category of "protected forest" and placed in the category of "reserved forest". Afterwards in 1922 by notification it ceased to be reserved forest. *Held* the effect of the notification was to restore the status of the land to what it was before, i.e., it again became "protected forest." Therefore the provisions of Sections 29 and 32 of the Forest Act would apply to it. (*Stuart, J.*) EMPEROR v. KAMLA PATI.

25 Cr. L. J. 999; 81 I. C. 711; 1924 All. 539.

—Ss. 39 and 41—"Timber and other forest produce"—Meaning of.

"Timber and other forest produce" in S. 41, Forest Act refers to what is described in S. 39. (*Harrison, J.*) LAL BADSHAH v. EMPEROR.

76 I. C. 104; 25 Cr. L. J. 104.

—S. 41—Rules under—Rr. 3 and 4—Removal of trees by licensee in excess of limit—Trees conveyed to wrong destination—Liability of forest officer.

The first accused was a forest contractor and the second accused was a forest officer. The first accused purchased and cut 44 sandalwood trees from Survey No. 32 and 9 trees from Survey Nos. 25 and 26. He obtained seven passes from the forest department giving him permission to remove 34 trees and 25 branches cut from Survey Nos. 25 and 26 under Rule 3 of the Rules under the Forest Act. The first accused with the knowledge and consent of the second accused removed the sandalwood trees he had cut in all the survey numbers and carried them away to a different destination from the one indicated in the passes. The wood was then cut off into chips. *Held* that the first accused was guilty of a breach of Rule No. 2 of the Rules framed under the Forest Act. It was not proved that the second accused was guilty because there was nothing to show that the trees removed under the passes exceeded the quantity and description of the forest produce mentioned in the passes and secondly because he had nothing to do with the destination to which the wood was carried. (*Shah, A. C. J. and Kincaid, J.*) EMPEROR v. PANDU.

26 Bom. L. R. 971; 1924 Bom. 489.

FRAUD—Execution sale—Judgment-debtor getting *ex parte* decree passed against him—Fictitious encumbrance in sale proclamation—Effect

FRAUD.

—Property sold for low price—Remedy of creditor. See C. P. CODE, O. 21, R. 90. 78 I. C. 108.

—*Ex parte decree—Setting aside—What to prove.*

An *ex parte* decree cannot be set aside on the ground of fraud so long as it is not established that, as a matter of fact, there was fraud in the service of notices and other processes of court by which the *ex parte* decree was obtained. (*Mukerji, J.*) PRITHURAM KALITA v. MAYARAM SARMA. 79 I. C. 330.

—*Party if can rely on his own fraud—Plaintiff and defendant—Distinction between.*

A plaintiff cannot rely on his own fraud to succeed in his suit, but a defendant who is resisting a claim stands on a different footing and is not precluded from setting up his own fraud. (*Martineau, J.*) RADHA KISHAN v. MOOL CHAND. 76 I. C. 128 : 1925 Lah. 27.

—*Setting aside decree—On service of summons.* 1924 P. 241

GAMBLING ACT (III OF 1887), Ss. 3, 4 and 5—Common gaming house—Proof—Independent evidence—Necessity for—Convictions under Ss. 3 and 4 if legal.

Where a warrant under S. 5 of the Public Gambling Act states definitely that the Superintendent of Police who issued it had received information which he considered reliable that the house in question was being used as a common gaming house, the presumption that official acts were regularly performed applies and independent evidence of this fact need not be produced at the trial.

The offences under S. 3 and S. 4 of the Gambling Act are different offences and a conviction under both the sections is legal. (*Daniels, J. C.*) CHOTAY LAL v. EMPEROR. 10 O. & A. L. R. 46 : 11 O. L. J. 347 : 25 Cr. L. J. 698 : 81 I. C. 186 : 1924 Oudh. 403.

—**Ss. 3 and 6—Amending Act I of 1917—Offence under—Instruments of gaming—Pieces of paper.**

Accused wrote figures 1 to 10 on separate pieces of paper which he rolled up into a ball and placed in a jar which was then closed. At an appointed time in the afternoon the jar was opened and three balls were taken out of it at random and the numbers found on them were added up. Persons who had correctly guessed the last digit, received 9 times their stake, and those who correctly guessed the last two digits received 50 times. Bets were recorded up to the time of the opening of the jar. The 3 balls were then taken out, 2 of them were handed to the public and the third ball was retained by the accused who read out the figure written on it. The Magistrate of the district had issued a warrant under S. 5 of Act (III of 1887) and in accordance with that warrant the premises were searched. When they were searched a jar containing these balls of paper was found. Held that it was quite clear that these balls of paper were instruments of gaming. Without them the gaming could not possibly have been carried on. They were quite distinct from the slips of paper or

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books in which bets were entered. Such slips were not necessary for carrying on of the game but these balls of paper were. They were, therefore, implements of gaming found in a search duly authorised under the Act, and therefore the provisions of Section 6 applied. The finding of these balls in a jar in a house occupied by the accused raised a presumption of guilt and he was rightly convicted under S. 3 of Act III of 1876 as amended by Act I of 1917. (*Mears, C. J., Lindsay and Ryves, JJ.*) ATMA RAM v. EMPEROR.

22 A. L. J. 249 : L. R. 5 A. 83 (Cr.)
25 Cr. L. J. 902 : 46 All. 447 :
81 I. C. 438 : 1924 A. 338.

—**S. 13—Public place—Definition of—Sata gambling.**

The term "public place" is not defined by statute, and it may have different meanings for the purpose of different acts. Where it is not specifically defined, its value must be reasonably determined by the court and the circumstances in which it has been used. Where a place was used for sata gambling and the "place" consisted of an enclosure within a larger enclosure and the public street ran along one side of the larger enclosure held that the place was a public place within the meaning of S. 13 of the Gambling Act. (*Boys, J.*) TULSHI DAS v. EMPEROR.

22 A. L. J. 741 : L. R. 5 A. 149 (Cr.) :
46 A. 787 : 82 I. C. 476 :
25 Cr. L. J. 1308 : 1924 All. 768.

—**S. 13—Public place what is—Question of fact.**

To amount to a public place within the meaning of S. 13, the public must have lawful access to it. Mere proximity to a public thoroughfare is not a sure criterion. The access may be as a result of dedication or by consent of a private owner. The question in every case must be decided on the facts of each case and is essentially one of fact. (*Kinkhede, A. J. C.*) SABINIYA v. EMPEROR.

25 Cr. L. J. 1073 : 81 I. C. 897 : 1925 Nag. 123.

GENERAL CLAUSES ACT (X OF 1897) S. 3 (25)—Immoveable property—Security held by simple mortgagee if included.

The expression "benefits to arise out of land" in the Act was never intended to cover such a matter as the security held by a mortgagee under a simple mortgage bond, but such "benefits" as the right to a ferry. (*Walsh, A. C. J., and Boys, J.*) UMRAN SINGH v. LAL SINGH. L. R. 5 All. 674.

—**S. 24—Notification under S. 3 of Act III of 1907—Re-enactment of S. 3 in same terms in Act V of 1920—Notification if in force.**

Where a notification was made under S. 3 of the Prov. Insolvency Act of 1907 investing certain officers with certain powers, the same remains in force without a fresh notification under the Act V of 1920, as S. 3 has been re-enacted word for word in the new Act. (*Suhrawardy and Graham, JJ.*) CHATTARBHUI MAHESHWRI v. HARLALL AGARWALLA.

80 I. C. 856 : 1925 Cal. 335.

—**S. 26—Criminal trial—No two punishment for the same act.**

76 I. C. 689 :
25 Cr. L. J. 225.

GENERAL CLAUSES ACT (BOM.) S. 21.

—(BOMBAY I OF 1904), S. 21—Any Bombay Act includes previous Acts.

The scheme of the Act is to distinguish between provisions which are intended to apply to all Bombay Acts and those which are intended to apply to Bombay Acts passed after 1904. The use of the words "any Bombay Act in S. 21" indicates that the section was intended to be of general application. (*Shah, A. J. C. and Kemp, J.*) BHAGCHAND DAGADUSHA v. SECRETARY OF STATE FOR INDIA. 48 Bom. 87 : 26 Bom. L. R. 1 : 1924 Bom. 1.

GOVERNMENT OF INDIA ACT, S. 107—Election dispute—Order of election commissioner directing prosecution of petitioner for offence under S. 465, I. P. C.—No revision by High Court. See U. P. DIST. MUN. ACT, S. 23 (3). 22 A. L. J. 497.

—S. 107—Expunging of passage from judgment—*Vakil*—*Locus standi*.

A *vakil* has no *locus standi* to apply to the High Court to have expunged from the judgment in a case in which he appeared, passages misrepresenting his conduct. 35 M. L. J. 368 foll. (*Oldfield and Devadoss, JJ.*) DANDAYUDAPANI IYER v. THE DT. MUNSIF OF KALLAKURICHI (BALAJI RAO). 78 I. C. 6.

—S. 107—High Court—Powers of superintendence—When exercised.

The power of superintendence vested in the High Court, which is now embodied in S. 107 of the Government of India Act, was not intended to authorise the High Court, in the exercise of the authority so given, to interfere with and set right the orders of a subordinate Court on the ground that such order has proceeded on an error of law or an error of fact. (*Mears, C. J. and Piggott, J.*) ADYA SARAN SINGH v. JAGANNATH. 46 A. 323 : 22 A. L. J. 235 : L. R. 5 A. 49 (Rev.). 78 I. C. 391 : 1924 All. 561.

GOVT. OF INDIA ACT, S. 107—Powers of superintendence—High Court—Grounds for interference. 1924 A 69.

—S. 107—Stay of Criminal Proceeding—Pending Civil Court—Power of High Court. NAMBIYA PILLAI v. SUDALAI MUTHU NALAN. 76 I. C. 872 : 25 Cr. L. J. 280.

—Grant—Confiscation—Effect of—Regrant. NORUL HUG v. MAHARAJAH BIRENDRA KISHORE MANIKYA BAHADUR. 1924 Cal. 133.

GRANT—Construction—*Khorposh grant*—Grant by holder of impartible estate—Right to minerals.

Until the decision of the Privy Council in 10 A. 272 it was the settled law in India that the holder of an impartible estate had only a limited estate and except for special justifiable causes, had no power of alienation beyond his life time. The subsequent holder of the estate might have confirmed the grant and such confirmation operated as a confiscation and regrant, but the grantee could not claim to hold under the original grant upon the death of the grantor. Though this interpretation was reversed by the Privy Council the reversal of the previously accepted interpretation of the law did not displace its application to a grant of 1794 and 1819, the parties to which

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were bound by the law as then understood. The holder of a permanently settled estate can claim the minerals underground as against trespassers, whatever be the rights *inter se* as between him and the Government. 39 C. 696 foll. (*Das and Ross, JJ.*) DEBI SINGH v. CHRISTIAN. (1924) P. C. C. 261 : 1924 P. 776.

—Construction—Inam—Personal or to endowment—*Devadaya*—Property treated as private property—Effect of, See C. P. CODE, S. 92. 47 M. L. J. 714.

—Fishery—Exclusive right—Navigable river—Right of the public to fish—Grant by Crown in derogation of public right—Legality of—Presumption against. See FISHERY, 51 Cal. 110.

—Construction—Jaghir—Life estate. 1924 P. 298.

—Inam—*Dharmadaya*—What is. 48 Bom. 1 : 77 I. C. 100 : 28 C. W. N. 906.

—Construction—*Permanency and heritability*—If reasonable.

A grant of lands to two brothers and their descendants on payment of a fixed rent, with provision for forfeiture in case of non payment of rent for three years is a permanent, heritable grant and cannot be resumed. (*Iwala Prasad and Macpherson, JJ.*) GOPAL OJHA v. RAMADHAR SINGH. 82 I. C. 204 : 1925 Pat 228.

—Marwat—Incidents of—Transferability.

A Marwat grant is not resumable but at the same time it is not transerable either. (*Simpson, A.J.C.*) SIA RAM v. SALIK. L. R. 5 O. 13 (Rev.).

GROVE HOLDER—Guava trees—Scattered over a large area, and not interfering on with the agricultural nature of land.

Where Guava trees scattered over a large area, did not interfere, in any way with the agricultural nature of the land. *Held*, that the person who planted the trees did not acquire the status of a grove-holder. (*Daniels, J.*) HAZARI v. RAM DULAR. L. R. 5 All. 290 Rev.

GUARDIAN—Gross negligence—What is—Filing suit *bona fide* but without considering all legal aspects.

Under the law, a minor could file a suit in respect of an adverse order on a claim petition within one year of attaining majority. But where the guardian *bona fide*, files the suit within one year of the date of the order and the same is dismissed, he cannot be said to be guilty of gross negligence. (*Phillips and Ve katasubba Rao, JJ.*) SUBBIAH PANDARAM v. ARUNACHALA PANDARAM. 60 I. C. 992.

GUARDIAN AND WARD—Appointment of guardian for minor—Duty of Court—Minor adopted into another family—Selection of guardian—Control and supervision.

The state from the earliest times is supposed to be the guardian of the infants and the earliest regulations gave effect to this principle and made provisions for the custody of minors; and when the state assumes direct custody of an infant it undertakes to bring up the boy in the same manner as his natural father or guardian would

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have done, that is, in the traditions of the family to which after becoming a major he has to revert. Under the Guardians and Wards Act the District Judge exercises this function of the state and becomes the protector and guardian of the infant. He exercises this power by appointing guardians of persons and properties of infants. The minor's habits have to be looked into, his manners have to be shaped, his sentiments have to be reared up and his concerns also have to be looked after. Where a boy is adopted into another family, it is the duty of a tutor guardian of the boy to so train the boy as to dissociate himself from his natural family and own the adoptive father and mother as his own parents. He should have reared up sentiments such as the adoptive father wanted to imbibe him with. (*Jwala Prasad and Kulwant Sahay, JJ.*) MANMOHINI DASI v. HARI PRASAD BOSE. 5 Pat. L. T. 415; 2 Pat. L. R. 200; 81 I. C. 1045; 1924 Pat. 755.

—Personal liability of the guardian on the strength of a personal covenant "agreeing to pay"—Misrepresentation that money would be applied for minor's benefit.

In a hypothecation bond, executed by a guardian, containing a personal covenant, to the effect, "we have agreed to pay" the guardian of the estates of M & N, (minors) . . . it was contended (1) that the guardians should be personally liable for the losses in the business, and (2) there was misrepresentation by the guardians by not applying the funds for the benefit of the minors.

Held, (1) that the wards in the document did not involve a personal covenant to repay by the executants, except as such guardians, (2) and that there was power to bind the estate, if the guardians employed the funds in the family business, though it may end in loss. 24 B. 116 *Beath v. Ebury* 1 Ch. A. 777, followed 40 I. C. 665 *Not foll.* (*Odgers, J.*) PATTUR NAGALUGAPPA v. PATTUR VENGANNA. 20 L. W. P. 746.

GUARDIAN AND WARDS ACT—Father—If can be appointed guardian.

An order appointing a father guardian of his child under the Guardians and Wards Act is wholly *ultra vires*. (*Wazir Hasan, J.C.*) CHHOTAY LAL v. CHANDRA KUNWAR. 80 I. C. 71; 11 O. L. J. 537; 1 O. W. N. 330; 10 O. & A. L. R. 7-8.

—Ss. 7 and 8—Appointment of guardians—Application for. MT. ISLAMAM v. MT. MAGBULAN. 1914 Oudh 126.

—Ss. 11 and 19 (a)—Married female—Minor—Guardian—Marriage without consent of guardian—Right to apply in revision—Person not a party in the lower court.

Where a person was not made a party to the proceedings in the lower court for appointment of a guardian though he was certainly a person to whom notice should have been issued under S. 11 of the Guardian and Wards Act, he can apply to the High Court for revision of the order. 27 I. C. 121 *Ref.* S. 19 (a) of the Guardian and Wards Act prohibits the court from appointing a guardian of the person of a minor girl who is married and whose husband is not, in the opinion of the court, unfit to be the guardian of her person. (*Martineau, J.*) BAILU MAL v. HARDWARI MAL. 6 Lah. L. J. 219; 1924 Lah. 570.

GUARDIAN AND WARDS ACT, S. 19.

—S. 17—Father as guardian, MT. MUKA BAR v. KARIM BAKSH. 75 I. C. 496.

—S. 17—Appointment of guardian—Order—Appeal—Death of appellant—Right of others to continue the appeal. See C. P. CODE, O. 22, R. 1. 46 M. L. J. 179.

—Ss. 18 and 30—Guardians and Wards Act (XL of 1858), S. 18, Hindu female—Daughter's estate—Sale by guardian without sanction of court—Suit by reversioners to declare alienation—Starting point—Limitation Act, Arts. 120 and 125.

Where a guardian is appointed under the Guardians and Wards Act her powers of dealing with the property of the infant must be regulated by the provisions of the statute. It is not open to any person dealing with such a guardian to support an unauthorized sale of a minor's property by calling in aid the personal law of the minor. Where a guardian has been appointed under Act XL of 1858 but a sale is made by her of the infant's property after the coming into force of Act VIII of 1890, the validity of the alienation is governed by the latter Act. Under S. 30 of that Act a disposal of the property of the infant by the guardian without the consent of the Court is voidable at the instance of any other person affected thereby. The alienation is not void. Where therefore the certificated guardian of a minor Hindu female having a daughter's interest in the property sells it without the permission of the court, the reversionary interest in the estate would be affected by the sale and it is open to the minor as well as the next reversioners to sue under S. 30 of the Guardians and Wards Act to avoid the sale. It is of no consequence that the lady did not choose to do so, the only effect of her omission being that it stands good so far as her interest is concerned. Not being entitled to immediate possession the male reversioners can ask for a declaration under the provisions of S. 42 of the Sp. Rel. Act. Such a suit comes within art. 110 of the Lim. Act and not under Art. 125 as it is not a suit to have an alienation made by a Hindu female declared to be void except for her life. The cause of action to the remote reversioner does not arise before he is born and the decision in 41 M. 659 is open to doubt. (*Rankin and Ghose, JJ.*) DAS RAM CHAUDHURY v. TIRTHA NATH DAS. 51 C. 101; 81 I. C. 522; 1924 Cal. 481.

—S. 19 (a)—Married minor girl—Appointment of guardian—Fitness of husband.

A court cannot appoint a guardian of the person of a minor girl who is married and whose husband is not unfit to be the Guardian of her person. (*Martineau, J.*) BULLU MAL v. HARDWARI MALL. 78 I. C. 451.

—S. 19 (b)—Mother—Question of fitness—Rights of other relations.

The principle underlying S. 17 (b) of the Guardians and Wards Act applies both to the father and mother and unless it is shown that she is unfit, the claims of other relations should not be considered. (*Baker, O.J.C. and Halifax, A.J.C.*) SUMITRI BAI v. MT. SUBHADRA BAI. 1924 Nag. 178.

GUARDIAN AND WARDS ACT, s. 19.

—S. 19 (c)—Mother appointed guardian of children—Declaration of estate being taken by Court of Wards. *NAGANA GURLINGAYA v. COLLECTOR OF BELGAUM.* 1924 Bom. 157.

—S. 25—Father's application for custody of child—No prior custody—Application if lies.

The fact that a child has never been in the custody of its father does not prevent the latter from applying under S. 25 for the custody of the child. (*Wazir Hasan, J. C.*) *CHHOTAY LAL v. CHANDRA KUNWAR.* 11 O. L. J. 537 : 1 O. W. N. 330 : 80 I. C. 71 : 10 O. & A. L. R. 758.

—S. 27—Guardianship of minor child—Rights of father—Substitution of another guardian—Revocable authority—Duty of Court—Welfare of the minor.

On an application by a father to be appointed guardian of his minor daughter of seven years of age, the girl having lost her mother previously. *Held*, that the application was misconceived. The father was the natural guardian of his minor child and he cannot be appointed as guardian under the Guardian and Wards Act. The guardianship of the minor child was a sacred duty of which he could not divest himself. He can delegate the performance of the daily duty of looking after the child and for that purpose place the child in the custody of somebody else. If he does so, it then becomes a question under S. 25 of the Guardian and Wards Act for the court to decide, when he applies for the restoration of the custody, whether it is for the welfare of the minor. In certain cases the courts will interfere to prevent the revocation of the authority of the father. The court ought then to be satisfied that it is for the child's welfare. But a court dealing with such a matter ought to acquaint itself with the fundamental principles at stake. It is not true to say that a father is liable to be deprived of the society of his child or the control of his child, because he quarrelled with the mother or distrusted the mother's moral character. It would not be true to say so of a father who was leading an immoral life. An immoral father has just as good a right to his own children as a moral man, and in many cases he is just as likely to see that his children are properly brought up even if he does not himself live properly. The mere fact that a father has left an infant in the charge of two relatives in the mother's family, is no ground for depriving him of the custody of the child, if he wishes it restored to him. (*Walsh, A. C. J.* and *Neave, J.*) *SUKHDEO RAI v. RAM CHANDAR RAI.* 22 A. L. J. 680 : L. R. 5 A. 417.

10 O. and A. L. R. 803 : 46 All. 708 : 1924 A. 622.

—Ss. 28, 29, 30 and 31—Appointment of father as guardian of minor son by Court—Powers and duties of guardian controlled by the Act only—Mortgage executed by guardian on behalf of minor—Sanction of Court not legal—Mortgage, whether binding on minor.

Once a person, natural guardian or a stranger, is appointed guardian of a minor by order of the Court passed in accordance with the provisions of the Guardians and Wards Act, he is clothed with all the obligations imposed by that Act in

GUARDIAN AND WARDS ACT, s. 30.

dealing with the ward's property. It is not in his power to throw off those obligations by the exercise of his own volition and pose as a natural guardian and act in that status. Therefore, if the sanction accorded by the District Judge to a transaction of mortgage proposed by the guardian who happens to be a father on behalf of a minor son is held to be not legal, the transaction must fall through and cannot be upheld on the ground that it was entered into by the father and was for the benefit of the minor. Otherwise the whole object of the enactment contained in sections 28 to 31 of the Guardians and Wards Act will be stultified. (*Wazir Hasan, and Neave, A. J. C.*) *RAMESHWAR BAKSH SINGH v. MT. RIDH KUER AND ANOTHER.* 1 O. W. N. 775.

—Ss. 29 and 31—Sale of minor's property—Sanction of court—Duty of court—Omission to recite necessity—Effect of.

It is the duty of the court to which an application is made for sale of a minor's property under S. 29 of the Guardians and Wards Act to satisfy itself by enquiry that the transaction is necessary and is for the minor's benefit and a creditor is entitled to rely upon an order of sanction as evidence that the court has satisfied itself on this point and that the transaction is a proper one. The fact that the necessity for the sale is not recited in the order granting the sanction is a mere irregularity and does not affect the validity of the sanction. (*Daniels and Neave, JJ.*) *BUDHOO v. SHEO CHARAN.* 22 A. L. J. 851.

L. R. 5 A. 726 : 82 I. C. 328 : 1924 All. 875.

—Ss. 29, 30 and 31—Sale of minor's property—Sanction of court given subject to conditions—Non-performance of conditions—Sale void.

The District Judge is the proper authority to sell the property of a minor for whom a certificated guardian has been appointed. The certificated guardian could not sell the property of the minor without the sanction of the District Judge. If the District Judge laid down certain terms which could not be complied with by the intending transferee, his remedy was to go to the District Judge and to say that under the conditions imposed he could not take the transfer. The District Judge may or may not have varied the terms. But it is not open to the transferee to say that the conditions laid down were impossible for compliance and, therefore, he would take the minor's property without complying with the restrictive terms imposed. Where instead of mortgaging 40 acres as sanctioned by the District Judge the whole of the minor's property consisting of 109 acres was mortgaged, the transfer is not binding on the minor. (*Kanhैया Lal and Mookerjee, JJ.*) *SRI THAKUR KISHORE RAMANJI MAHARAJ v. DUBY RAM.* 22 A. L. J. 155 : L. R. 5 A. 77 : 78 I. C. 226 : 1924 All. 474.

—S. 30—Minor—Guardian or property—Sanction of Court obtained for usufructuary mortgage—Guardian mortgaging the property for a larger sum as a simple mortgage—Decree on mortgage against minor represented by the guardian—Decree not binding on minor—C. P. Code, O. 32, R. 4—Suit by minor to set aside decree—Restitution.

GUARDIAN AND WARDS ACT, S. 81,

The certificated guardian of a minor obtained the sanction of the court to mortgage usufructually the property of the minor for Rs. 200 but in contravention thereof he executed a simple mortgage for Rs. 400 with a provision for interest. The mortgagee sued the minor on the mortgage represented by the certificated guardian and obtained a decree. Eventually the minor brought a suit to set aside the decree as not binding on him.

Held, (1) that the mortgage deed for Rs. 400 with interest was executed by the guardian without the sanction of the Court and was therefore not binding on the minor, (2) that the minor was not properly represented in the suit on the mortgage because the guardian's interest was adverse to the minor and the guardian could not put forward the plea that the mortgage was not binding on the minor, (3) that the minor was under no liability to pay back a sum of Rs. 200 the amount for which a mortgage was sanctioned by the Court inasmuch as there was no evidence that the minor was benefited thereby, and (4) that the decree in the mortgage suit was not binding on the minor. (*Danils and Dalal, JJ.*) CHIWANJI LAL vs. SYED ILIAS ALI. 22 A. L. J. 493 : L. R. 5 A. 360 : 10 O. & A. L. R. 678.

46 All. 620 : 79 I. C. 556 : 1924 All. 751.

— S. 31, Sub S. (2), S. 48—*Finality of order under S. 48 how far affected by violation of procedure prescribed by S. 31—Order not drawn up in form prescribed, effect—Order based on absence of jurisdiction—Effect—Payment of amount due under a pre-emption decree, whether a ground for permitting transfer on behalf of a minor—Transferee, whether affected by defects of procedure—Fitness of father to be appointed guardian ad litem—Non appearance of guardian in suit against minor—Inference—Minor how far bound by act of guardian—Omission of guardian to raise defence—Minor not precluded to raise that defence in a subsequent suit.*

Although the provisions of sub-section (2) of S. 31 of the Guardians and Wards Act are mandatory yet the violation of the procedure prescribed by it for recording the order granting the permission cannot be made the ground of brushing aside the finality of the order as enacted by S. 48 of the Act. The only condition in which the finality prescribed by S. 48 can be avoided is to establish that the order granting the permission was a nullity.

An order passed by a Court in violation of such rules of procedure, however mandatory, as relate merely to the form of the order cannot be treated as nullity. The omission to follow such rules of procedure can amount to no more than a mere irregularity or immaterial irregularity. On the other hand an order passed by a Court in violation of such rules of procedure as the observance of which only invests the Court with jurisdiction to pass the order is a nullity.

Where a guardian applied to Court for permission to make a mortgage on behalf of a minor on the ground of the existence of a pre-emption decree in favour of the latter and his liability to pay therefor by a certain date and the District Judge after 7 days' passed the order "approved."

Held, that in view of the contents of the application and the interval between it and the order,

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it must be presumed that the Court was satisfied of the existence of the conditions for which alone permission can be granted under S. 31, sub-sec. (2). 11 C. L. J. 197 referred to.

Held further, that sub-section (2) relates to the form of the order granting the sanction to enquire into the propriety of which a Court is debarred by the provisions of S. 48 of the Act, and further that the transferee cannot be made to suffer for the defects of procedure and for his protection the order of the Court is sufficient 11 C. 379 P. C. referred to.

Where a suit for recovery of arrears of revenue was brought against the minor under the guardianship of his father but the latter did not put in an appearance in consequence of which an *ex parte* decree was passed against minor and it further appeared that the revenue fell into arrears owing to the mismanagement of the father who was in possession and his interest clashed with that of the minor.

Held, that though the presumption as to the due observance of the procedure prescribed O. 32, R. 3, C. P. C., can be applied to the acts of the Court yet there is no legal bar to entering into the enquiry whether the father was or was not a fit person to be appointed guardian *ad litem* for the minor.

Held further that in view of the provisions of sub-rule (3) of rule 4 of O. 32, C. P. C. that no person shall, without his consent, be appointed guardian *ad litem*, and the non-appearance of the guardian negativing any such consent, the minor cannot be said to have been properly represented in the suit.

Held, also, that having regard to the general principles of equity as to how far a minor should be held bound by the act of his guardian and the particular circumstances of this case the sale of the minor's property in execution of the decree of the Court was not binding on him.

The omission of guardian to raise a defence on behalf of his ward which he might and ought to have raised cannot preclude the ward from raising that defence in a subsequent suit otherwise the minor would be made to suffer for the laches of his guardian, (*Wazir Hasan, and Neave, J. J. C.*) RAMESHWAR BAKHSI SINGH vs. MUSAMMAT KIDH KUER. 1 O.W. N. 775.

— Ss. 31 (2) & 48—*Permission of court to sell property of minor—Sale effected in pursuance of—When open to attack.*

The provisions of S. 31 (2) of the Guardians and Wards Act are mandatory and not merely directory and an order which failed to recite the necessity for or the advantage of the transfer is not a legal order which could be pleaded as sufficient sanction for a sale by the guardian. A sanction given by the District Judge for the sale of a minor's property has no special sanctity in itself but is open to attack on the ground not only that it was otherwise improper and did not comply with every requirement of S. 31 (2). A sale effected in pursuance of such defective sanction is itself liable to be set aside by the minor or others interested in the estate. (*Pullan, A. J. C.*) RAM ADHIN SINGH vs. RAM SUMER SINGH. 80 I. C. 679 : 10 O. & A. L. R. 420.

GUARDIAN AND WARDS ACT (1890), S. 34.

—Ss. 34, 45 and 47—*Accounts filed by guardian—Power of Court to investigate and order refund—Disobedience—Remedy of minor—Suit.*

The Guardians and Wards Act has for its object the protection of the helpless minor and the control of the guardian charged with looking after his estate. In order to exercise that jurisdiction the court has been vested with disciplinary powers. The Court's power under S. 34 (c) and (d) to direct payment of the balance is not limited by such balance as the guardian chooses to show in the account which he exhibits. The court can amend the accounts by striking out objectionable items or it may reject the accounts on the ground that it is an untrue account of the guardian's liability and direct the guardian to submit a fresh account within a limited time. It is the duty of the Court and not the duty of the guardian to decide what is the balance due on a true and just account. If the guardian fails to pay the balance found by the court on a correct account, he becomes contumacious and can be dealt with under S. 45. 21 C. W. N. 68 diss. from. Where the District Court refuses to take action under S. 45 acting on the erroneous view that it has no power to compel the guardian to furnish fresh accounts and to pay the amount due after deleting objectionable items, the order of the District Court is not appealable under S. 47 but the High Court could interfere in revision and set it aside (*Walsh, A. J. C. and Neave, J.*) SITA RAM v. GOBINDI. 23 A. L. J. 585 : 46 All. 458 : 80 I. C. 593 : 1924 All 593.

—Ss. 34 and 39—Appointment of guardian—Order when effective—Omission to furnish security—Removal. MT. KHUSAL DEVI v. SUKH DIAL. 1924 Lah 313.

—S. 39 (h)—*Residence outside jurisdiction—Effect.*

There is nothing to prevent a court from appointing as guardian a person who resides outside the jurisdiction of the court. (*Prideaux, A. J. C.*) MT. AHILYABAI v. MT. VITHABAI. 75 I. C. 595.

—S. 39—Appointment of guardian—Mahomedan minor—Appointment of sister's husband—Personal law.

Under S. 17 of the Guardian and Wards Act in appointing or declaring a guardian of a minor girl, the Court is to be guided by what appears under the circumstances to be the welfare of the minor but the proviso is that this should be done consistently with the law to which the minor is subject, in this instance, the Mahomedan law. There is the precept of the Mahomedan law that the custody of a minor may not be given to a married sister where there is a possibility of the married sister's husband taking the minor into marriage for himself. But if it is impossible to discover a suitable guardian the powers of the District Court would not be circumscribed by the tenets of Mahomedan law. The person who is appointed guardian by a Court must be a person to whom the Court can render every available assistance under the law. It will be a contradiction in terms to choose a guardian and then tell him that the Court was not prepared to help him for the protection of the person and property of the minor. If the guardian is considered

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fit by the Court he must receive every assistance within the power of the Court. If he is considered unfit, he must be removed and then the question will arise as to who should be appointed guardian. (*Dalal, J. C.*) GUNNA v. DARGAHL. 10 O. & A. L. R. 1281.

—S. 43 (1)—*Scope of—Court if can pass order against stranger—De facto Guardian—Order against—Validity of.*

Under S. 43 (1), Guardian and Wards Act, it is only the conduct of proceedings of any guardian appointed or declared by Court which can be called in question. Where the minor was in the custody of a certain person and thereafter a court guardian was appointed, the court has no jurisdiction to call upon the former to deliver up jewels of the minor under S. 43 of the Act. 36 M. L. J. 189 distinguished 10 M. L. T. 483 followed. (*Odgers, J.*) KUPPAMMAL v. MUNIAPPA CHETTY. (1924) M. W. N. 892 : 82 I. C. 488 : 47 M. L. J. 655 : 1924 Mad. 902.

—S. 46—Report of Collector—When evidence. NAGANA GURULINGAYA v. COLLECTOR OF BELGAUM. 1924 Bom. 157.

—Ss. 47 and 48—Order sanctioning sale—Review Appeal, if lies.

Where a District Judge sanctions the sale of a minor's property, he can in the interest of the minor review his order. The order is appealable under S. 47, G. and W. Act. (*Baker, O. J. C. and Prideaux, A. J. C.*) SONBA v. NARAYAN. 1924 Nag. 269.

—Ss. 47 and 48—Order fixing maintenance—Appeal.

No appeal lies from an order on a guardianship application fixing the amount to be paid by the guardian of the property for the maintenance and education of the ward. (*Prideaux, A. J. C.*) MT. TULSI v. MT. TULSI. 1925 Nag. 141.

—S. 47 (g)—*Removing a guardian—Order fixing remuneration—If appealable—Revision.*

Where on a guardian being removed, the court granted him a lump sum for services rendered, there is no appeal against the order. Nor should it be interfered with in revision, as a court has jurisdiction to grant an allowance if it thinks fit. (*Wazir Hasan, A. J. C.*) SURAJ NARAYAN SINGH v. BISHAMBAR NATH BHAN. 78 I. C. 138.

—S. 48—Order refusing to remove guardian—Finality of—Appeal. 1924 Mad. 327.

—S. 72—Lunatic—Legal heir—Appointment of guardian.

The provisions of S. 72 of the Guardians and Wards Act imposing a restriction to the appointment of the legal heir of a lunatic to be guardian of his person cannot be attended to in a case where only near relations could be appointed guardians of the person. (*Dalal, J. C.*) BALBIR v. CHHED LAL. 10 O. & A. L. R. 968.

GOVERNMENT OF INDIA ACT, S. 72-D—*Rules and standing orders, Rr. 15 and 94—Demand for grant—President of the Legislative Council—Decision if can be challenged in Civil Court—Injunction—Power of a High Court to issue—Jurisdiction.*

HABEAS CORPUS.

The plaintiff, a member of the Bengal Legislative Council, brought a suit on the original side of the High Court and applied for an interim order that the first defendant, the President of the Legislative Council, may be restrained from putting a certain motion, being item 6 in the list of business, before the Bengal Legislative Council at its Sessions and for an interim order restraining the second and third defendants, the Ministers in charge of Education and Agriculture, from discharging any duties as ministers or receiving any payment of salary. Objection was taken to the jurisdiction of the Court on the ground that the legislature was supreme and that the Court could not interfere in any way with the conduct of business in the Legislative Councils. *Held*, that the proceedings of a subordinate legislature, like the Bengal Legislative Council, could be questioned in Courts; that the High Court was a superior Court of Record and *prima facie* no matter was deemed to be beyond the jurisdiction of the Court unless it was expressly shown to be so. By the word "jurisdiction" was meant the authority which the Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The President of the Bengal Legislative Council is appointed under the provisions of S. 72 C of the Government of India Act and is the holder of an office created by statute. Consequently if any person, whether an officer of State or a subordinate, has to justify an act alleged to be unlawful by reference to an act of the legislature, the legal justification can be enquired into by the High Court. A suit could therefore be brought against the President of the Legislative Council.

The present suit was in the nature of a *quia timet* bill. These *quia timet* bills are in the nature of writs of prevention to accomplish the ends of precautionary justice and are ordinarily applied to prevent wrongs or anticipated mischiefs and not merely to redress them when done. There are two necessary ingredients of for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proved that the apprehended damage will, if it comes, be very substantial and irreparable, (*i.e.*) it must be shown that if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it, if relief is denied to him in a *quia timet* action. The power is entirely discretionary. In these matters the Court, in the exercise of its discretion is under an obligation to take large and liberal views, so that the rights of the subject may be preserved and the constitution safeguarded by such means as are in the power of the Court. (*C. C. Ghose, J.*) KUMAR SHANKAR ROY CHOWDHURI v. H. E. A. COTTON. 40 C. L. J. 515.

HABEAS CORPUS—Guardian de jure—Application by, in respect of child detained against his will—Considerations applicable to case of—Infant a boy over 14 or a girl over 16—Wishes of infant if must be given effect to in case of—Law in England and in India

On an application by a *de jure* guardian for Habeas Corpus in respect of a child detained

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against his will, the question of the interests and the welfare of the infant is the dominant question and the Court must dispose of the application with reference to it. The word "welfare" must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being and due regard must be had to the ties of affection. If the infant is capable of forming an intelligent opinion and expresses its views, the Court is bound to take them into consideration. In weighing the question what is for the benefit of the child, this will form an important element and the degree of the child's mental development must to a certain extent weigh with the Courts in deciding how far its wishes shall be given effect to. In the same way, the age of the child is also an important factor. There is no inflexible rule in England that in the case of a boy over 14 and in the case of a girl over 16 the Court has no option in the matter and that the wishes of the infant must be given effect to. Even if such a rule obtained in England it was too artificial to be extended to India where different considerations might apply and different conditions prevail.

On an application under S. 491, Criminal Procedure Code, by the mother of a minor girl who was a little over 17 and under 18 for the production of the minor by her step-sister with whom she was living, and for restraining her marriage with a person to whom the mother objected, *held*, on an application of the above principle that the proper order to be made was that the minor should be freed from all restraint and should be at liberty to go where she chose. (*Venkatasubba Rao, J.*) SARASWATHI AMMAL v. DANAKOTTI AMMAL. 20 L. W. 902 : (1924) M. W. N. 870 : 1924 Mad 873 (2) : 47 M. L. J. 614.

HABITUAL OFFENDERS' RESTRICTION ACT—(BURMA ACT II OF 1919), S. 7—*Requisites of a preliminary order*, S. 4 (c)—S. 13 of the Act, *Applicability*—*Provisions of* Ss. 112 (f), 112, 117, 118, *to be applied to Act II of 1919.*

Where under S. 7 of the Act, P was restricted to a certain town by the Sub-divisional Magistrate, and it was contended, on revision that the proceedings were contrary to the security sections under the Procedure Code, and was contrary to S. 4, cl. (c) of the Act in question, and was prejudicial to the accused :—

Held, (1) that the order of the Magistrate did not comply with the provisions of proviso (a) to S. 4 of Act II of 1919 and that no order under S. 7 could be passed, when the substance of the information is not recorded under S. 112 of the Criminal Procedure Code before the passing of the preliminary order; (2) that the magistrate's order is not a proper order, as it contravened S. 112 of the Code of Criminal Procedure, and (3) the procedure prescribed in the Code, with necessary modification must be followed when magistrates take action under the preventive jurisdiction vested in Act II of 1919, and (4) that the special procedure to be followed under S. 13, by magistrates cannot apply to the present case, and that R. 12 of the rules framed under the Act indicates the class of reason which would justify such a charge and that Act II of 1919 is not intended to apply to the present case, as action under the preventive

HIGH COURT.

sections was initiated at the instance of the private individual. (*Lentaigue, J.*) *PARSODAN v. EMPEROR* 2 Rang. 524 : 1925 Rang. 69

HIGH COURT—Chief Justice—Powers of—If can constitute Bench for trying only an issue in a case. 1924 Cal. 186.

HIGHWAY—Right to access—Right of individuals—User—Obstruction when actionable.

The cases recognise a right of immediate access from private property to public highway as a private right distinct from the rights of the owner of that property to use the highway itself as one of the public. Consequently if there is an interference with such right it is open to the individual to sue for damages. 8 A. L. J. 19 ; 31 A. 444 ; 46 L. J. Ch. D. 69, 80 Rel. on (*Mears, C. J. and Piggott, J.*) *HANUMAN PRASAD v. RAGHUNATH PRASAD*, 22 A. L. J. 568 : L. R. 5 A. 393.

46 A. 573 : 82 I. C. 659 : 1924 A. 715 :

HINDU LAW—Adoption—Form of—Dattaka form—Jains—Rights of adopted son. 1924 Lah. 339.

—Adoption—Formalities of—Bairagi.

The mere fact of a boy being taken on his lap by a bairagi mahant and his being brought up by him does not constitute an adoption. (*Burn, J.M.*) *TIRLOKE NATH v. NILKANT RAO*.

L. R. 5 A. 181 (Rev.)

—Adoption—Who may be adopted—Daughter's son—Agarwala Vaishas. *Mr. BALLO v. RAM KISHAN* 81 I. C. 490 : 1924 A. 49.

—Adoption—Who can be adopted—Boy of the same caste but of different sub-caste.

Though each of the four primary castes of the Hindus must adopt from its own limits there is nothing to prohibit the adoption of a boy belonging to a different sub-caste from that of the adoptive father. (*Sulaiman and Kanhaiya Lal, JJ.*) *SHIB DEO MISRA v. RAM PRASAD*.

46 A. 637 : 22 A. L. J. 690 : 1925 All. 79.

—Adoption—Who may be adopted—Only son.

The adoption of a married orphan who was the only son of his natural father is not valid under Hindu Law. (*Zafar Ali, J.*) *CHHANGA v. JAI LAL* 6 Lah. L. J. 174 : 78 I. C. 161 : 1924 Lah. 480.

—Adoption—Daughter's son or sister's son—Custom among Maharashtra Brahmans.

Among the Maharashtra Brahman community of Nagpur the prohibition of the Hindu Law of the adoption of a daughter's son or of a sister's son has been abolished by custom. (*Baker, J. C. and Hallifax, A. J. C.*) *JAGESHWAR v. PANDURANG*.

7 N. L. J. 82 : 78 I. C. 840 : 1924 Nag. 73.

—Adoption—Sudras of the Madras Presidency—Who may be adopted—Married person.

Among the Sudras of the Madras Presidency the adoption of a person who is married at the time of adoption is valid. Case-law on the subject reviewed. (*Ramesam and Reilly, JJ.*) *LINGAYYA CHETTY v. CHENGALAMMAL*.

20 L. W. 959 : 1925 Mad. 272 :

47 M. L. J. 776.

—Adoption—Giving in—Remarried widow—Power of.

HINDU LAW.

On remarriage a widow's connection with the family of her husband ceases and she cannot thereafter validly give her son by her first husband in adoption. 23 Bom. L. R. 482, Rel. (*Baker, J. C., Kotwal and Priedaux, A. J. C.*) *MT. SHEOKABAI v. GANPAT*. 20 N. L. R. 57 : 79 I. C. 142 : 1925 Nag. 1.

—Adoption—Who can be adopted—Sister's son—Jats—Sudras.

Under the Hindu Law, the adoption of a sister's son is allowed among Sudras. This applies to the Jats also who are Sudras. (*Harri-son and Campbell, JJ.*) *HIRA v. SHIBBU*.

6 Lah. L. J. 442.

—Adoption—Age of boy to be adopted—Adoptee older than adoptor.

Under the Hindu Law an adopted son may be older than the adoptive father and this does not invalidate the adoption. (*Macleod, C. J. and Shah, J.*) *BALABAI TUKARAM v. MAHADU KISHINA* 48 B. 387 : 80 I. C. 529 : 1924 Bom. 349.

—Adoption—Who can give—Gift by Hindu widow—Only son. 1924 Bom. 159.

—Adoption—Power to adopt—Death of grandson—Grandmother if can adopt.

Where a grandson succeeds direct to his grandfather and on his death his grandmother succeeds him, she can adopt a son to her husband. (*Macleod, C. J. and Shah, J.*) *NAVAR GOVIND NAVATHIE v. BALVANT HARI NAVATHIE*. 80 I. C. 435 : 48 Bom. 559 : 26 Bom. L. R. 528 : 1924 Bom. 437.

—Adoption—Proof. *Mr. UTTAM DEI v. DINA NATH*. 75 I. C. 774.

—Adoption—Rights of adopted son—Alienation by widow—Suit to recover possession.

In the case of a reversioner it is not essential for him to set aside any alienation by the widow, but he could sue to enforce his rights as a reversioner without setting aside the alienation within the period prescribed by the Limitation Act, after the death of the widow. The case of an adopted son stands on a different footing in this sense that his rights come into existence as soon as he is adopted by the widow, and the rights of the widow as the heir of her husband come to an end on adoption, while in the case of a reversioner his rights come into existence on the death of the widow. Subject to that important difference there is no essential difference in the position of the adopted son seeking to enforce his rights with reference to the property alienated by the widow before the adoption and the reversioner seeking to enforce his rights with regard to property alienated by the widow before her death. 19 Bom. 809 ; 33 Bom. 88 referred to. (*Shah, A. C. J. and Fawcett, J.*) *HANAMGOWDA v. IRGOWDA*. 48 Bom. 654 : 26 Bom. L. R. 829 : 1925 Bom. 9.

—Adoption—Rights of adopted son—Property acquired by succession—If divested.

Where after a person has succeeded to the property of his father, he is adopted into another family, he is not thereafter deprived of the rights to which he has already succeeded at the date of adoption. (*Zafar Ali, J.*) *CHHANGA v. JAI LAL*. 6 Lah. L. J. 174 : 78 I. C. 161 : 1924 Lah. 480.

HINDU LAW.

— *Adoption—Rights of adopted son—Inheritance to maternal ancestors.*

An adopted boy cannot inherit to the relations of the wife of the adoptive father who does not take part in adopting him; or in other words, he can only inherit to the adoptive mother's relations and not to the wife of the adoptive father who does not take part in the adoption. 18 M. 277; 23 M. 1; 37 M. 199, 222 referred to. (*Devadoss, J.*) VENKATASUBBIE v. SUNDARAMMA.

20 L. W. 925. 48 M. L. J. 126.

— *Adoption—Widow—Consent of sapindas—Necessity for.*

In Mysore the course of thought and the tenets of Hindu Law followed are more akin to those in the Madras School than anywhere else and the necessity for a widow to seek the consent of her husband's sapindas to make a valid adoption has been recognised by Courts. 16 M. C. C. R. 227, Ref. Consequently an adoption made by a Hindu widow without consulting her husband's sapindas is invalid. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) DODDA MOGA v. NARAYANA BHATTA. 2 Mys. L. J. 157.

— *Adoption—Widow—Limits of her power—Grandmother inheriting to grandson.*

Under the Hindu Law a grandmother who inherits the estate of her grandson directly as his next heir, can adopt to her husband. 26 B. 526; 46 B. 455, Ref. (*MacLeod, C. J. and Shah, J.*) NARHAR GOVIND v. BALVANT HARI.

48 Bom. 559. 80 I. C. 435; 26 Bom. L. R. 528; 1924 Bom. 437.

— *Adoption—Divesting—Vatan property.*

Where on the death of a person vatan property of his vests in some of his male heirs, a subsequent adoption by his mother who was his heir under the Hindu Law does not divest the heir who has succeeded to the vatan of his property. (*MacLeod, C. J. and Shah, J.*) ADIVEVA FAKIRGOWDA v. CHANMALL GOWDA. 26 Bom. L. R. 360.

81 I. C. 1018. 1924 Bom. 393.

— *Adoption—Widow—Limits of power—Right of adopted son to come on record in pending litigation.*

A widow has power to adopt several sons in succession, if the prior sons died leaving no issue or widow behind. Such adopted son has a right to come on the record in all pending litigations even though the widow had already been impleaded as legal representative in the place of the deceased. (*Kotwal, A. J. C.*) SHEIKH DALLU v. PANJAB. 78 I. C. 95; 1924 Nag. 344.

— *Adoption by widow—In the Madras school, the consultation with daughter's son who is a major, next heir and otherwise competent to advice is necessary. Per Jackson, J.—It is not necessary.*

Per Ramesam, J. (*Jackson, J. contra*):—In a case where daughter's son is next heir and is a major and otherwise competent to advice, he ought to be consulted by the adopting widow.

Jackson, J.:—The assent of the daughter's son, though good evidence of the absence of caprice or corruption actuating adoption, is not necessary

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for its validity. (*Ramesam and Jackson, JJ.*) ANNE BRAHMAYYA v. C. RATTAYYA.

20 L. W. 503; (1924) M. W. N. 844; 83 I. C. 59; 47 Mad. 716; 1925 Mad. 67.

— *Adoption by widow—Consultation with reversioners.*

A registered letter to a person, containing a request to assent to an adoption, the letter being never opened by him and returned, is not a valid consultation. (*Ramesam and Jackson, JJ.*) ANNE BRAHMAYYA v. C. RATTAYYA. 47 Mad. 716; (1924) M. W. N. 844; 83 I. C. 59; 20 L. W. 503; 1925 Mad. 67.

— *Adoption by widow—Consent of one only of two kinsmen.*

Consent of one only of two kinsmen is not that of majority even where the other was asked and the consent of a remote kinsman cannot cure the defect. (*Ramesam and Jackson, JJ.*) ANNE BRAHMAYYA v. C. RATTAYYA. 20 L. W. 503; 47 Mad. 716; (1924) M. W. N. 844; 83 I. C. 59; 1925 Mad. 67.

— *Adoption by widow—Consent of sapindas is different from authority of husband in that the former should be exercised within a reasonable time and also should refer to the boy to be adopted.*

There is an essential difference between the authority of the husband and the assent of a sapinda. The former is intended to be exercised only after the death of the husband. The latter is intended to be used within a reasonable time, after the consent is given. When the interval is short, the death of the sapinda may not matter; but a sapinda's assent is not to be pocketed by the widow and used long after it was given, when entirely different considerations as to the expediency of the adoption may apply. Again, the boy to be adopted ought also to be referred to the consideration of the sapinda whose consent to the adoption of "any boy at any time" is invalid. (*Ramesam and Jackson, JJ.*) ANNE BRAHMAYYA v. RATTAYYA. 47 Mad. 716; (1924) M. W. N. 844; 83 I. C. 59; 20 L. W. 503; 1925 Mad. 67.

— *Adoption by widow—Courts should examine the motives of the sapindas in giving consent—Object of helping widow to screen alienation by widow, from the attacks of nearer reversioners makes consent invalid—Consent obtained by promise of payment of some money is corrupt.*

Courts are bound to examine the sapinda's motives in giving consent to an adoption. Consent given with the object of screening certain alienations made by the widow from the attacks of nearer kinsmen is invalid as also consent obtained by promise of payment of some money in return. (*Ramesam and Jackson, JJ.*) ANNE BRAHMAYYA v. RATTAYYA. 47 Mad. 716; (1924) M. W. N. 844; 83 I. C. 59; 20 L. W. 503; 1925 Mad. 67.

— *Adoption by widow—Refusal of assent, unaccompanied by reasons is not necessarily improper unless reasons were asked for and declined.*

Any refusal unaccompanied by reasons is not necessarily an improper refusal. It is, of course improper if the sapinda were asked to state his

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reasons and 'declines' to state them, either at the time or later on, in the course of the judicial proceedings. (*Ramesam and Jackson, JJ.*) ANNE BRAHMAYYA v. C. RATTAYYA. 47 Mad. 716 : (1924) M.W.N. 844 : 83 I. C. 59 : 20 L. W. 503 : 1925 Mad. 67.

———Adoption—Suit for declaration of invalidity—Burden of proof.

Where a Hindu reversioner asks for a declaration that the defendant was not the validly adopted son of the last holder, the onus of proof is on the latter to establish the adoption. (*Prideaux, A. J. C.*) LAXMAN v. MT. BHULABAI. 78 I. C. 862.

———Adoption—Effect—Adopted son—Rights of—Alienations by widow—Effect on.

1924 Bom. 159.

———Adoption—Partition between co-widows prior to—If binding.

Where prior to an adoption, two widows of the deceased had divided the property among themselves, it is not binding on the adopted son, even if the property allotted to each widow is only just sufficient for maintenance. Adoption divests both of them of the estate vested in them. (*Kotwal and Prideaux, A. J. C.*) MT. ANNAPURNABAI v. RUPRAO. 1924 Nag. 319.

———Adoption—Mother succeeding as heir to son—Attaining ceremonial competence—Power to adopt.

A Hindu widow who succeeds to the estate of her son who dies a widower is competent to make an adoption even though the son had attained ceremonial competence at the time of his death. (*Maddox, C. J. and Crump, J.*) ANJIRABAI GULABRAO POWAR v. PANDURANG BALAKRISHNA POWAR. 48 Bom. 492 : 80 I. C. 185 : 26 Bom. L. R. 326 : 1924 Bom. 441.

———Applicability—High caste Hindus in the Punjab. 75 I. C. 109 : 6 Lah. L. J. 69.

———Applicability—High caste Hindus in the Punjab. MT. BALLO v. RAM KISHAN. 1924 A. 49.

———Applicability—Banias of Ambala District—Succession.

Banias of Ambala District are governed by Hindu Law and not agricultural custom in matters of succession. (*Harrison and Zafar Ali, JJ.*) LALCHAND v. MANOHRI. 78 I. C. 717 : 1925 Lah. 108.

———Applicability—Cutchi Memons.

Cutchi Memons are governed by Hindu Law in matters of succession and inheritance alone. (*Raymond, A. J. C.*) YUSUF MAHOMED v. ABUBACKER IBRAHIM. 78 I. C. 817 : 1925 S. 26.

———Applicability—Gonds—Inheritance—Sons—Rights of.

Gonds are Hindus and follow Hindu Law in matters relating to joint family, succession and survivorship, etc. Sons take interest by birth in the property of their father. (*Kinkhede, A. J. C.*) RAMNATH v. SUKALSI. 1924 Nag. 380.

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———Applicability—Jains—Widow—Powers of.

Jains are Hindu dissenters and when their customs are set up they must be proved like other customs varying the ordinary law and when so proved effect must be given to them.

A Jain widow has absolute power of disposal over the estate inherited by her from her husband which was not ancestral. (*Baker, O. J. C.*) MT. SANO v. BABOO PURAN SINGH. 78 I. C. 461 : 1925 Nag. 174.

———Application of—Dancing girls—Prostitutes and outcastes—Law applicable—Caste Disabilities Removal Act.

The Hindu Law as now understood is the law of the *Smritis* and *Smritis* including the recognised customs administered and interpreted in the light of judicial decisions. That law is applicable to all persons in India who have not adopted some other personal law than that of their own.

The class of dancing girls and prostitutes have been recognised as a caste like the other four castes—whether they are to be regarded as a fifth caste or included in the residuary caste of *Sudra* as *Manu* would have it. They are, in matters of succession, governed by the Hindu Law.

Since the Caste Disabilities Removal Act (XXI of 1850), a convert or an outcaste from Hindu religion retains his right of inheritance whether the right accrues before or after the conversion to another religion or exclusion from caste. (*Jwala Prasad and Ross, JJ.*) RAM PARGASH SINGH v. MT. DHAN BIBI. 1924 P.H.C.C. 85 : 5 Pat. L. T. 203 : 3 Pat. 152 : 78 I. C. 749 : 1924 P. 420.

———Conversion—Effect of—Joint family—Severance in status.

The conversion of a Hindu co-parcener to an alien faith has the effect of separating the convert *ipso facto* from the coparcenary. 9 M. I. A. 199, Ref. (*Martineau, J.*) MT. JAMNA BAI v. GONDA RAM. 6 Lah. L. J. 84 : 80 I. C. 519 : 1924 Lah. 479.

———Converts—Custom in contravention of general Hindu Law—Quantum of proof. MT. DURGA DEVI v. GUR NARAIN. 1924 Lah. 157.

———Conversion—Effect of—Rights of convert.

Conversion to Christianity does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in and his powers over property, and he is at liberty to retain so much of the old law as is consistent with his change of status or to adopt the usage of any other class with which the new status allows him to associate himself. The Hindu Law, except so far as it may be inconsistent with the new religion adopted by the convert will continue generally applicable to him and his descendants, if they do not elect to abandon the Hindu Law. (*Chandrasekhara Aiyar, C. J. and Plumer, J.*) RAMJEE RAO v. ANANDAPPA. 2 Mys. L. J. 92.

———Custom—Exclusion of daughters—Burden of proof.

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The burden of proving a custom of succession under which daughters are excluded from inheritance lies upon the person setting it up. (*N. R. Chatterjee and Persoi, JJ.*) DHARANI KALITANI v. SISU RAMKALITA, 39 C. L. J. 100.

— *Damdupat* — Rule of — Applicability — Court's power to award interest from date of suit.

The Hindu Law principle of *Damdupat* applies to money debts and mortgage debts. Where prior to the filing of the suit the amount of interest accrued exceeds the principal, then under the rule interest ceases to run but there is nothing to prevent the Court from awarding interest from the date of the suit under S. 34, C. P. Code. (*Kinkhede, A. J. C.*) MOTI LAL RAMLAL v. RENU, 1924 Nag. 348.

— *Damdupat* — Mortgage — Mortgagors forcing mortgagee out of possession — Rule inapplicable. See MORTGAGE, INTEREST.

26 Bom. L. R. 455.

— Dancing girls — Law applicable to — Hindu Law of Succession and Inheritance. See HINDU LAW — APPLICABILITY, 1924 P. H. C. C. 85.

— Debts — Antecedent debts — What is.

The obligation incurred by a Hindu father in order to be binding on his sons must have two attributes, i.e., it must have been incurred antecedently to the transaction in suit; and it must have been incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such a joint estate.

When the prior mortgage is relied on as antecedent debt, the mortgagee must prove that there was necessity for the original transaction also. (*Walmesley and Suhrawardy, JJ.*) DAMODAR PROSHAD PANDEY v. SURENDRA NATH, 78 I. C. 45.

— Debt — Antecedent debts — What is.

In order to validate an alienation by the father on the ground it was for discharging an antecedent debt, antecedency in time and dissociation in fact have to be proved. Where a prior mortgage which is relied on as an antecedent debt was to pay off losses arising out of business transactions, it is an antecedent debt within the meaning of the decision in *Sahu Ram's* case. (*Pipon, J. C.*) SANT RAM v. GURDAS MAL, 75 I. C. 239.

— Debt — Nature of — Antecedent debt — Mortgage debt.

Per *Lindsay, J.* — Antecedent debt means merely a debt which is antecedent in fact as well as in time, i.e., a debt truly independent of and not part of the transaction impeached.

Per *Sulaiman, J.* — A mortgage debt can be an antecedent debt just as much as simple money debt can be. (*Lindsay and Sulaiman, JJ.*) GAURI SHANAR SINGH v. SHEO NANDAN MISRA, 46 A. 384; 22 A. L. J. 369; 78 I. C. 911.

L. R. 5 A. 306; 1924 A. 543.

— Debts — Antecedent debt — Usufructuary mortgage.

The consideration for a usufructuary mortgage constitutes an antecedent debt which can support a subsequent alienation. (*Wazir Hasan, A. J. C.*) MUNNU LAL v. BISHAMBHAR NATH, 79 I. C. 85.

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— Debts — Antecedent debts — Time-barred debt — Alienation by father — Necessity. See HINDU LAW, JOINT FAMILY, ALIENATION.

22 A. L. J. 601.

— Debts — Antecedent debts — Joint family property — Father's alienation. 77 I. C. 640.

— Debts — Antecedent debt — Joint family property — Father's alienation. 1924 Nag. 1.

— Debts — Liability for — Failure by father to render accounts — Son's liability. 76 I. C. 907.

— Debt — Decree debts — Decree against father. 76 I. C. 582.

— Debts — Liability for — Son's liability — Mortgage by father. 1924 Lah. 263 (2).

— Debts — Antecedent debts — Liability of sons.

To justify an alienation by a Hindu father as against his sons, the debts for which the alienation is made must not merely be antecedent in time but should also be dissociated in fact therefrom. (*Dalal J. C. and Neare, A. J. C.*) AWADH RAM SINGH v. MAHBUB KHAN, 10 O. L. J. 525. 79 I. C. 725; 1924 Oudh 255.

— Debts — Father — Son's liability — Pious obligation — Time-barred debts.

A Hindu son is under no pious obligation to pay off the debts of his deceased father of which the recovery is barred by time. Consequently the sale of a minor's estate by a guardian for the payment of such a debt of the minor's father is not binding on the minor 33 M. 308; 41 B. 347. Ret. (*Baker, J. C. and Hallifax, A. J. C.*) CHITNAVIS v. NATHU SAO, 20 N. L. R. 106; 7 N. L. J. 170; 79 I. C. 1002; 1925 Nag. 2.

— Debts — Pious obligation of sons.

The pious obligation of sons to pay their father's debt only arises on the death of the father. There is no such obligation on their part to pay whatever debts the father may incur. (*MacLeod, C. J. and Crump, J.*) SHIVRAO RAMRAO v. LAKSHIBAI, 1924 Bom. 523.

— Debts — Father — Son's liability.

It is now settled law that the son's pious obligation to discharge his father's debts arises even during his life time. (*Phillips, J.*) MAHBOOB SIR FRAJYANTU SREE RAJA PARTHASARATHY APPA RAO v. SUBBA RAO, 35 M. L. T. (H.C.) 84; (1924) M. W. N. 517; 1924 Mad. 840; 47 M. L. J. 483.

— Debts — Father — Son's liability — Execution proceedings — Sale of entire property.

A Hindu father governed by the Mitakshara law can by incurring a debt, so long as it is not for an immoral purpose, lay the estate including his son's share open to be taken in execution proceedings upon a decree for payment of that debt. The pious obligation of the son to pay the father's

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debt exists whether the father is alive or dead. 28 B. 383, 51 I. A. 129, 43 B. 612 Ref. (*Shah, A.C.J. and Fawcett, J.*) NARAYAN GANESH v. SAGUNABAI GANGADHAR, 26 Bom. L. R. 1200.

——— *Debts—Son's liability—Basis of.*

Per *Sulaiman, J.*—The basis of the liability of Hindu sons for the liability of their father's debts is threefold. It may be based on the existence of a legal necessity or on the ground of the personal obligation of the sons to pay their father's debt or on the ground of the transfer being in lieu of an antecedent debt. Each of these is a distinct and separate basis. (*Lindsay and Sulaiman, JJ.*) GAURI SHANKAR SINGH v. SHEO NANDAN MISHRA, 46 A. 384 : 22 A. L. J. 369 : 78 I. C. 911 : L. R. 5 A. 306 : 1924 A. 543.

——— *Debts—Son's liability—Extent of.*

A Hindu is now liable for his father's debts only to the extent of the share in the coparcenary property that come to him at a partition made after the debt has been incurred and to the extent of the property inherited from his father at his death whether the debt was incurred before or after partition. (*Hallifax, A.J.C.*) BHO PRASAD v. NAKSHED PRASAD, 1924 Nag. 410.

——— *Antecedent debts—The family business resulting in loss and insolvency—Whether minor's interests are liable.*

Where the father and major members of a joint family were adjudicated insolvents, and the attaching creditors proceeded against the undivided shares of the minor members. *Held*, The decision on *Sant Prasad Singh v. Sheodut Singh*, 2 Pat. 724 cannot be considered as an authority. "It is too late to contend that property over which a person has a disposing power which he may exercise for his own benefit does not include ancestral property which may be sold for the satisfaction of antecedent debts." 7 B. 438; 26 M. 214; 44 A. 126 followed. (*Das and Ross, JJ.*) AMOLAKCHAND v. MAN SUKA RAI MANGAN LAL, 3 Pat. 857 : 1925 P. 127

——— *Debts—Antecedent debts—Loan on security of family property.*

A debt contracted on the security of joint family property is not an "antecedent debt." (*Kotwal and Prideaux, A. J. Cs.*) RAKHMAHAI v. VITHUSA, 78 I. C. 384.

——— *Debts—Antecedent debts—Prior mortgage.*

The view that the amount due on a prior usufructuary mortgage executed by Hindu father is not a good antecedent debt cannot now be upheld in view of the recent decision of the Privy Council in 21 A. L. J. 934. In order to be antecedent the previous debt need not necessarily be a simple debt but may also be a mortgage debt. (*Sulaiman and Mukerjee, JJ.*) SANMUKH PANDAY v. JAGARNATH PANDAY, 46 A. 531 : 22 A. L. J. 417 : L. R. 5 A. 289 : 1924 A. 708.

——— *Debts—Father undertaking to indemnify third person—Debt created by decree against father—Liability of sons to pay decree out of ancestral property.*

The liability imposed by the Court upon the father to indemnify the person, with whose

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property he had improperly interfered, creates a debt which may justly be recovered from the ancestral property in the hands of the son. 39 C. 862 followed. (1908) 32 Bom. 348, not followed. L. R. 44 I. A. 126 : 39 A. 437, and (1924) 1 O. W. N. 48 : L. R. 51 I. A. 129 : 46 A. 95 referred to.

M and B were co-mortgagees of a certain property. The mortgagor redeemed the property from B alone who undertook to satisfy M's claim. M died, leaving three sons but B settled the claim with one of his sons only, S by transferring certain property and paying some cash. S undertook to indemnify B against any claim by his other two brothers. The brothers made a claim and obtained a decree. The heirs of B in consequence sued for the return of cash and obtained the decree, in execution whereof the property in the hands of the sons of S was attached. The latter brought a suit for a declaration that the property was not liable to be sold for the debt.

Held, that the debt for which the heirs of B obtained the decree under execution having arisen out of his liability to indemnify B in the event of a claim by his brothers, the decree-holder could proceed against the ancestral property in the hands of the son, S. (*Wazir Hasan, A. J. C.*) MATA DIN v. MAHRAJ DIN, 1 O. W. N. 960 : 12 O. L. J. 33.

——— *Debts—Father's debts—Immortality—Proof.*

The onus of proving that a debt of a father was incurred for an immoral purpose is on the sons. It is sufficient to prove that he was leading a licentious life beyond his means and that there was no business or moral occupation on which the funds could have been expended. A direct connection need not be established between the debt and the alleged immorality. (*Pipon, J. C.*) SANT RAM v. GURDAS MAL, 75 I. C. 239.

——— *Debts—Father's debt—Liability of estate in execution.*

In the case of a joint family consisting of father and sons, the family property is liable to be proceeded against in execution of a decree for payment of a debt incurred by the father which is neither illegal nor immoral. (*Wazir Hasan and Neave A.J.Cs.*) GOKARAN SINGH v. JOKLU SINGH, 11 O. L. J. 405 : 79 I. C. 21 : 1924 Oudh 407.

——— *Debts—Decree against father—Liability of family property.*

In execution of a decree against the father for a debt not illegal or immoral joint family property can be proceeded against. (*Wazir Hasan, J.C. and Kendell, A.J.C.*) SHAMBU BHAN SINGH v. CHANDRA SEKHAR BAKHSH SINGH, 1 O. W. N. 343 : 80 I. C. 17 : 10 O. & A. L. E. 912.

——— *Debt—Father's debt—Liability of family property—Extent of.*

The whole of a joint family property in the hands of the sons and grandsons of a deceased judgment-debtor can be attached and sold in execution of a personal decree passed against the father or grandfather. (*Kendall, A.J.C.*) HARIHAR PRASAD v. MAHABIR PANDEY, 1 O. W. N. 487 : 10 O. & A. L. R. 893 : 79 I. C. 1055 : 11 O. L. J. 689 : 1925 Oudh 91.

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Debts—Father—Decree for damages—Liability of sons.

Damages were awarded against a Hindu father for having cut trees which did not belong to him and demolished a house. It was apparent that the family had benefited to a large extent by the action of the father. In execution of the decree for damages an item of family property was sold. The sons who were not parties to the suit or the execution proceedings challenged the validity of the sale. *Held*, that the debt being neither illegal nor immoral the sons were bound to discharge it and were therefore bound by the sale. 32 Cal 862; 4 Lah, 83; 32 Bom. 348 referred to. (*Daniels and Dalal, JJ*) CHANDRIKA RAM TIWARI v. NARAIN PRASAD RAI. 46 A. 617 :

22 A.L.J. 468 : L.R. 5 A. 378 :
79 I. C. 1036 : 1924 A. 745.

Debts—Father—Personal contract—Liability of sons—Survivorship.

The estates taken by sons by survivorship is not liable for a contract the father may have made personally and not as manager of the joint family, except in respect of instalments which had come into existence before his death. (*Hallifax and Kotwal, A.J.C.*) KANTICHAND v. UDAYA BANSHA 80 I. C. 349 : 1925 Nag. 7

Debts—Father—Personal decree—Sons' liability.

On the question whether the entire family property could have been sold under a personal decree passed against the father in his life-time there is not a long string of authorities which answer the question in the affirmative. Cases reviewed. (*Daniels, J. C. and Wazir Hasan, A. J. C.*) BHAGWATI SAHAI v. MAHARAJ PRAG DIN.

27 O. C. 111 : 10 O. & A. L. R. 313
81 I. C. 15 : 1 O. W. N. 13 : 11 O. L. J. 202 :
1924 oudh 393.

Debts of father—Sons when to prove illegality or immorality.

In challenging an alienation by a Hindu father the sons have to prove illegality or immorality only in two cases, one, where property has passed out of the family under a conveyance executed by the father in consideration of an antecedent debt in order to raise money to pay such debt; secondly, where property has been sold in execution of a decree for the father's debt. The rule does not apply to a private conveyance where cash is paid before the Registrar. (*Daniels, J*) BALDEO v. BHAGWAN MISIR. 78 I. C. 595.

Debts—Father—Son's liability—Antecedent debts—Personal covenant—Prior mortgage—Extravagant habits of father—Proof of.

The grandfather head of a joint Hindu family consisting of himself and his grandsons mortgaged a portion of the property and twelve years afterwards executed another mortgage with possession to the prior mortgagee in discharge of the earlier mortgage. The grandsons sued to set aside the later mortgage alleging that it had not been executed for binding purposes and that the grandfather was a man of extravagant habits. *Held*, that the debt evidenced by the first mortgage was an antecedent debt and that

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the second mortgage was therefore binding on the grandsons.

21 A. L. J. 934 foll.; 13 M. 189; 11 B. 320; 6 M. 293; 20 A. L. J. 577 dist. 44 A. 368; 21 C. W. N. 957; 42 M. 711 Ref.

Per *Lindsay, J.*—A debt which had become absolutely barred by time and the liability to pay which had not been undertaken in a previous writing could not be deemed to be a good antecedent debt so as to validate as against the sons a conveyance by the father of a joint Hindu family in lieu of it. But when a mortgage debt as such had not become time-barred but only the personal remedy against the father was barred, it could still be a good antecedent debt so as to justify an alienation of it. (*Lindsay and Sulaiman, JJ.*) GAURI SHANKER SINGH v. SHEO NANDAN MISRA. 46 A. 384 : 22 A. L. J. 369 :

L. R. 5 A. 306 : 78 I. C. 911 : 1924 A. 543.

Debts—Father—Liability of sons and grandsons—Immoral or illegal debts—Extravagant transaction—Antecedent debts—Meaning of.

If the father in a joint Hindu family purported to burden the estate by mortgage, then unless the mortgage is to discharge an antecedent debt, it would not bind more than his own interest.

Antecedent debt means antecedent in fact as well as in time, that is to say that the debt must be truly independent and not part of the transaction impeached. But a mortgage debt may also be an antecedent debt.

The pious obligation upon which the doctrine of antecedency is founded extends to grandsons as well as sons. Indeed the pious duty would appear to be more pressing in the case of the grandfather's debts than in the case of the father's.

The sons are liable to pay the debts of the father except when they are contracted for illegal or immoral purposes. It cannot be said that the purpose for which the debts were contracted was illegal or immoral, where the money was borrowed to pay the purchase price of an interest in land; the fact that the transaction was reckless and extravagant is immaterial. The question of justifying necessity or benefit to the family does not arise. It is only in cases where those elements are lacking that the doctrine of antecedent debt becomes important and the only exceptions relieving the sons and grandsons from pious obligation are where illegality or immorality is proved.

Whatever may have been the origin of the exception to the liability of the sons and grandsons in such cases, it is now established that the exception only exists in cases where the debt was contracted for an illegal or immoral purpose or where the obligation arises from some illegal or immoral transaction. (*Miller, C. J. and Foster, J.*) KULDIP SAHAY v. RAM BHUJHAWAN MAHTO.

3 Pat. 425 : 5 Pat. L. T. 115 : 1924 P. 454.

Debts—"Antecedent debts"—Liability of grandson.

A debt secured by a usufructuary mortgage is "an antecedent debt" within the meaning of that expression in the Hindu law. Not only a son but also a grandson is liable for the antecedent debts

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of a Hindu (Wazir Hasan, J. C. and Kendall, A. J. C.) MADHO PRASAD v. NEAMAT.

10 O. & A. L. R. 621 :
11 O. L. J. 579 : 1 O. W. N. 292 :
1925 Oudh 185.

——— *Debts — Illegal or immoral debts — Damages for malicious prosecution—Liability of sons to pay such debt.*

It is an illegal and immoral act on the part of the father to lodge a maliciously false criminal case against another. It is also opposed to public policy. The course adopted by the father could not possibly be said for the benefit of the family and was fraught with great risk to the family status and reputation. It was a highly tortious act. Consequently the son's share of the joint family property would not be liable for such damages.

A debt incurred by a father to defend himself in a criminal case may in certain circumstances be for the benefit of the family in order to save the father and consequently the family from the degradation in the eyes of the public. But the present was not a case where the father incurred the debt to defend himself in an action, civil or criminal brought against himself. The debt was not incurred to defend himself against the suit for damages for malicious prosecution, but the decree was passed against him for having done a tortious act, namely, the institution of a false and malicious criminal proceeding against the decree holders. It was a voluntary and aggressive action on the part of the father to bring the false criminal case and he was not at that time trying to save himself against any action, civil or criminal causing any danger to his person or property. (Jwala Prasad and Foster, JJ.) SUNDAR LAL v. RAGHUNANDAN PRASAD.

5 Pat. L. T. 135 : 3 Pat. 250 :
1924 P. 465.

——— *Debts—Father—Insolvency—Debts not illegal or immoral—Power of Official Receiver to sell entire properties including son's shares. See PROV INSOL. ACT, S 18,*

46 M. L. J. 314.

——— *Debts—Father—Partition—Liability of sons and their shares after partition for debts of their father incurred before partition*

A Hindu son in possession of property which had been joint and which fell to his share on partition is liable in a suit brought after partition impleading also the son, for the father's debts incurred before the partition and not illegal or immoral. 24 M. 555; 38 M. 1120 followed, 41 M. 131 considered. 40 M. L. J. Dissented. (Ramesam and Jackson, JJ.) TADURI RAMA CHANDRA JAGANNATHA RAO v. VADREYU VISWESAM.

19 L. W. 691 : 47 Mad 631 :
80 I. C. 258 : 46 M. L. J. 590 : 1924 Mad. 682.

——— *Debts—Decree against grandfather—Suit to challenge—Onus.*

Where a grandson attacks the validity of sale in execution of a decree against his grandfather the onus is on him to prove immorality or illegality. In cases of alienation, the onus is on the purchaser to make out a title but where the alienation was by means of a court auction sale, the burden is on the person challenging the sale. (Pullan, A. J. C.) BADRI NATH v. RADHA BAL-LARAJI IDOL.

80 I. C. 622 : 1925 Oudh 199.

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——— *Debts — Manager—Liability of other members—Pronote executed by manager—Suit on the note—Decree against other members.*

There is no presumption in law that a document signed in his personal capacity by one who is the manager of a joint Hindu family is signed by him as such manager. Consequently if in a suit on a pronote executed by the managing member, the creditor seeks to make the other members of the family liable for the debt, the burden lies on the plaintiff to prove that there was necessity for the loans. Where in a suit on a pronote executed by the deceased manager of a joint Hindu family against the surviving member it is found that the pronote was not executed by the manager as such, but the loan was incurred for family purposes and the plaintiff also alleged such family necessity, it is open to the court to pass a decree on the debt against the surviving members. (Wallace, J.) SUPPAI GOUNDAN v. A. M. R. M. MURUGAPPA CHETTIAR.

19 L. W. 605 : 1924 Mad. 710.

——— *Debts—Rights of Creditor—Interest—Borrowing by manager—Enforceability against Family.*

1924 P. 71.

——— *Debts—Nature of—Litigation concerning mesne profits.*

A decree for mesne profits passed against a person who was defending the suit in two courts cannot be characterised as illegal or immoral. (Wazir Hasan, J. C. and Kendall, A. J. C.) SHAMBHU BHAN SINGH v. CHANDRA SEKHAR BARSH SINGH

1 O. W. N. 343 : 80 I. C. 17 :
10 O. & A. L. R. 912.

——— *Debts—Nature of—Extravagance and want of thrift—Effect.*

The debt incurred by a Hindu father, when it is not for an illegal or immoral purpose, will be binding on the sons even if it be proved the father was extravagant and thriftless. (Baker, J. C.) BANSIDAR v. PANDURANG.

78 I. C. 431.

——— *Debts—Liability for—Manager—Binding nature of—Onus.*

1924 Lab. 44.

——— *Debts—Manager—Joint family—Mortgage not binding on family property, if operative on share of the mortgagor.*

A Hindu father is not incompetent to bind his own interest in the joint family estate by the execution of a deed of mortgage to discharge any debt of his own, even though that debt has not been contracted for the purposes of family necessity and is not an antecedent debt. The recent decision of the Privy Council in 21 A. L. J. 934 did not intend to modify the law as understood in these provinces. All that the creditor can do in such a case is to obtain a money decree and attach and sell the father's share in execution. (Kendall, A. J. C.) JOKHU PANDE v. MATA PRASAD TEWARI.

27 O. C. 161 : 1925 Oudh 94.

——— *Debts—Antecedent Debt—Joint family estate—Mortgage by manager—Necessity.*

The manager of joint Hindu family cannot mortgage the family property qua manager except for purposes of necessity. 51 L. R. I. A. 129 followed.

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Where it is not shown that the debt due on a prior mortgage executed by the father which the subsequent mortgagee redeemed on payment of certain sum of money was borrowed for legal necessity or antecedent debt, the subsequent mortgagee cannot claim that sum against the minor son. (*Wazir Hasan and Neave, A. J. Cs*) PARTAB SINGH v. SHAMSHER BAHADUR SINGH. 10. W. N. 694.

Debts—Son's debts—Liability of father's property.

There is no law which prohibits a person from taking measures to ensure that his self-acquired property should enure for the benefit of his minor grandsons and not be taken by the creditors of his son. (*Baker, O. J. C.*) DEBI CHARAN v. SANKER RAO. 7 N. L. J. 1: 80 I. C. 322: 1924 Nag. 71.

Family arrangement—Settlement of disputed claims to property—Properties divided among various claimants—Some of the claimants subsequently claiming against the terms of the settlement—Ratification—Estoppel.

On the death of a Hindu owning considerable properties, there was a dispute as regards succession to them among his surviving daughter, the minor sons of a predeceased daughter and two nephews who claimed to have been members of an undivided family with the deceased. The parties settled their disputes amicably and each of the contesting parties took a share of the properties, entered into possession and subsequently dealt with the items allotted to them as their own by selling and mortgaging them. Subsequently after the death of the daughter, the daughter's sons sued to recover possession of the properties allotted to the daughter and the nephews of the last male owner. *Held*, that there had been a bona fide settlement of family disputes and the arrangement was binding on the grandsons who were parties thereto, through their guardian. Moreover the grandsons had obtained considerable benefit under the compromise inasmuch as they obtained immediate possession of the properties allotted to them and having dealt with the properties so allotted as their own, were estopped from challenging the validity of the settlement. 33 A. 356; 18 C. W. N. 929; 40 A. 487; 45 A. 339; 46 B 292; 1 Pat. L. T. 335, 338; 44 A. 44 1011. (*Jwala Prasad and Foster, JJ.*) JAGDAMSAHAY v. RUPNARAIN MAHTON. 5 Pat. L. T. 375: 19-4 P. 736.

Gift—Acceptance—Express or implied—Considerations for Court.

Acceptance by the donee is necessary for the validity of a Hindu gift. Taking all the facts into consideration, the court must be satisfied of this fact. The acceptance of a deed of gift is *prima facie* evidence of acceptance of gift but the whole conduct in connection with the acceptance must be carefully scrutinised. In all such cases two points ought to be considered, first, whether the donee is in possession of the deed of gift, and secondly, whether the donee is in possession of the properties.

Quære, whether under the Hindu Law acceptance can be presumed till the donee signifies his

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dissent. (*Das and Ross, JJ.*) JAMUNA PRASAD SINGH v. MT. SHEORATI KUER. 78 I. C. 469: 1925 P. 251.

Gift—Construction—Gift by father-in-law to widowed daughter-in-law—Life estate—Estate not terminated by remarriage. See HINDU WIDOWS' RE-MARRIAGE ACT. 19 L. W. 510.

Gift—Construction—Gift to wife and other persons—Nature of estate taken.

Where a Hindu testator bequeathed his properties in four shares to his wife, two daughters and nephew with a condition that if any of the daughters had a son born to her, the son was to get her share failing whom it was to go to the nephew. *Held*, that the testator's widow took an absolute estate in respect of the one-fourth share bequeathed to her. (*Sulaiman and Mukerji, JJ.*) LAKSHMI NARAIN MISIR v. MT. SUMARNI KUAR. L. R. 5 A. 342: 46 A 439: 79 I. C. 839: 1924 A. 731.

Gift—Construction—Gift by husband to wife—Donee described as malik—Nature of estate granted.

Where a gift by a Hindu husband to his wife described his wife as malik but the gift was made to her subject to all rights and conditions set forth in the deed of gift, *held*, that the wife took a limited and not an absolute estate. The deed as a whole left no room for doubt that it did not confer the maliki rights without conditions, nor did it confer on the donee those rights of property and alienation which a bare disposition in favour of a person denominated as malik would have involved. A Court in construing a deed must look at all the terms of the document. (*Lord Shaw*) ASHRAFI SINGH v. BIDYA PRASAD NARAYAN SINGH. 35 M. L. T. 135: L. R. 5 (P. C.) 136: 26 Bom. L. R. 776: 20 L. W. 425: 80 I. C. 826 (1): 1924 M. W. N. 819: 6 Pat. L. T. 77: 47 M. L. J. 585 (P. C.).

Guardianship—Alienation by defacto manager—When binding.

An alienation by the *de facto* guardian of a Hindu minor, if for the necessity or benefit of the latter is binding on the estate. (*Kinkhede, A. J. C.*) NARAYAN v. DHARMA. 81 I. C. 273: 1925 Nag. 134.

Guardianship—Property—Mother—Rights of.

Under Hindu Law, after the father the mother is the natural and legal guardian of her minor son's person and property in a family, when her minor son is the sole owner of the property and there are no undivided coparceners entitled to a share therein. (*Kinkhede, A. J. C.*) GANPAT SAMBAJI v. MAHADEO. 1924 Nag. 354.

Guardianship—Testamentary guardian—Hindu father. 1924 Mad. 327.

Guardianship—Father—Testamentary guardian—Joint family property—Minor son—Appointment of guardian invalid. See NEGOTIABLE INSTRUMENTS ACT, S. 29. 47 M. L. J. 765.

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———*Impartible estate—Accretion—Income—Rents and profits accrued due but uncollected.*

The produce of an impartible estate does not necessarily belong to and form an accretion to the original property. Where there is no evidence that the late Raja treated the produce of the estate as an accretion to the estate, *prima facie* the successor is not entitled to rents which accrued due in the life-time of the late Raja in preference to his widow. Rent which has become due is produce of the impartible estate whether that produce has actually come into the hands of the owner or not. No distinction between realized rent and unrealized rent in this respect can be made. (*Das and Ross, JJ.*) APARNA DEBI *v.* SHRI SHRI SHIVA PRASAD. 5 Pat. L.T. 111: 3 Pat. 367: 1924 P. H. C. C. 207: 1924 Pat. 451

———*Impartible estate—Accretion—Talukdari property—Succession to accretion.*

The last male owner of a taluka obtained a decree for the taluk together with all the properties appurtenant thereto against the widow of the previous deceased talukdar. The widow was held entitled to the non-talukdari property. The appellant succeeded to the taluka after the death of the last male owner. Both the widow and the last male owner instituted suits on the basis of mortgages executed in favour of the previous deceased talukdar and obtained decrees for sale. In execution of the said decrees the mortgaged properties were put up to sale and were purchased by the last male owner. The reversionary heir of the previous deceased talukdar after the death of the widow brought a suit to recover his share in the properties purchased by the last male owner on the ground that the mortgages taken by the previous deceased talukdar not being appurtenant to the taluk were subject to the ordinary rules of inheritance under the Hindu Law and that the properties acquired under decrees on the mortgages were separate property.

Held, that the properties in question could not be treated as accretions to the taluka. The title to the acquisitions was regulated by the ordinary rule of inheritance under the Hindu Law and the plaintiff was entitled to shares therein. (*Wazir Hasan and Neave, A. J. Cs.*) THAKUR JAI INDAR BAHADUR SINGH *v.* THAKUR SHEO INDAR BAHADUR SINGH. 10 O.L.J. 481: 78 I. C. 393. 1924 Oudh 218.

———*Impartible Estate—Acquisitions from income—Incorporation with parent estate—Presumption—Proof.*

The question whether the properties acquired by an owner become a part of his impartible estate for the purpose of succession depends on his intention to incorporate the acquisition with the original estate. But that intention can only be gathered in most cases from his declaration, conduct or treatment, or in other words, from the mode of his dealing with the property or its income, and the mere fact that the purchase of the subsequently acquired property was made from the savings of the impartible estate cannot by itself be regarded as sufficient proof of his intention to incorporate it. If a person is the absolute owner of the income derived from an

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impartible estate, it is open to him to spend that income in any way he likes or to invest it in the acquisition of other property. If he invests it in the acquisition of other property, the property so acquired partakes of the nature of the income which contributed to its acquisition and continues to be his self acquired property in the same sense as the income of the impartible estate, which is admittedly his. The mere fact that he keeps the income of such subsequently acquired property with the income of the impartible estate does not establish such an incorporation as to make the subsequently acquired estate an accretion to or a part and parcel of the impartible estate for the purpose of succession. (*Kanhariya Lal and Mukerji, JJ.*) HARBAKSH SINGH *v.* DAL BAHADUR SINGH. 22 A. L. J. 1079: 1925 A. 155.

———*Impartible Estate—Income—Savings—Property acquired by saving is separate property of the holders.*

The income of an impartible estate is not so affected by its source that it should be assumed to form an accretion of the estate and property acquired by savings from the income of the impartible estate does not become a part of that estate but remains the separate property of the holder. 1923 P. C. 59 foll. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) HARIHAR PRASAD *v.* KESHEO PRASAD. 5 Pat. L. T. Supp. 1: 1925 Pat. 68.

———*Impartible Estate—Succession—Survivorship—Alienability.*

The fact that an estate is impartible does not make it separate or self-acquired property. A raj, though impartible, may in fact be self acquired or it may be the family property of a joint undivided family. If it is the latter, succession will be regulated according to the rule which obtains in an undivided family so far as the selection of the persons entitled to succeed is concerned *i. e.*, the person will be designated by survivorship, although then, according to the custom of impartibility, he will hold the raj without the others sharing it. But so far as the power of alienation goes, an impartible estate is not incapable of alienation either *inter vivos* or by will in the absence of a custom to that effect in the family. 15 I. A. 51; 4 M. 250; 22 M. 383. 42 C. 1179: 41 M. 782; 43 A. 278 Ref. (*N. R. Chatterjee and Chotzner, JJ.*) SRI PRATAP CHANDRA DEO *v.* SRI RAJ JAGADISH CHANDRA DEO. 82 I. C. 886: 40 C. L. J. 331.

———*Inheritance—Brothers and nephew.*

1924 Bom. 140.

———*Inheritance—Benares school—Stridhanam—One female inheriting property of another—Nature of estate—Further devolution.*

Where Stridhanam property of a female is inherited by another female, the latter takes it not absolutely but for a life estate and on her death the property would go not to her heirs but to the heirs of the original female owner. (*Sulaiman and Mukerji, JJ.*) LAKSHMI NARAIN MISIR *v.* MT. SUMARNI KUAR. L. R. 5 A. 342: 46 A. 439: 79 I. C. 389. 1924 All. 781.

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— — — *Inheritance — Bandhus — Father's sister's son's son.*

Under the Mitakshara school, a father's sister's son's son is a heritable *Bandhu*. Tests and case law discussed. (*Kankaryalal and Mukerji, JJ.*)
HARIHAR PRASAD v. RAM DAUR. 22 A.L.J. 1012 : 82 I. C. 1032 : 1925 All. 17.

— — — *Inheritance — Bandhus — Priority.*

Among *bhandhus*, *pitrabhandus* are entitled to preference over *matrībhandus*. Among *pitrībhandus* a male *bhandu* is entitled to preference over a female *bhandu* even though the latter is nearer in degree. Consequently the father's sister's son of the *propositus* is preferable to the father's brother's daughter. (*Lord Phillimore*)
KENCHAVA SANYELLAPPA v. GIRI MALLAPPA CHANNAPPA. 48 Bom. 569 : 1924 M. W. N. 719 : 22 A. L. J. 962 : 40 C. L. J. 447 : L. R. 5 P. C. 182 : 35 M. L. T. 241 : 10 W. N. 505 : 82 I. C. 966 : 51 I. A. 368 : 26 Bom. L. R. 779 : 20 L. W. 417 : 47 M. L. J. 401 : 1924 P. C. 209.

— — — *Inheritance — Bandhus — Priority — Mother's brother — Father's sister's son — Preference.*

In a contest between the maternal uncle and fathers' sister's son of a deceased person, the latter is a preferential heir to the former. Though propinquity is the governing test of the right of succession under the Mitakshara law, regard must be had primarily to the nearness of the stock or line to which each claimant belongs. Individual propinquity is a consideration which ought to come in only in the last resort as between rival claimants belonging to the same line or lines of equal proximity. It is only when all other principles fail that the theory of spiritual benefits must be resorted to. There is no warrant for engrafting the theory of spiritual efficacy on the principle of propinquity of blood underlying the Mitakshara scheme of succession. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*)
VENKATARAMA SETTY v. BORE GOWDA. 2 Mys. L. J. 183.

— — — *Inheritance — Bandhus — Relationship — Counting of — Heritability — Grandfather's brother's daughter's son.*

A grandfather's brother's daughter's son is a heritable *bhandu* under the Mitakshara Law. Where a party claims through his father as a *bhandu*, he must be within 7 degrees from the common ancestor, counting the claimant himself. Where a party claims through his mother, he must be within 5 degrees from the common ancestor counting the claimant himself. (*Mukerji and Dalal, JJ.*)
RAM SIA v. BUA. 22 A. L. J. 861 : L. R. 5 A. 715 : 1924 All. 790.

— — — *Inheritance — Bandhus — Sagotra Sapinda — Predeceased daughter's daughter.*

A predeceased daughter's daughter is not a *Sagotra Sapinda* even under the Bombay School of Hindu Law but she can succeed as a *bhandu* in the absence of nearer heirs to her maternal grandfather. (*Kinkhede, A. J. C.*)
GHUNAJI v. TULSI. 20 N. L. R. 182 : 82 I. C. 457 : 1925 Nag. 98.

— — — *Inheritance — Bandhus — Sister and brother's daughter.*

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A sister being a *bhandu* under Hindu law is entitled to succeed in preference to a brother's daughter who is not a *bhandu*. (*Martineau, J.*)
MT. PUKO v. SULAKHAN MAL. 76 I. C. 121 : 1925 Lah. 62.

— — — *Inheritance — Disqualification — Burden of proof — Leprosy.* 75 I. C. 474.

— — — *Inheritance — Exclusion from — Ascetics.*

Hindu texts applicable to the disinheritance of ascetics do not apply to Sudras unless some usage or custom to the contrary is proved. 40 Cal. 545 : 40 M. 846 : 39 Bom. 168 Foll. (*Daniels and Dalal, JJ.*)
SOBHADDI LAL v. GOBIND SINGH. 22 A. L. J. 470 : L. R. 5 A. 364 : 46 All. 616 : 80 I. C. 579 : 1924 All. 742

— — — *Inheritance — Exclusion from — Dumbness.*

Dumbness to be a ground of exclusion from inheritance under the Hindu Law must be incurable though not congenital. 18 C. 327 Foll. (*Rafiji, J.*)
BAI PRATAPGAVRI v. MUL SHANKAR. 26 Bom. L. R. 269 : 80 I. C. 173 : 1924 Bom. 353.

— — — *Inheritance — Exclusion from — Grounds for — Murder — Conviction for — Disqualification.*

Under the Hindu law a person guilty of the murder of another cannot succeed to the estate of the latter. He is disqualified not merely as to the beneficial interest but wholly. The theory of legal and equitable estate is no part of Hindu law, observations in 27 M. 591 diss. (*Lord Phillimore*)
KENCHAVA SANYELLAPPA v. GIRI MALLAPPA CHANNAPPA. 48 Bom. 569 : 22 A. L. J. 962 : 40 C. L. J. 447 : 1924 M. W. N. 719 : L. R. 5 P. C. 182 : 35 M. L. T. (P. C.) 241 : 26 Bom. L. R. 779 : 20 L. W. 417 : 1924 P. C. 209 : 10 W. N. 505 : 82 I. C. 966 : 51 I. A. 368 : 47 M. L. J. 401 (P. C.).

— — — *Inheritance — Exclusion from — Leprosy — Burden of proof.*

Leprosy to be a ground of exclusion must be of the sanious or ulcerous and not of the anaesthetic type. The presumption of Hindu Law is against disqualification and the burden of proof of disqualification lies on a person who seeks to exclude another who would be an heir, should no case of exclusion be established. Where it is contended that a person is excluded from inheritance by reason of disease, the strictest proof of the disease such as will disqualify him at the time the succession opened will be required. (*C. C. Ghose and Panton, JJ.*)
SURENDRA NATH DE v. ASHUTOSH NANDI. 27 C. W. N. 959 : 1923 Cal. 331.

— — — *Inheritance — Exclusion from — Leprosy — When a sufficient ground.*

Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would be the test to determine whether or not leprosy is a sufficient ground for excluding a person from inheritance under the Hindu Law. 38 M. 250 : 22 I. A. 94 : 5 B. H. C. R. 145 relied on. (*Lord Shaw*).
RAMABAI v. HARNABAI. 26 Bom. L. R. 308 : 22 A. L. J. 384 : (1924) M. W. N. 357 : L. R. 5 P. C. 92 : 48 Bom. 363 : 20 L. W. 8 : 29 C. W. N. 129 : 10 W. N. 225 : 10 O. & A. L. R. 829 : 80 I. C. 193 (P. C.) : 1924 P. C. 125 : 46 M. L. J. 537.

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———*Inheritance—Exclusion from—Unchastity or immorality.*

Under the Mitakshara school of Hindu Law an unchaste or immoral daughter is not disentitled to succeed. The condition of chastity is laid down in the case of widows but not in the case of daughters. 4 B. 104 Kef. (*Jwala Prasad and Ross, JJ.*) RAM PANGASH SINGH v. MT DHAN BIBI. 3 Pat. 152 : 78 I. C. 749 :

1924 P. H.C.C. 85 : 5 Pat. L. T. 203: 1924 P. 420.

———*Inheritance—Illegitimate son—Right to inherit—Shudras.*

According to the Hindu Law as administered in South India an illegitimate son in the case of the unregenerate classes is the heir of his father provided the connection between the father and mother was continuous and exclusive and was not incestuous or adulterous. 7 M. 407 : 39 M. 136 : 13 M. I.A. 141. Ret. (*Chandrasekhara Aiyar, C. J. and Plumer, J.*) RAMJEE RAO v. ANANDAPPA. 2 Mys. L. J. 92.

———*Inheritance—Illegitimate son—Sudras.* MAROTI v. TUKARAM. 76 I. C. 934.

———*Inheritance—Mother—Re-marriage—Effect of.*

Notwithstanding re-marriage a Hindu mother remains competent to succeed as heir to the estate of her son by the first marriage where such estate devolves after her second marriage. (*Kinkhede, A. J. C.*) HUSSAINBHAI BHORA v. BANRILAL. 1924 Nag. 338.

———*Inheritance—Order of—Daughter's son—Right of representation—Daughter's son's son.* 76 I. C. 881.

———*Inheritance—Rules of, not to be altered at the will of parties—Agreement for devolution of property contrary to law of succession—Invalidity of.* See HINDU LAW, PARTITION.

L. R. 5 A. 282.

———*Inheritance—Sapindas—Rule as to.*

The ordinary principle of succession among Sapindas is that the nearer in degree excludes the more remote. (*Wazir Hasan, J.C. and Neave, A. J. C.*) BRIJRAJ BUX SINGH v. BHAWANI BUX SINGH. 11 O. L. J. 586 :

1 O. W. N. 231 : 1925 Oudh 178.

———*Inheritance—Widow—Husband's Reversioners—Rights of—Low caste Hindus.*

Once it is found that a woman is a Hindu widow inheriting a life interest in her husband's property, there is no authority that among any caste of Hindus her property so inherited can on her death devolve upon a stranger, whether she has or has not married him in accordance with the custom of her caste. Such inheritance is totally contrary to Hindu law. (*Pullan, A. J. C.*) GANGA v. PANCHAM. 10 O. & A. L. R. 725 :

80 I. C. 691 : 1925 Oudh 97.

———*Joint family—Acknowledgment of a debt on behalf of—Whether coparceners are bound.*

While a karta could bind himself in an acknowledgment of a time-barred debt, he could not bind his coparceners. In the case of debts within time the acknowledgment is binding not

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only on the karta but on the other members of the joint family of which he is the head. (*Broadway and Campbell, JJ.*) THAKUR DOSS v. MT. PUTLI. 82 I. C. 96 : 5 Lah. 317.

———*Joint family—Acquisition—Nucleus—Planting of grove—Effect of.*

Where there is an admitted nucleus of joint family property it is reasonable to presume that the expenses of planting a grove on the site of an old one came out of the joint family funds and that the grove itself is joint family property. (*Wazir Hasan, A. J. C.*) HAR DATT LAL v. DHANDHI SINGH. 10 O. & A. L. R. 786 :

11 O. L. J. 660 : 1925 Oudh 93.

———*Joint family—Alienation of ancestral property by grandfather—If grandsons not in existence can question—The others lose the right by efflux of time.*

Where the grandson of A disputed the alienations made by him, on the ground of want of necessity, and it was found that before he was conceived, his father had lost the right to question the alienation, by efflux of time. Held, on appeal—

(1) A Hindu son when he is born in a family is born to all the rights which exist at the time of his birth, and not to rights which existed a century ago and no title derived from such a Hindu would be safe under such a contingency.

(2) Once every member of a Hindu family has lost by efflux of time the right to question an alienation, a son conceived and born subsequent to the loss of the right to sue by the family cannot revive a timebarred right.

(3) A son born in a joint Hindu family acquires by birth an interest in ancestral property but does not acquire any interest in any right to sue and the cause of action in a suit to set aside alienation (4) accrues when the purchaser takes possession and not from the date of birth of a subsequent son in the family "*Ujagar Singh v. Petam Singh.*" 4 All. 120 relied upon. (*Dalal, J.*) SEKKANDAR SINGH v. BACHHUR PANDE. 82 I. C. 307 :

L. R. 5 All. 663 (Civ.).

———*Joint family—Alienation—Benefit—Point of time.*

In testing the validity of an alienation of joint family property for the purpose of purchasing another estate, the question is whether the transaction was for the benefit of the estate and the point of time at which this should be judged is the date of the transaction and not whether at a much later time it might not have become beneficial. The fact that the purchase turned out to be a good bargain many years after its date is not a ground for holding that it was for the benefit of the family at the time it was made. (*Katwal and Pridemur, A.J.Cs*) RAKHMABAI v. VITHUSA. 78 I. C. 384.

———*Joint family—Alienation—If can be validated on ground of pious obligation.*

Where a joint family property is mortgaged by three brothers neither for an antecedent debt nor for legal necessity, it cannot be supported on the bare ground of pious obligation to discharge a debt

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of the executants' deceased father. (*Wazir Hasan and Neema, A. J. Cs.*) *GAJADHAR BAKSH SINGH v. BAU NATH.* 10 O & A. L. R. 264 :

27 O. C. 133 : 1 O. W. N. 60 : 79 I. C. 104 :
11 O. L. J. 264 : 1925 Oudh 9

— Joint family — Alienation — Consent of other members. 1924 Oudh 138.

— Joint family — Alienation — Consent of members — Presumption of necessity — Absence of one — Effect.

Where all the members of a Hindu family consent to an alienation, it raises the presumption of necessity. The fact that one member who was employed abroad did not join does not make any difference in this respect. (*Daniel, J.*) *BHAGWAN DAS v. ALLAN KHAN.*

78 I. C. 649 : 1925 All. 28.

— Joint family — alienation — Duty of alienee — Inquiry, extent of.

In a suit to set aside certain alienations by the managing member, it was found by the trial court that a portion of the total consideration for the mortgage were paid by him to discharge certain prior debts of the family, and that there was no proof of necessity for the balance to justify an alienation of the coparcenary property, and it was decided that the alienee had failed to establish necessity for the mortgage, held, on appeal, (1) that the present mortgage in so far as it discharged antecedent debts, was binding on the estate, and that the alienee had failed to establish necessity for the whole mortgage, (2) that no enquiry would sustain an alienation of the coparcenary property, unless the facts represented to the alienee were such, as if true would have justified the loan. (3) That the mere existence of a joint family business was not sufficient and lender must show that the money was required for family business [*Vittal Yeswant Garde v Shivappa Mallappa Hosmain.* 72 I. C. 659 followed] *Tarachand v. Bank of Bombay* 34 Bom. 72 dissented from. (*Sir Shadi Lal, C. J. and Malan, J.*) *GIRDAREE LAL v. KISHANCHAND.*

5 Lah. 511.

— Joint family — Alienation by father — After-born son — When can dispute.

Where the alienation by a Hindu father is valid, the subsequently born son cannot sue to set it aside, but if the alienation is invalid can sue to set it aside not because the alienation was an invasion of his rights—for he had none at that time but because it was bad in itself. In the latter class of cases where the son is the whole survivor he can recover the whole of the property for the benefit of the estate. (*Baker, J. C.*) *MAX SINGH v. KARAN SINGH.* 1924 Nag. 200.

— Joint family — Alienation — Father — Consideration — Small portion not for necessity — Suit by sons to set aside sale — Form of decree 77 I. C. 174.

— Joint family — Alienation — Father — Decree — Sons challenging — Burden of proof. 1924 Oudh 34.

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— Joint family — Alienation — Father — Enquiry by alienee — Duty to see to the expenditure of money.

An alienee from the father of a joint Hindu family has to satisfy himself by enquiries that there is a necessity for the alienation, but when that is done he is not bound to see it was applied for that very purpose. (*Baker, J. C.*) *BANSIDAR v. PANDURANG.* 78 I. C. 431.

— Joint family — Alienation by father — Mortgage — Personal liability barred — Debt if antecedent.

Where a Hindu father created a mortgage over family property and more than 6 years after when his personal liability was barred, created another mortgage to pay off the prior one and there was no question of illegality or immorality, the same is binding on the sons on the basis of an antecedent debt.

Per *Lindsay, J.*—Even the discharge of a time-barred debt by a Hindu widow being binding on the reversioners, much more so is it with the sons.

Per *Sulaiman, J.*—Where the liability of the father is barred the sons can take advantage of it and challenge the alienation. But where it is only the personal remedy that was barred, but the mortgage qua mortgage was subsisting it can still be a good antecedent debt and the sons cannot impeach the transaction. (*Lindsay and Sulaiman, JJ.*) *GACRI SHANKER SINGH v. SHRO NANDAN MISRA.* 46 A. 334 : 22 A. L. J. 369 :

78 I. C. 911 : L. R. 5 A. 306 : 1924 All. 543.

— Joint family — Alienation — Father — Mortgage by Public auction sale — Rights of parties. L. R. 5. A. 53 : 75 I. C. 783 : 1924 All. 169.

— Joint family — Alienation by father — Necessity — Sons minors — Effect of.

The mere fact that the alienation was by the father, even though he was at the time the sole adult male member of the family, is not by itself sufficient to prove that it was made for the benefit of the family; there must be something in the circumstances to show that that it was so. Nor does the mere fact that a price was real zed, and that it was utilized for the money-lending business carried on by the father on behalf of the family, necessarily make the alienation one made "for the sake of the family"; for the question is not so much whether there was consideration for the alienation and the consideration was utilized for the family, as whether the motive which determined the father or manager in entering into the transaction was to meet some necessity of the family or secure to it some advantage or benefit out of the transaction. If this were not so, every sale, where a price is reserved would have to be upheld as being incidentally for the benefit of the family, which cannot be the law. A son not born at the time cannot question the validity of an alienation by the father. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) *MUDDA CHARI v. KENCHAYYA.* 2 Mys. L. J. 70.

— Joint family — Alienation by father — Not binding — Effect — If a charge on father's shares.

A Hindu father created a mortgage over joint family properties and then a deed of further

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charge. As regards the latter it was found that there was no legal necessity for the same nor was it for an antecedent debt. *Held*, it did not create a charge over the share of the father even and the sons were not bound to redeem it.

The proposition of law laid down by Lord Dunedin in 46 M. L. J. 23 (P. C.) examined and explained. (*Kendall, A. J. C.*) JUKHU PANDE v. MATA PRASAD. 10 O. & A. L. R. 161; 1 O. W. N. 122.

— — — Joint family—Father—Powers of alienation.

In a joint Hindu family the father *qua* father and manager can mortgage family property for payment of antecedent debts or raise money for legal necessity on the security of not only his share but that of his sons also. (*Kinkhede, A. J. C.*) MOTILAL RAMLAL v. RENT 1924 Nag 348.

— — — Joint family—Alienation by Father—Right of subsequently born sons and grandsons to object.

Where a Hindu father mortgages joint family property, sons and grandsons born subsequently take an interest subject to the mortgage right and cannot challenge its validity. (*Kotwal and Prideaux, A. J. C.*) RAKHMABAI v. VITHUSA. 78 I. C. 384

— — — Joint family—Alienation—Father—Setting aside—After born son—Rights of.

10 O. & A. L. R. 189; 77 I. C. 353; 1924 Oudh 141.

— — — Joint family—Alienation—Father—Setting aside alienation—Afterborn son—Right of.

A son born after an alienation does not acquire a fresh cause of action by birth to set aside a father's alienation of ancestral property but is entitled to take advantage of the existing cause of action if he is born before the title of the transferee becomes absolute. (*Daniels, A. J. C.*) OUDH BEHARI LAL v. DAL SINGH. 10 O. L. J. 404; 79 I. C. 666; 1924 Oudh 205.

— — — Joint family—Alienation by father—son's suit—challenging alienation—Considerations governing.

The manager of a joint Hindu family may alienate the interests of himself and also of the other co-parceners for family necessity and when the manager is also the father, he may alienate those interests to satisfy an existing debt provided it is an antecedent debt not incurred for immoral purposes. The onus of proving immorality is on the sons. (*Pipon, J. C.*) SANT RAM v. GURDAS MAL. 75 I. C. 239.

— — — Joint family—Alienation—Father and sons—Mortgage decree—Liability of sons' shares in execution.

There was a decree in a suit on a mortgage which was brought against the mortgagor and his sons and two *ijaradars*. The suit was decreed *ex parte* against the father and on compromise against the sons and the *ijaradars*. It was expressly stipulated that on failure to pay the entire money due to the plaintiffs, the plaintiff would be competent to bring the mortgaged properties to sale and realize the money.

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Held, that this implied an agreement on the part of the sons to put their shares at the disposal of the decree-holders and therefore amounted to a specification of their shares, which at that time were three fourths shares. The right of the mortgagee to put up the shares for sale under a decree was supported by numerous decisions of the Privy Council. (*Jwala Prasad and Ross, JJ.*) BADRI NARAIN SINGH v. DWARKA PRASAD. 1924 P. H. C. C. 65; 78 I. C. 630; 5 Pat. L. T. 565; 1924 Pat. 353.

— — — Joint family—Alienation—Father—Time-barred debts—Necessity.

A time-barred debt can constitute a valid antecedent debt as consideration for a sale deed given by a father of a joint Hindu family alienating joint ancestral family property. 35 A. 207, 8 A. L. J. 1099 overruled 44 A. 628; 33 M. 308; 43 A. 604; 41 C. 317; 13 M. 189 Ref. (*Walsh, A. J. C.*) PEGGOT, KANHAJIYAL, DANIELS and MOOKERJEE, JJ. GAJADHAR v. JAGANNATH. 22 A. L. J. 601; L. R. 5 A. 498; 80 I. C. 684; 46 A. 775; 1924 A. 551.

— — — Joint family—Alienation—Legal necessity.

Caste feasts are not "charitable or religious purposes" within the meaning of Hindu Law. (*Mudgalkar, A. J. C.*) THAOMMAL PUNJOMMAL v. SOMMAL CHELLARAM. 1924 Sind 140.

— — — Joint family—Alienation—Legal necessity—Benefit of estate must be looked at the date of alienation.

The right way of judging ordinary cases whether a loan on a mortgage of family property for purchasing an estate constitutes a benefit to the family is not looking at the ultimate result of the purchase many years after. The question of benefit must be determined with reference to the time of the purchase. (*Kotwal and Prideaux, A. J. C.*) RUKHMABAI v. VITHUSA AND OTHERS. 1924 Nag. 395.

— — — Joint family—Alienation by manager—Consideration not binding in part.

Where the property is ancestral, the sale by the father of that property is genuine and there is no contention that the price paid is unreasonably low, the mere fact that a small portion of the consideration representing an eighth share of the purchase money is not found to be binding on the family is no ground for setting aside the sale. In such cases unless the portion not covered by legal necessity is really large, the fact that a small portion of the consideration was not for legal necessity cannot affect the validity of the sale itself. (*Prideaux, A. J. C.*) BHADAJI v. GANESHRAO. 20 N. L. R. 4; 1924 Nag. 109.

— — — Joint family—Alienation—Manager—Necessity—Alienation of properties subject to mortgage—Rights of.

L. R. 5 A. 61; 1924 All. 29.

— — — Joint family—Alienation—Manager—Suit to set aside by minor co-parceners—Liability of sons to prove illegality or immorality.

If the managing member of a joint undivided estate incurs debt his sons are liable for the payment of the debt to the extent of the estate of the

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joint family provided that the debt is not tainted with immorality or illegality *Brij Narain v. Mangala Prasad*, 1923 (51 I. A. 129) followed. (*Sir Shadi Lal, C. J. and Malan, J.*) *GIRDHAREE LAL v. KISHEN CHAND*, 5 Lab. 511.

——— *Joint family—Alienation—Manager—Sale in discharge of pre-existing mortgages.*

Where the junior members of a joint Hindu family sue to set aside a sale by the manager in discharge of certain prior mortgages the mere fact that they were not born at the date of the mortgages or that they were debarred by lapse of time from questioning the mortgages would not prevent them from questioning the sale. The plaintiffs were challenging the validity of the sale and the mortgages which were alleged to form the consideration for the sale could also be indirectly impugned. It could be shown that the mortgage debts were not for family necessity. (*Dalal and Simpson, A. J. Cs.*) *AMBICA PRASAD v. LAL BAHADUR*, 11 O. L. J. 164 : 1924 Oudh 353.

——— *Joint family—Alienation—Manager—Without necessity—Voidable—Not void.*

1924 All. 51.

——— *Joint family—Alienation—Money payable for pre-emption decree—If legal necessity.*

Money payable by the successful plaintiff in a pre-emption suit is not an antecedent debt for the purpose of supporting an alienation of family property. The fact that it was for repurchasing property sold by a separated brother does not constitute legal necessity. (*Daniels, J.*) *SHEO DAN SINGH v. HABIB ULLAH KHAN*.

1924 All. 721.

——— *Joint family—Alienation—Mortgage by father—Necessity—High rate of interest—Immorality—Onus of Proof—Mortgage not for necessity—Liability of share of mortgagor* *MANNA LAL v. KARU SINGH*, 89 C. L. J. 256.

——— *Joint family—Alienation—Mortgage—Liability of shares of mortgagors—Death of coparcener—Effect of.*

Where joint family property is mortgaged the share that is liable to be sold is determined by the mortgage and afterwards it cannot be subject to lapse or reduction on account of the death of one of the coparceners. (*Jwala Prasad and Ross, JJ.*) *BADRI NARAIN SINGH v. DWARKA PRASAD*, (1924) P. H. C. C. 65 : 78 I. C. 630.

5 Pat. L. T. 565 : 1924 Pat. 353.

——— *Joint family—Alienation—Mortgage—Necessity—Proof.* L. R. 5 A. 61 : 1924 All. 29.

——— *Joint family—Alienation—Necessity—Adult members joining in transaction—Presumption.*

Where the then existing adult members joined in a sale of family property to wipe off a prior mortgage and the transaction is sought to be impeached 30 years afterwards. Held, that the execution of the sale by all the adult members raised a presumption of its validity. (*Daniels, J.*) *ISHDAT TEWARI v. TAMESHAR*, L. R. 5 A. 357 : 79 I. C. 296 : 1924 A. 916.

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——— *Joint family—Alienation—Absence of necessity—If can be set aside fully.*

Where joint family property is alienated without any necessity, any co-parcener can challenge the same and recover possession of the whole property and not merely his share in it. (*Campbell, J.*) *CHURANJI LAL v. KARATAR SINGH*, 79 I. C. 171 : 1925 Lab. 130.

——— *Joint family—Alienation—Necessity—Antecedent debt due to third party.* *MT BEGAM v. JAFAR HASAN*, 1924 Lab. 312.

——— *Joint family—Alienation—Necessity—Burden of proof.* 10 O & A. L. R. 189 : 77 I. C. 333 : 1924 Oudh 141.

——— *Joint family—Alienation—Necessity—Burden of proof—Position of purchaser.*

When the purchaser proves that the sale of joint family property was effected for a purpose which would constitute valid necessity for the transfer, the burden shifts on those who repudiate the transaction to prove that such necessity could have been satisfied by ways other than the sale of joint family property. Where the creditor satisfied himself that money was borrowed for legal necessity and it would not be in his power to inquire further whether the vendor had any money put away in the house out of which the necessity could be satisfied, he has discharged the burden laid on him by law. (*Dalal, J.C.*) *BASHIRUDDIN KHAN v. MAHADEO SINGH*, 11 O. L. J. 565 : 27 O.C. 26 : 79 I. C. 663 : 1924 Oudh 306.

——— *Joint family—Alienation—Necessity—Discharge of prior debts—All adult members joining in alienation—Presumption of necessity.*

It is not legally essential that where a sale is made in discharge of prior debts, the prior deeds which were paid off out of the consideration must be produced and formally proved.

Indeed such a requirement would render proof in respect of an old transaction impossible. Deeds which have been paid off are not retained with the same care as deeds which are still in force. Where a sale of joint family property is executed by the representatives of all the branches of the family and all the adult male members of the family living at the time, each of these circumstances is sufficient to raise a presumption of legal necessity. When combined they certainly do so. (*Daniels, J.*) *DHANRAJ RAI v. RAM NARESH*, L. R. 5 A. 325 : 79 I. C. 1019 : 1924 All. 912.

——— *Joint family—Alienation—Powers of—Father and other coparceners—Distinction.*

There is a very clear distinction between cases in which the alienation is made by the father and is being contested by his sons, and cases in which alienations made by the managing co-parcener of joint undivided estate are being contested by the other co-parceners, not the sons of the person making the alienation. In the latter there is no question of pious obligation to discharge the debts of the alienor. (*Mears, C. J. and Piggott, J.*) *ANANTOO KALWAR v. RAM PRASAD TEWARI*, 22 A. L. J. 182 : L. R. 5 A. 86 : 46 A. 295 : 78 I. C. 619 : 1924 All. 465.

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—Joint family—Alienation—Purchaser from coparcener—Liability for mesne profits.

Though the purchaser of a particular portion of joint family property or the purchaser of the interest of one of the members of the family in any particular item of joint property may not be entitled to possession, if he gets possession, his possession cannot be considered as wrongful possession against the other members and he cannot be liable to account for the mesne profits. All that the law allows is that a coparcener is entitled to recover possession from an outsider of the joint family property or any portion of it. But if he stands by and allows an outsider to remain in possession, then although his share in that property or interest in that property is not thereby affected, he is not entitled to demand an account for the past profits. (*Macleod, C. J. and Shah, J.*) GANGABISAN JEEVAN RAM v. VALLABHDAS.

48 Bom. 428; 26 Bom. L. R. 464; 1924 Bom. 433

—Joint family—Alienation—Rights of members.

Where an alienation of joint family property is made without justification, the whole of it can be set aside at the instance of a member whose rights have been infringed (*Wazir Hasan, A. J. C.*) MUNNU LAL v. BISHAMBHAR NATH.

79 I. C. 35.

—Joint family—Alienation—Senior brother requiring the deed—If others party.

1924 Nag. 112.

—Joint family—Alienation—Right to set aside—After-born member.

Two brothers forming a joint Hindu family executed a mortgage and subsequently separated. At the date of the mortgage one of the brothers had a son but the other had not. Held, that the subsequently born son could not impeach the mortgage merely because the other brother had a son in existence at the date of the mortgage who could challenge it. (*Daniels, J.*) ISHDAT TEWARI v. TAMESHAR.

L. R. 5 A. 357; 79 I. C. 296; 1924 All. 916.

—Joint family—Alienation—Setting aside—After-born members—Right of.

Even though a member of a joint Hindu family was not born at the time of alienation of joint family property, still where there are members who were alive at the time of alienation, it is open to the member born subsequently to impeach alienation. (*Lindsay and Sulaiman, JJ.*) BENAİK RAO v. PUTTAIN SINGH

L. R. 5 A. 335; 79 I. C. 69; 1924 A. 929.

—Joint family—Alienation—Setting aside—Major portion of the consideration found to be binding—Form of decree.

Where in a suit by a son to set aside an alienation of ancestral property by his father, the alienee succeeds in establishing necessity for antecedent debt with respect to a part of the consideration, the difficulty often arises whether the sale deed should or should not be upheld. It is impossible to lay down any hard and fast rule which could apply equally to every case for every transaction has to be considered on its own merits and the Court has to come to a finding on the

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merits of the case. Where out of the sale price of Rs. 1,000 in respect of a sale effected by a Hindu father a sum of Rs. 200 is not proved to have been applied for binding purposes, the sale deed should be set aside on payment by the plaintiff of the sum of Rs. 800 found to be good consideration. 25 A. 330; 27 A. 494; 32 A. 292 Ref. (*Sulaiman and Mukerji, JJ.*) SANMUKH PANDE v. JAGARNATH PANDE. 22 A. L. J. 417; L. R. 5 A. 289; 46 A. 531; 1924 All. 708.

—Joint family—Alienation—Setting aside—Sons impeaching alienation—Burden of proof.

It is only where the property has passed out of the joint family under an alienation in lieu of an antecedent debt or in execution of the creditor's remedies for such debt that it lies on the sons to prove that the debt was illegal or immoral. 6 I.A. 88; 39 A. 437 Ref. (*Daniels, J.*) MCNESHAR LAL v. AMAR NATH.

L. R. 5 A. 286; 78 I. C. 626; 1924 All. 493.

—Joint family—Alienation—Setting aside—Subsequently born members—Rights of.

When an alienation is made by the manager of a joint Hindu family which is not justified by necessity, a cause of action arises in favour of all the members to have it set aside and to recover possession from the alienee, but there is only one cause of action in favour of the other members of the family. Successive causes of action cannot arise as new members are born year after year. 61 I. C. 801; 19 A. L. J. 978, 64 I. C. 757; 65 I. C. 404 Ref. (*Sulaiman and Rauhaya Lal, JJ.*) SITA RAM SINGH v. CHEDDI SINGH.

22 A. L. J. 809; L. R. 5 A. 634; 1924 All. 798.

—Joint family—Alienation—Sons born after alienation take subject to it.

Sons and grandsons not born at the date of the mortgage take by their birth an interest in the family property subject to the mortgagee's rights in respect of the father's shares as they existed at the date of the mortgage and they are not entitled to object to the alienation of such shares. (*Kotval and Pringleaux, A. J. C.*) RUKH-MABAI v. VITHUSA.

1924 Nag. 398.

—Joint family—Alienation—Suit by sons for cancellation of auction sales of joint property—Burden of proof.

In a suit by a Hindu coparcener to set aside certain auction sales of joint family property in execution of a mortgage decree passed against his father, on the ground, that the onus lay on the auction purchaser to prove that the debt was contracted for legal necessity, Held, relying on, 13 Cal. 21 and 39 A. 437 that the burden of proof lay upon the plaintiff (son) and not upon the auction purchaser, regarding the legality or otherwise of the father's debts, and that he had not discharged it. (*Dalal, J.*) BISHU-NATH RAI v. JODHI RAI. L. R. 5 All. 690 (Civil); 82 I. C. 180; 1925 A. 120.

—Joint family—Father—Insolvency of—Interest of sons—Liability of.

1924 Lah. 297 (1).

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— *Joint family—Alienation—Uncle acting as manager—Extent of his powers.*

There is nothing in the decisions to warrant the view that an uncle acting as manager of a joint family is entitled to sell the share of his nephew in the joint family property in order to discharge a debt incurred by his own father, even though the said father be also the grandfather of the nephew whose property is alienated. (*Mears, C. J. and Piggott, J.*) *RAMESHRA v. KALPOO RAI.* 46 A. 264 : 22 A. L. J. 159 : L. R. 5 A. 112 : 1924 All. 538

— *Joint family—Alienation to various persons—Disputes—Joint possession*

In a case of dispute between alienees from various co-parceners of a joint Hindu family, a decree for joint possession can be given. (*Kinkhede, A. J. C.*) *GULAM DASTAGIR v. AHMED KHAN.* 1924 Nag. 337.

— *Joint family—Ancestral business—Debts—Minors if bound.*

In the case of an ancestral business all members of the family including minors are liable for debts incurred in the course of business to the extent of their shares in the family property. (*Prideaux, A. J. C.*) *RATAN LAL v. JAIDEO.* 1924 Nag. 123

— *Joint family—Ancestral property—Property inherited from maternal grandfather.*

Where property is inherited by an adoptive father along with his brothers from their maternal grandfather, it is the joint family property in which the adopted son has a right as co-parcener 25 M. 678 : 24 M. 382 : 39 M. 930 followed. (*Ramesam and Jackson, J.J.*) *AVASARALA VENKATA SESHAMMA v. AVASARALA APPA KAO.* 20 L. W. 181 : 80 I. C. 79 : 1925 Mad. 125.

— *Joint family—Co-mortgagees—Presumption of continuance of joint status.*

In the case of co-mortgagees who at the time of the mortgage were members of a joint family, the mortgagor in the absence of notice, is entitled to presume they continued joint and payment to one would be a valid discharge. (*Kinkhede, A. J. C.*) *BASANTRAO v. NARAYAN.* 1924 Nag. 401.

— *Joint family—Co-parcener—Conversion to alien faith—Effect of—Convert separated ipso facto from coparcenary. See HINDU LAW.*

6 Lab. L. J. 84.

— *Joint family—Co-parcener—Decree against—Execution sale—What passes under.*

When there is a decree against A who happens to be a member of a joint Hindu family, without stating whether he is sued in a representative capacity or not, the property belonging to the family cannot be seized in execution of the decree against A. The interests of persons who are not parties to the decree either by name or by implication cannot be attached in execution of such a decree. 40 B. 329 *Rei. (Macleod, C. J. and Shah, J.) NAMDEV TUKA RAM v. VISHNU CHINTAMAN.* 26 Bom. L. R. 497. 80 I. C. 425 : 1924 Bom. 395.

— *Joint family—Co-parcener—Partnership—If all members partners.*

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Where a business carried on by one member of a joint Hindu family is neither ancestral nor set up with the help of family funds, there is no presumption that it is a family business. (*Bilaram, A. J. C.*) *FIRM OF MOTHARAM DOULATRAM v. GOPALDAS.* 80 I. C. 141.

— *Joint family—Debts of father—Antecedent debts—Mortgage debts.*

Where there are pre-existing mortgages contracted by the father it is within his competence to alienate a portion of the joint family property in satisfaction of these antecedent debts of his own, so long as those debts had not been incurred for an immoral purpose. 21 A. L. J. 934 *foli. (Mears, C. J. and Piggott, J.) BHIM SINGH v. RAM SINGH.* 46 A. 301 : 22 A. L. J. 180 : L. R. 5 A. 75 : 1924 All. 309.

— *Joint family—Debts not immoral or illegal—Son's share in family property—Liability of, during father's life-time.*

Held, that on the insolvency of a Hindu father, the Official Assignee could sell the joint ancestral estate of the insolvent and his sons to pay the debts of the insolvent not tainted with illegality or immorality. (*Schwabe, C. J. Coult's Trotter and Krishnan, J.J.*) *BALUSWAMI IYER In the matter of.* 47 Mad. 87 : 19 L. W. 86 : 1924 Mad. 411 : (1924) M. W. N. 94 : 80 I. C. 108 : 34 M. L. T. (H. C.) 317 : 46 M. L. J. 86.

— *Joint family—Debt—Pious obligation of the son—Liability of the joint estate.*

When a managing member of a joint family borrows money for legal necessity, it is the pious duty of the son to pay a simple money debt due from his father during his lifetime. (*Duttal, J.*) *BISHMALI RAI v. JODHI RAI.* L. R. 5 All. 690 (Civ.) 82 I. C. 180 : 1925 A. 120.

— *Joint family—Decree against father—If can be executed against sons.*

Where a decree is obtained against a Hindu father for a debt which is not illegal or immoral the creditor can in execution attach and sell the son's share also in ancestral property. (*Korwar and Prideaux, A. J. C.*) *MITSUI BUSSAN KAISHA v. PADAMRAJ.* 1924 Nag. 232.

— *Joint family—Family business—Debts contracted by manager—Binding nature of.*

Debts incurred by the manager of a joint family for the purpose of conducting a family business carried on for the benefit of the family will be binding even if it is an ancestral business. It is by no means incumbent on the creditor to prove the family was actually benefited out of the transaction. (*Sulaiman and Rytes, J.J.*) *MAHABIR PRASAD MISIR v. AMLA PRASAD RAI.* 46 A. 364 : L. R. 5 A. 264 : 22 A. L. J. 295 : 79 I. C. 517 (2) : 1924 All. 379.

— *Joint family—Father—Adjudication as insolvent—Debts not tainted with immorality or illegality—Power of Official Receiver to sell the entire property. See PROV. INS. ACT, S 18 (1).* 46 M. L. J. 314.

— *Joint family—Father—Alienation by—Bulk of consideration for necessity—Effect.*

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Where a Hindu father sells ancestral property for the discharge of his debts, if the application of the proceeds is satisfactorily accounted for, the fact that a small portion is not accounted for will not invalidate the sale. As to what would be a bulk depends on the facts of each case. A sum of Rs. 3,000 out of a total of Rs. 3,500 is a bulk of the consideration. Having regard to decisions it will be difficult to hold that Rs. 500 is a trifling amount. (*Lindsay and Kanhaiya Lal, JJ.*)
NATHU RAM v. KANHAIYA LAL. 80 I. C. 226.

——— *Joint family—Father—Alienation—Suit by sons to set aside—Pre-emption—Decree in a suit against the father's alienation—No shifting of onus.*

The father and manager of a joint Hindu family sold away family property and the defendant a preemptor, sued for preemption and obtained a decree against the vendee. Subsequently the sons and grandsons of the original vendor sued to set aside the alienation. Held, that the onus of proving justifying necessity lay on the defendant. The preemptor stood in the shoes of the original transferee and the decree in the pre-emption suit was not binding on the father and much less on the sons. The preemptor could not stand in a better position against the sons than the vendee from the father, except that being in a less favourable situation than the vendee to prove proper inquiry as to the existence of necessity or of antecedent debts of the father, less strict proof of enquiry may be required of him. The burden of proving their existence however is not shifted by preemption from the transferee to the sons, unless the sons were parties to the preemption decree. The decree which shifts the burden on the sons is one in execution of mortgage by the father (*Dalal, J. C. and Neave, A. J. C.*)
AWADH RAM SINGH v. MAHBUB KHAN. 100 L. J. 525:
79 I. C. 725: 1924 Quab 255.

——— *Joint family—Father—Compromise—Suit by Mortgagee—Decree passed on compromise—Sons how far bound by the decree.*

In a suit on a mortgage executed by the father of a joint Hindu family consisting of himself, his five sons and grandsons by one of the sons, mortgagee failed to implead as party to the suit one of the sons of the mortgagor who was then in existence. A compromise decree was passed in the suit under which the mortgagee obtained possession of the properties. Subsequently he was dispossessed by the person who was not made party to the prior suit and he brought a suit for possession alleging that the prior compromise decree saved limitation. The defendant contended that the mortgage as well as the compromise decree in the prior litigation were not binding upon him. Held that the compromise decree passed in the prior suit against the father was in reality no better than a transfer made by the father and the mere existence of the decree could not deprive his sons of their rights in joint family property. The plaintiff could not therefore obtain possession of the joint family properties under the mortgage and the decree unless he could prove that the debts were contracted for valid necessity or for payment of an antecedent debt. (*Dalal, J.*)
RAM DAYAL v. NIMAR SINGH. 110 L. J. 360.

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——— *Joint family—Father—Gift by—Validity against son—Condition—Gift to wife or to mother—Gift to daughter—Distinction.*

There is no warrant for the proposition that a member of a joint Hindu family can make a gift of the joint family property provided the property gifted does not exceed what he would obtain for his share on partition. That fact only furnishes a maximum limit, and the Court has to be satisfied that the gift is otherwise reasonable. As regards its validity a gift of joint family property by a father to his widow or to his mother stands on a different footing from a gift by him to his daughter (*Coutts Trotter, C. J. and Ramesam, J.*)
MOVVA SUBBARAO v. MOVVA ADAMMA.

20 L. W. 440: 1925 Mad. 60:
(1924) M. W. N. 850: 47 M. L. J. 465.

——— *Joint Family—Father—Insolvency—Sons' shares if vests in Official Assignee—Pres. Towns Ins Act, Ss. 2, 17 and 52.*

Where one of the coparceners of a joint Hindu family governed by the Mitakshara system of Hindu Law has been adjudicated an insolvent under the Pres. Towns. Ins. Act (11 of 1909) such adjudication does not divest the coparcenor's son of his right and interest in the unpartitioned immoveable property of the family or deprive him of his right of pre-emption therein under the Punjab Pre-emption Act. of 1913 7 B. 438: 1 I. A. 321; 51 I. A. 129; 19 M. 74: 26 M. 214; 42 C. 225; 54 P. R. 423 Ref. (*Sir John Edge, J.*)
SAT NARAIN v. BEHARI LAL. 100 W. N. 916:
100 O & A. L. R. 1332: 1925 M. W. N. 1:
47 M. L. J. 857 (P. C.).

——— *Joint family—Father—Powers of—Division in status—Power of father to sell son's share.*

Where there has been a division in status between a father and his son, it is not competent to the father acting alone to convey the interest of the son in the family property. (*Ramesam and Jackson, JJ.*)
AVASARALA VENKATA SESHAMMA v. AVASARALA APPA RAO. 20 L. W. 181:
80 I. C. 79: 1925 Mad. 125.

——— *Joint family—Father—Powers—Partition by arbitration.*

A Hindu father can refer to arbitrators the partition of joint family property and the award even if it apports shares unequally is binding on the sons, in the absence of fraud and collusion. (*Baker, J. C. and Prideaux, A. J. C.*)
SAWAI SINGAI BALCHAND v. SAWAI SINGAI LACHMAN PRASAD.

1924 Nag 148.

——— *Joint family—Father's suit relating to family—How far binding on sons.*

Where a suit by the father of a joint Hindu family relating to family property was allowed to be withdrawn with liberty to file fresh suit provided cost were not paid in one month and it was not so paid, the result of the adjudication is one which binds the sons also, as the suit must be deemed to have been filed in a representative capacity.

The question whether a Hindu father represents his coparceners is one which has to be decided

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with reference to the circumstances of each case. (*Foster, J.*) *HUKUM MAHTO v. SANT SAHO*

78 I. C. 19.

———Joint family—Father—Transfer of property—Minor sons joining in alienation.

10 O. & A. L. R. 189 : 77 I. C. 353 : 1924 Oudh 141.

———Joint family—Hypothecation bond executed by father to discharge encumbrance on a property acquired by pre-emption—Binding nature of.

Where a Hindu father, hypothecated some items of joint ancestral property, in order to discharge a mortgage on another property which he had acquired under a pre-emption decree, the plaintiff filed a declaratory suit against him, that the debt was not binding upon them.

Held, that it was not established that the discharge of the encumbrance at the cost of hypothecating the family property was for the benefit of family. (*Daniels and Neave JJ.*) *BHAGAWAT SINGH v. GURCHARAN DUBE*.

L. R. 5 All. 647 (Civil.) : 1925 All. 96.

———Joint family—Manager—Alienation—Necessity—Antecedent debt—Rate of interest—Necessity for.

It is incumbent upon those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage that rate and those terms cannot stand. 41 All. 571 : 50 I. A. 14 followed. A debt incurred by a previous mortgage is an antecedent debt even though the repayment thereof was secured by a subsequent alienation of the family estate, that is to say, by the execution of a usufructuary mortgage. It is open to the member of a joint Hindu family governed by the Mitakshara Law, whose rights had been infringed by an alienation of the joint family property to have the entire alienation set aside. (*Vazir Hasan, J.*) *MANNU LAL v. BISSHAMBAR NATH*.

11 O. L. J. 415 : 79 I. C. 35 : 1924 Oudh 378.

———Joint family—Manager—Alienation—Not justified by necessity—Alienor's share if affected by sale.

The Privy Council in the case of *Brij Narain v. Mangal Prasad* 21 A. L. J. 934 did not lay down that a Hindu father's alienations which are otherwise invalid could be enforced against his own share in the joint family property even in the United Provinces. The rule was meant to apply to those provinces in which the right of a co-sharer to dispose of his own share is recognized. It has no application to the United Provinces. (*Daniels, J.*) *MUNESHER LAL v. AMARNATH*. L. R. 5 A. 286 : 78 I. C. 626. 1924 All. 493.

———Joint family—Manager—Bonds executed by, for family necessity—Defts. in existence and not impleaded denying liability—Unconscionable interest.

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Where a bond was executed by the karta, and other members of the family, certain members who were not impleaded, and who were in existence at the time of the transaction questioned its binding character on (1) the absence of any legal necessity (2) and at any rate no necessity for agreeing to such a high interest. *Held*, that the minor members who were not impleaded can question the authority of the karta to enter into a contract with regard to the rate of interest so as to be binding upon them, unless it was shown that the high rate of interest agreed upon was necessitated by the circumstances of the family. The decree holder must prove that the rate of interest agreed to was the proper rate chargeable in the market relying upon. *Mahadeo Prasad v. Bessesswar Prasad*, 2 Pat. 488.

Held further, that the question of necessity is one of fact, and has to be proved by evidence. (*Jwala Prasad and Kulwant Sahay, JJ.*) *PARAMESHWAR PANDEY v. RAJ KISHORE PRASAD NARAYAN SINGH*. 5 Pat. L. T. 646 : 80 I. C. 34 : 3 Pat. 829 : 1925 Pat. 59.

———Joint family—Manager—If can claim exclusive possession.

The manager of a Hindu family cannot claim exclusive possession of the family properties as against other members. The case of a Hindu father may stand on a different footing. (*Hallifax, A. J. C.*) *KHEDU SINGH v. BHAGWAN SINGH*. 1924 Nag. 163.

———Joint family—Manager—Contract to sell joint family properties—Enforceability against minor members. See SPECIFIC PERFORMANCE. 46 M. L. J. 575.

———Joint family—Manager—Debts contracted—Binding nature of

Debts contracted by a Hindu manager will be binding only on him personally, unless it is shown they were contracted for family purposes. (*Shadi Lal, C. J. and Le Rossignol, J.*) *BARU v. BALLA*. 6 Lah. L. J. 441 : 1925 Lah. 141.

———Joint family—Manager—Duty to keep accounts—Partition—Mesne profits.

The manager of a joint family is not obliged to keep accounts while the family remains joint and where a partition is asked for partition takes place of the property as it exists in the hands of the manager. Although there is a severance of interest from the date of the suit, it does not follow that the family property does not remain joint till it is actually divided. Hence mesne profits cannot be claimed as from date of suit. (*Baker, J. C.*) *JANARDHAN v. WASUDEO*.

1924 Nag. 315.

———Joint family—Manager—Insolvency—Position of Official Assignee.

On the insolvency of the managing member of a joint Hindu family the Official Assignee succeeds to the undivided interest of the insolvent in the joint property and his rights as managing member so far as they can be exercised for his benefit, but he is not entitled to have vested in him the shares of the other members though he is entitled to deal with them as the insolvent would lawfully.

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have done if there be no insolvency. (*Schwabe, C. J. and Coleridge, J.*) VARADARAJAN v. SRINIVASA RAO 1924 Mad. 792

———Joint family—Manager—Liability to account—Partition—Misappropriation by manager—Meaning of—Family house—Residence of members of family in—Nature of partition—Provision for residence in case of—Allotment of portion of family house—Necessity—Allotment of portion in other house—Allotment of money—If and when may be made.

When assets are traced into the hands of the managing-member he is bound to account for them on partition, whether his coparceners are minors or majors. It is not enough for him to say that he has no longer got those assets. Capital moneys proved to have come into the hands of a manager must be considered as available for partition, in the absence of evidence showing what has happened to them.

Misappropriation of family property by the managing member means nothing more than the expenditure of the money on other than justifiable family expenses. The right of members of one joint Hindu family to the family house is not a right *in rem*. While the house is being used as a family house, they have, no doubt, a right to reside there.

Quære.—Whether they have a right to any particular separate room. On partition, it is clearly a matter for the Court arranging the partition to say whether it is in the general interest of the coparceners that residence should be given in a particular house or not.

Some other provision can be made if there are more houses than one to choose from. Provision may, if the general advantage of the family requires it, also be made in money instead of in kind. (*Schwabe, C. J. and Waller, J.*) THE OFFICIAL ASSIGNEE v. RAJABADAR PILLAI

(1924) M. W. N. 192 : 19 L. W. 597 : 1924 Mad 458 : 34 M. L. T. (H. C.) 341 : 78 I.C. 536 : 46 M. L. J. 145.

———Joint family—Manager—Mortgage of property—Necessity—Purchase of other lands in the same village.

A joint Hindu family owned a share of a village ancestrally. The manager of the family purchased at a sale for arrears of roadcess another share of the same village. To pay off a mortgage to which the property purchased was subject, the manager raised on a mortgage of the joint family property. It was shown that the purchase was profitable though only in a small way. *Held*, that the manager was entitled to borrow money on mortgage in order to purchase a share in a village in which the family already had a share, in a transaction which was not on the face of it a losing one. The transaction was in no sense speculative but a prudent one. 6 M. L. A. 893 ; 49 C. 560 ; 1 Pat. L. T. 6 ; 46 A. 95 Ref (*Das and Ross, JJ.*) BENI MADHO SINGH v. CHANDER PRASAD SINGH. 3 Pat. 451.

———Joint family—Manager—Powers of alienation.

The powers of alienation possessed by the manager of a joint Hindu family where he acts

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for benefitting the family are the same whether he happens to be the father or not. In such cases he represents the whole family and all the members are bound. (*Kennedy, J. C. and Raymond, A. J. C.*) NARUMAL MUL CHAND v. NICHUMAL 1924 S. 124.

———Joint family—Manager—Powers of New business.

It is not open to a manager of a joint Hindu family to embark on purely new and speculative business under the plea that the expansion business in general will be beneficial to the estate. (*Pipon, J. C.*) SANT RAM v. GURDAS MAL 75 I. C. 239.

———Joint family—Manager—Promote executed by—Enforceability against other members—Suit on debt—Decree against family properties.

A promissory note made by the manager of a joint Hindu family will not be binding on the other members of the family unless their names appear on the instrument even though the note may have been borrowed for family purposes 17 M. C. C. R. 133 ; 17 M. C. C. R. 175 ; 27 M. C. C. R. 181, Ref. The creditor cannot recover the debt from the other members of the family who are not parties to the instrument and whose names do not appear in the instrument by basing his claim on the original consideration apart from the note. There cannot be two distinct causes of action where the advance of the loan and the execution of the promissory note are simultaneous and where the contract of loan cannot be proved independently of the note. 21 M. C. C. R. 317 (F. B.) toll. (*Chandrasekhara Aiyar, C. J. and Plumer, J.*) SUBBA RAO v. SWAMI RAO. 2 Mys. L. J. 83.

———Joint family—Manager—Suit against—Minor son impleaded but not properly represented—Decree if binding.

In a suit for sale on a mortgage executed by a Hindu father his minor son was impleaded but not properly represented. A decree was passed for sale of the properties. In a subsequent suit by the minor to set aside the decree, *Held* that if the mortgage executed by the plaintiff's father was executed for legal necessity, then the mortgage would be binding on the joint family property and would be equally binding even though the plaintiff had not been formally impleaded in the suit. (*Daniels and Dalal, JJ.*) CHANDRADIP TEWARI v. BABU JADUNANDAN SINGH. L. R. 5 A. 366 : 79 I. C. 1041 : 1924 A. 573.

———Joint family—Mortgage—Alienee what to prove.

A mortgagee from the manager of a joint Hindu family must prove the necessity for the mortgage and also that the rate of interest fixed was reasonable. (*Wazir Husan and Neave, A. J. C.*) BAKHTAWAR SINGH v. BAKHTAWAR SINGH. 78 I. C. 232.

———Joint family—Mortgage decree and sale—When sale cannot be set aside by minor members.

Where joint family properties were mortgaged by the manager, and other major members, and the mortgagee obtained a decree thereon without

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making minors as parties, and the properties were sold to strangers, the minors brought a suit for declaration that the mortgage was not binding on them on the ground of want of necessity.

Held, that when the property had been sold in execution of a decree against the father then it was not open to his sons and grandsons to have the sale set aside for want of necessity but it was further necessary to establish that the debt had been tainted by illegality or immorality, *Rama chander v. Md. Nur*, 21 A. L. J. 485, and *Brij Narain v. Mangla Prasad*, 21 A. L. J. 934, relied on.

Held further, (2) that the word 'debt' in the proposition, "he may by incurring debt so long as it is not for an immoral purpose lay the estate open to be taken in execution proceedings" means a mortgage debt and a simple money debt, and that it is not open to the minor members to have the sale set aside, especially when rights of third party have come in without establishing that the debt had been tainted with illegality or immorality. (*Sulaiman and Mukerjee, JJ.*) *GAJADAR PANDE v. JADURBIR PANDE*. 22 All. L. J. 980 : 1925 A. 180.

——— *Joint family—Mortgage—Father—Decree against sons—Proof of necessity.*

So long as the creditor is seeking to enforce a mortgage executed by the father he is bound to prove as against the sons that it was executed for valid necessity. But when once the mortgage has merged in a decree it no longer subsists and the judgment debt which the creditor is seeking to enforce is on the same footing as any debt incurred by the father. The rule that the sons cannot set up their rights against the remedies of their father's creditors for their debts, if not tainted with immorality is good. The decision in 26 O. C. 299 must be considered to have been overruled by the recent decision of the Privy Council in 21 A. L. J. 934. (*Daniels, J. C.*) *GAURI SHANKER v. JANG BAHADUR SINGH*. 27 O. C. 124 : 10 O. & A. L. R. 49 : 79 I. C. 1008 : 11 O. L. J. 246 : 1924 Oudh 394.

——— *Joint family—Property—Presumption.*

There is a presumption that every Hindu family is joint in food worship and estate and this will hold till proof of division is let in. Even in the absence of a nucleus of ancestral property, property can be presumed to be joint from the conduct of parties. (*Rankin and Mukerjee, JJ.*) *KUMUDDIN DASSYA v. MUKTA SUNDARI DASSYA*. 80 I. C. 432 : 1925 Cal. 257.

——— *Joint family—One member becoming partner—Effect of death.*

When member of a joint Hindu family enters into a partnership with another on behalf of the family, it does not make the other members of the family partners and on his death the partnership is dissolved. (*Baker, J. C.*) *SETH RAMBHAN v. PRAYAGDAS*. 20 N. L. R. 49 : 78 I. C. 198 : 7 N. L. J. 195 : 1924 Nag. 263.

——— *Joint family—Onus to prove joint family*

NARSINGH DAS v. ULTAN CHAND. 76 I. C. 852

——— *Joint family—Partition—Step mother—Rights of—Co-widows.*

Under the Mitakshara law, a step mother on partition gets a share equal to that of a son. If

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there are co-widows, their rights are in lieu of maintenance and on the death of one, her share does not enlarge the other's share but devolves on the sons. (*Wazir Hasan and Neave, A. J. Cs.*) *GAYA PRASAD v. GIRJA SHANKAR*.

11 O. L. J. 286 : 78 I. C. 574 : 1924 Oudh 360.

——— *Joint family—Pious obligations of son during lifetime of father.*

As long as father is alive sons' pious obligation does not arise and their share is not liable to attachment and sale in execution of a money decree against father. (*Gokul Prasad, J.*) *RAM KISHORE v. ABDUL KARIM*. 1923 All. 173 (1).

——— *Joint family—Presumption of jointness—Commensality—Residence.*

The question of separation or jointness of a Hindu family is one of fact. There is a presumption that every Hindu family is joint, but where the facts show it is not joint, there is no presumption as to the date on which separation took place. Commensality and residence are always important factors in considering whether a family is joint or not. (*Simpson, A. J. C.*) *DHAUNTAL KHAN v. RAMLAL KALWAR*. 10 O. L. J. 412 : 75 I. C. 227 : 1924 Oudh 154.

——— *Joint family—Property—Acquisition of—Nucleus of family property—Burden of proof.*

Where a joint family is possessed of large ancestral property, the onus is on the party who sets up a particular property is his own to prove his case and show it was not purchased with family funds. (*Wazir Hasan and Neave, A. J. Cs.*) *GAYA PRASAD v. GIRJA SHANKAR*.

11 O. L. J. 286 : 78 I. C. 574 : 1924 Oudh 360.

——— *Joint family—Property—Gains made by a member—Separate amounts.* *MT. UTTAM DEVI v. DINA NATH*. 75 I. C. 774.

——— *Joint family—Property—Inheritance by collateral succession—Nature of.*

77 I. C. 1028 : 1922 P. C. 1093.

——— *Joint family—Property—Nature of—Burden of proof.*

Where there is a nucleus of joint family property, the burden of proof is on the person who sets up that a particular property is his self-acquisition to show it was not purchased out of the joint funds. If it is purchased out of the savings of income or by raising loans, it will be joint unless the manager proves the loans were borrowed on his own personal responsibility. (*Baker, J. C.*) *JANARDHAN v. WASUDEO*.

1924 Nag. 315.

——— *Joint family—Property—Nature of—Burden of proof.*

The question whether the members of a Hindu family are joint or separate is one of fact. Where there is joint family property, the onus is on the party who asserts there was separation to prove it. Various circumstances such as cesser of commensality, separate enjoyment of property and income, mutual dealings, etc., should be taken into consideration. (*Das and Ross, JJ.*) *HARNARAYAN PANDE v. SURESH PANDE*. 78 I. C. 472 : 1925 P. 161.

——— *Joint family—Property—Question of status—Burden of proof.*

76 I. C. 747.

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——— *Joint family—Property—Throwing into joint stock—Essentials of.*

Where separate property of a member of a joint Hindu family is claimed to have become joint family property as having been thrown into the common stock, it must be shown that the owner knew it was his separate property and had a clear intention to give up such rights. (*Dyling and Odgers, JJ.*) *MAYANDI SERVAI v. SANTHANAM SERVAI.* 20 L.W. 813 : 81 L. C. 1031 : 1925 Mad 303.

——— *Joint family—Self acquisition.*

No doubt when it is proved and admitted that a Hindu has lived in commonality and possessed joint property, if any member of the family claims any property as his, the burden lies upon him to prove that it was acquired in circumstances which would constitute it his separate property. But where the deceased was a member of a joint family and it was not shown that he acquired any education at the expense of the joint family or that any money was contributed out of the joint family funds to help him in any of his undertakings.

Held, that the property left by him was his separate property. 16 Bom. L. R. 101 P. C. and 12 S. L. R. 116 P. C. Ref.

Every member of a joint family who is found to be in possession of property at his death can not necessarily be said to have acquired the property as a member of the joint family. (*Kennedy, J. C. and Raymond, A. J. C.*) *SANT SINGH v. RARIBAI.* 1924 S. 17.

——— *Joint family—Separation of one member—Presumption.*

When the separation of one coparcener is proved, there is no presumption that the others remained united. There is in fact no presumption remaining either way and an agreement amongst the remaining coparceners either to remain united or to reunite must be proved like any other fact. (*Daniels, J.*) *SAHEB SINGH v. MT. INDAR KUAR.* 1924 A. 730 (1).

——— *Joint family—Separation—Onus of proof.*

The onus to prove separation in the case of the members of a joint Hindu family is on the person who alleges it, the natural presumption of the Hindu law being in favour of the family being joint. (*Jwala Prasad and Ross, JJ.*) *NENA OJHA v. PARBHU DUTT OJHA.*

5 Pat. L. T. 234 : 75 L. C. 508 : 1924 P. 647.

——— *Joint family—Status—Separate transactions and mutual dealings—Effects of.*

Separate transactions by members of a joint family do not by themselves establish separation but mutual transactions between two members of a family stand on an entirely different footing for if the family were joint there can be no question of one borrowing from the other. (*Das and Ross, JJ.*) *JAY NARAIN PANDEY v. KISHUN DUTT MISRA.* 5 Pat. L. T. 581 : 78 L. C. 705 (2) : 3 Pat. 575 : 2 Pat. L. R. 306 : 1924 P. 551.

——— *Joint family—Suit against person other than a Karta, whether can be deemed to be in a representative capacity—Suit against nephews alone—Share of an uncle, whether bound—Equity*

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of redemption, whether can be acquired by adverse possession—Assertion of title—Quantum of evidence.

Even where a person is not a Karta of a joint Hindu family, there may be circumstances which would entitle a Court to hold that that person sued or was sued as representing the entire family.

Where in the time of the first regular settlement decree of under-proprietary rights was passed in favour of three brothers and two nephews—sons of two deceased brothers—and the latter alone were sued for arrears of under-proprietary rent with the result that the superior proprietors obtained a decree and purchased the property in execution thereof, while one of the brothers had made mortgage of the property even after the sale of the under-proprietary interest.

Held, that the two nephews were not sued in a representative capacity and the sale did not transfer the share of the uncle who had mortgaged the property.

Although a title can be acquired by adverse possession in the equity of redemption, yet such acquisition will depend on the amount of evidence whether or not it established an open assertion of title on the part of the person alleging it. (*Dalak, J. C.*) *THAKURAIN ANPurna KUAR v. JAGESHAR MISRA.* 1 O. W. N. 842.

——— *Limited estate—Income from—Disposal of.*

The holder of a limited estate can dispose of the income as she likes, but if anything remains undisposed of at her death, it forms part of the estate. (*Das and Ross, JJ.*) *SHEONANDAN PRASAD v. DAMODAR PRASAD.* 1924 P. 711 (1).

——— *Limited owner—Compromise—Alienation—Distinction between—Necessity—Reversioners—Right of.*

It is now settled beyond dispute that a daughter as heiress of her father takes a restricted interest similar to that taken by a widow with a similar power of disposal. This power is conditional she can dispose of the inheritance for legal necessity, but it lies on the alienee to prove the existence of this necessity, and this is so even though the absence of the necessity be not pleaded by the reversioner. The reversioners (grand sons) on the mother's death can treat the alienation as a nullity without the intervention of any Court.

In a suit on a bond made by a person with restricted power of alienation the defendants are not required to plead the absence of legal necessity for the borrowing. It is for the plaintiffs to allege and prove the circumstances which alone will give validity to the mortgage. Even though there may not be legal necessity in fact the alienee would be equally protected if he honestly did all that was reasonable to satisfy himself that the required necessity existed.

It is true that the reversion is an expectancy but expectant reversioner's right to sue for a declaration has a statutory recognition and they would on the death of the restricted owner in their life time have the immediate title without the intervention of any Court. And there would be no principle of justice, equity or good conscience that would empower the Court to deprive

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them of their legal title or to impose any restriction in derogation of it. (*Sir Lawrence Jenkins.*)
OBALA KONDAMA NAZAKER T. KANDASAMY
GOONDAR. 19 L. W. 107 : 22 A. L. J. 16 :
1924 M. W. N. 86 : 26 Bom. L. R. 198 :

34 M. L. T. (P. C.) 20 : 10 O. & A. L. R. 176 :
39 C. L. J. 194 : L. R. 5 P. C. 19 : 51 I. A. 143 :
47 Mad. 181 : 1 O. W. N. 1 : 79 I. C. 961 :
1924 P. C. 56 : 28 C. W. N. 1050 :
46 M. L. J. 172 (P. C.)

— Limited owner—Relinquishment—Disclaimer—Right of next reversioners.

In a suit by the nephews (protner's sons) of a deceased Hindu for a declaration of title to his estate as next reversioners after the daughter of the deceased, the plaintiffs alleged that the daughter had relinquished her right by keeping quiet and not denying the allegations of the plaintiffs and subsequently by filing a petition of disclaimer, at the appellate stage of the suit. *Held*, that the omission of the daughter to actively assert her rights did not amount to a disclaimer and that the plaintiff's suit was unsustainable. The court was bound to decide in the rights of the parties as at the date of suit and the subsequent disclaimer by the daughter on appeal did not affect the question of the maintainability of the suit. (*Miller, C. J. and Mullick, J.*) LALLOO PRASAD SINGH v. LACHMAN SINGH. 3 Pat 224 : 82 I. C. 510 : 1924 P. 438.

— Maintenance—Daughter-in-law—Right to get maintenance from husband's family—Extent of

1924 Cal. 364.

— Maintenance grant—Nature of estate granted—Rights of grantee.

A maintenance grant is *prima facie* resumable on the death of the grantee and on the death of the grantor. A maintenance grant is not absolutely inconsistent with a grant to the donee and his heirs. Such a grant is *prima facie* resumable on the death of the grantee, but the context may show that it was intended to make provision, not only for the donee, but for the heirs of the donee. Where the grant is so expressed the grantor has the right to resume the grant on the extinction of the line of the grantee. It is a question of construction in each case. If however the grantor elects to recognise the widow of the grantee as having succeeded to the interest of her husband, he cannot bring a suit against third persons for recovery of the lands granted so long as the widow is alive. (*Das and Ross, JJ.*) MAHARAJA BAHADUR KESHO PRASAD SINGH v. MADHO PRASAD. 5 Pat L. T. 513 : 3 Pat 880 : 1924 P. 721.

— Maintenance—Illegitimate sons—Vaishyas—Mayukha law

Illegitimate sons of the three regenerate classes are entitled to maintenance and their right to maintenance does not cease when they come of age. This is the law under the mayukha which does not differ from the Mitakshara in this respect. The illegitimate sons are however not entitled to their marriage expenses. (*Macleod, C. J. and Shah, J.*) MOTICHAND GIRDHARSHET v. CHANDRABAI. 26 Bom. L. R. 488 : 80 I. C. 418 : 1924 Bom. 421.

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— Maintenance—Mistress—Married woman kept by another.

Where a married woman whose husband is alive is kept by another person, she is not an avarudhashi and cannot claim maintenance from the estate of her paramour after his death. 10 B. H. C. R. 381 : 26 B. 163 not followed. (*Shah, A. C. J. and Crump, J.*) ANANDILAL BHAGCHAND v. CHANDRABAI TATYA. 48 Bom. 203 : 26 Bom. L. R. 63 : 80 I. C. 536 : 1924 Bom. 311.

— Maintenance—Rate of—Circumstances to be taken into account by Court.

The principle which should govern the Court in fixing the maintenance of a Hindu widow is first to look to the mode of life of the family during her husband's life time and the amount fixed must be sufficient to allow the widow to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's life time. Then to see what the husband's estate is and also to see how far that estate is sufficient to supply her with maintenance on this scale, without injustice to other members of the family who also have their rights to maintenance out of the estate like her. 9 C. W. N. 651 Foll. (*Kajiji, J.*) BAI PRATAPGAVRI v. MUL SHANKAR. 26 Bom. L. R. 269 : 80 I. C. 173 : 1924 Bom. 353.

— Maintenance—Widow—Enhanced maintenance in future—Release of right of—Validity—Residence—Right of—If separate from that of maintenance.

An agreement by a Hindu widow to receive maintenance at a particular rate is, no doubt, not binding for all time; but an agreement which goes further and binds her not to claim a higher rate even in changed circumstances is binding on her.

Quære : Whether the right of residence is a separate right from that of maintenance. (*Phillips and Venkatasubba Rao, JJ.*) AYYADEVARA MOHANLESWARA RAO v. AYYADEVARA DURGAMBA. 19 L. W. 165 : 34 M. L. T. (H. C.) 47 : (1924 M. W. N. 266 : 1924 Mad. 687 : 47 Mad. 308 : 78 I. C. 831 : 46 M. L. J. 189.

— Maintenance—Widow of a co-parcener—Right to a charge—Joint family property—Liability of—Decree—Rights of purchasers.

It is a fundamental rule of Hindu law that a widow of a co-parcener is entitled to maintenance out of the whole of the property belonging to her husband's family. Apart from the question how far purchasers from the husband's co-parceners will be affected by the claims of the widow by the fact that a decree for maintenance charges only some of the properties with the payment of it, it is impossible to lay down that such a decree effects any change in her right to proceed against properties not so charged for recovering what is due to her unless upon some contest the Court decides otherwise. (*Plumer and Subhanna, JJ.*) BHAGYA LAKSHMAMMA v. MAHISHI MANJAPPA. 2 Mys. L. J. 171.

— Marriage—Members of different Sudra Castes—Validity of.

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The marriages between members of different Sudra castes are valid under the Hindu Law. Marriage between a Kayastha and a Dom is valid. The Bengali Kayasthas are treated as Sudras in Calcutta High Court.

Upon the authorities it does not appear that if a marriage is otherwise valid it becomes invalid because it is opposed to the usages of the community and is not recognised by them as valid. (*Graves and Pantou, JJ.*) BHOLA NATH MITTER v. EMPEROR. 51 Cal 488 : 28 C. W. N. 323 : 81 I. C. 709 : 25 Cr. L. J. 997 : 1924 Cal. 616

——— *Marriage—Mitakshara Law—Presumption.*

Under the Mitakshara Law, there is in the absence of any evidence to the contrary a presumption that the marriage was in one of the approved forms. (*Dalal, J. C.*) MR. UMRAO KUAR v. SARHAJIT. 1 O. W. N. 579 : 10 O. & A. L. R. 1030.

——— *Marriage—Mother's rights—Absence of consent of father.*

75 I. C. 24

——— *Marriage—Provision for marriage expenses for unmarried co-parceners—Whether allowable.*

Held, in view of the decision of the P. C. in *Ramalinga Annavi and another v. Narayana Annavi and others* in which it was held that a member of a joint Hindu family who is then unmarried, is not after the institution of a suit for partition entitled to make provision in the partition for his marriage expenses, although he marries before the decree in the suit is made. 45 M. 489 relied. (*Scott-Smith and Ffryde, JJ.*) BHOLI BAI v. DWARKA DAS. 5 Lah. 375.

——— *Marriage—Remarriage—Succession.*

The second marriage of a Hindu lady does not affect the right to which she became entitled by virtue of the first marriage. Nor does it affect the right of the collaterals of her first husband to succeed to her stridhanam property. (*Kanhaiya Lal, J.*) MT. RUKMA v. CHHIDDU. L. R. 5 A. 160 : 1924 A. 464.

——— *Marriage—Sub-castes—Validity of—Issue—Legitimacy.*

A Hindu may marry a woman of a lower class or grade within his caste and may thereby fall into the class of his wife. But in the absence of a custom to such effect, the marriage is valid and the issue legitimate with rights of inheritance. (*Sulaiman and Kanhaiya Lal, JJ.*) HAR PRASAD v. KEWAL. 22 A. L. J. 1009 : 1925 A. 26.

——— *Marriage—Validity—Absence of guardian's consent—Effect.*

A Hindu minor's marriage is not invalidated by want of the guardian's consent. (*Martineau, J.*) BULLU MAL v. HARDWARI MAL. 79 I. C. 451.

——— *Migrating family—Law applicable to—Nagar Brahmins—Migration from Guzerat to United Provinces—Mayukha—Mitakshara.*

The law of succession is, in any given case, to be determined according to the personal law of the individual whose succession is in question.

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Prima facie any person governed by the Hindu law is held to be subject to the particular doctrines of the Hindu law recognized in the province in which he is residing. The law becomes the personal law and part of the status of every family residing in it. Consequently where any such family migrates to another province governed by another law, it carries its own law with it. *Held*, that the Nagar Brahmins who had migrated about three hundred years ago from Guzerat and settled in the United Provinces were governed by the Mitakshara as modified by the Vyavahara Mayukha. Even if the migration was before the Mayukha was written, it merely embodies a pre-existing custom and the parties would be bound thereby. 24 A. 2. : 47 I. A. 213 : 29 C. 433 Rel. (*Lindsay and Kanhaiya Lal, JJ.*) LAWAHIR LAL v. JARAU LAL. 22 A. L. J. 49 : L. R. 5 A. 130 : 46 A. 192 : 79 I. C. 861 : 1924 A. 350.

——— *Minor—De facto guardian—Powers of.*

Under Hindu Law the power of a *de facto* guardian as regards the alienation of a minor's property are co-extensive with those of *de jure* one. If made in the interests of the minors it has the same legal effect as that made by the latter. Where the latter has neglected to perform his duties or has shown apathy or hostility as regards the interests of the minors, the position of the *de facto* guardian becomes even stronger, especially in a case where he has a personal interest in the matter along with that of the minors on whose behalf he acts. (*Pipon, J. C.*) SUNDAR SINGH v. RAGHBIR SINGH. 75 I. C. 384.

——— *Minor—Guardian—Debt borrowed for purchase of property for minor—Binding character of, against minor's estate or heirs—Purchase beneficial to minor—Effect—Creditor's rights in such case.*

Where the guardian of a minor borrowed money for purchasing property for the minor and executed a promissory note therefor, *held*, in a suit on the note brought after the minor's death against his heirs, that, even assuming that the purchase was for the benefit of the minor, the debt was not binding on the minor's estate or the heirs of the minor, but that the plaintiff was entitled to a decree against the lands actually purchased with the money advanced by him. (*Krishnan and Odgers, JJ.*) JELADI BURAYYA v. PONDURI RAMAYYA. 47 Mad. 449 : 46 M. L. J. 49 : 19 L. W. 67 : (1924) M. W. N. 42 : 78 I. C. 90 : 33 M. L. T. (H. C.) 254 : 1924 Mad. 472.

——— *Minor—Guardian—Sale of minor's property—Validity—Portion of sale price agreed to be left with vendee to be paid by him to the minor on his attaining majority—Vendee executing bond thereafter—Sale if rendered invalid thereby—Vendor's lien if lost by reason of such arrangement.*

A guardian of a minor sold property of the minor, and, as part of the transaction of sale agreed that the purchaser should withhold one-third of the entire purchase-money and keep it in his hands till the minor attained majority. Simultaneously with the sale, the purchaser executed a bond to pay the balance of the purchase money on demand by the minor immediately

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after he attained majority. In a suit brought by the minor on attaining age to set aside the sale, it was argued, *inter alia*, that the deposit of the balance of the sale price with the vendee indicated that there was no immediate necessity for the sale and that it was imprudent transaction as the minor's guardian ran the risk of the vendee becoming insolvent before the minor came of age.

Held, that the circumstances of the case amply justified the sale by the guardian, and that it was not invalid on account of the arrangement entered into as regards the balance of the sale price.

Per *Spencer*:—The arrangement as to the balance of the sale price did not put an end to the vendor's statutory lien therefor. 35 M. L. J. 305 considered. (*Spencer and Srinivasa Aiyangar, JJ.*) KARNATI MUNAYYA v. MITTA KRISHNAYYA. 20 L. W. 695; 47 M. L. J. 737

—Minor—Guardianship—Mother—Paternal uncle.

The mother and not the paternal uncle is the natural guardian of a minor member of a joint Hindu family and consequently while the mother is alive the paternal uncle cannot affect the minor's interest in the joint family properties by professing to act as guardian for the minor. (*Le Rossignol, J.*) HARDWARI v. CHUNI LAL. 6 Lah. L. J. 182; 80 I. C. 735; 1924 Lah. 538.

—Partition—Agreement for devolution of share—Validity of.

At a family partition between a Hindu father and his sons it was agreed between them that on the death of any one of them his share should pass to the other two and after the death of any two of them the right of inheritance should devolve on the last survivor. *Held*, that it was open to the parties to enter into an agreement of the kind in question. It was not however competent for them to lay down a rule of inheritance for the property in the hands of the last in derogation of the ordinary rules of Hindu law. (*Mears, C. J. and Piggeott, J.*) BAGESHAR RAI v. MT. MAHADEL. 22 A. L. J. 419; L. R. 5 A. 282; 79 I. C. 514; 46 A. 525; 1924 A. 461 (2)

—Partition—Co-heirs—Maintenance of widow and daughter met by one of the co-heirs—Family property is liable for the expenses so incurred—Money spent for marriage of daughter—Provision for marriage of males.

Where one co-heir spent a certain sum on the maintenance of his mother and sister, and it was contended that the co-heir having spent it out of his own free will, cannot claim contribution from the other heirs, and that the claim of a widow for maintenance is not a charge upon the estate of a deceased husband until it is fixed and charged upon the estate either by a decree, or by mutual agreement between the widow and the holder of the estate.

Held, that the other co-heirs are not entitled to partition of their shares without reimbursing the co-heir, for their share of the expenses borne by him, which they as well as he, were legally bound to bear out of the estate. Male co-parceners who are unmarried at the time of partition cannot

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claim a provision for marriage in anticipation. (*Scott-Smith and Fford, JJ.*) BHOLI RAI AND NARAIN DAS v. DWARKADAS AND ANOTHER. 5 Lah. 375.

—Partition—Co-parcener—Brothers—No severance of joint family as between a brother and his own sons.

The effect of the separation and partition between a Hindu Co-parcener and his brother, after the death of their father is not to cause, by implication of law, a separation between him and his own descendants and to make them cease to constitute amongst themselves a joint family unless it was proved that they had agreed to continue to be a joint Hindu family. 30 C. 723, 80 C. 738 Ref. (*Sir John Edge*) HARI BAKSH v. BABU LAL. 5 Lah. 92; 34 M. L. T. (P. C.) 70; L. R. 5 P. C. 113; 22 A. L. J. 254; 28 C. W. N. 953; 1924 P. C. 126; 20 L. W. 406; (1924) M. W. N. 650; 26 Bom. L. R. 1108; 1 O. W. N. 536; 47 M. L. J. 938.

—Partition—Evidence of—Alienation of shares.

10 O. & A. L. R. 194; 27 O. C. 140; 77 I. C. 329; 1924 Oudh 120 (2).

—Partition—Evidence of—Separate living.

1924 Oudh 115.

—Partition—Evidence of—Separation in status—Entries in *wajib-ul-arz*.

On a question arising as to whether the husband of a Hindu widow had died a separated member or as a member of a joint Hindu family, reliance was placed on certain entries in the *wajib-ul-arz* prepared at the regular settlement when the husband or the widow was alive. The *wajib-ul-arz* recited that every year there took place a rendition of accounts among the co-sharers. *Held*, that the entry was strong evidence of separation, for the manager of a joint Hindu family was not liable to account to the co-parceners. (*Simpson, A. J. C.*) LACHMI NARAYAN v. SALIG RAM. 11 O. L. J. 154; 1924 Oudh 428.

—Partition—Evidence of—Separate transactions—Transactions between members.

Separate transactions by members of a joint family do not by themselves establish separation, but mutual transaction between two members of a family stand on an entirely different footing. If the family was joint it would be impossible for one member to borrow money from another, for the fund would be a common fund. (*Das and Ross, JJ.*) JAI NARAYAN PANDEY v. KISHUN DUTT MISRA. 5 Pat. L. T. 581; 2 Pat. L. R. 306; 78 I. C. 705 (2); 3 Pat. 575; 1924 P. 551.

—Partition—Evidence of entries in revenue papers.

In the absence of any other evidence, mere entries in the revenue papers could not be accepted as evidencing a divided status in a joint Hindu family. (*Wazir Hassan, A. J. C.*) JAISI RAM v. RAJ BAHADUR KURMI. 11 O. L. J. 87; 1924 Oudh 326.

—Partition—Father and sons—Re-union—Minor sons—After born sons.

Where after a partition between a father and sons, the minor sons remain with the father and

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even after attaining majority live with him, conduct his business and litigation, the evidence establishes re-union. They are bound by his acts as manager. After born sons are in the same position. (*Kendall, A. J. C.*) *ONKARESHWAR PRASAD v. DUSHYANT PRASAD.*
82 I. C. 10 : 1925 Oudh 56

——— *Partition — Grandmother — Right to share — Benares School*

Under the Benares School, a grandmother is entitled to a share when after the owner's death, a partition takes place among the grandsons. (*Walsh, A. C. J. and Sulaiman, J.*) *KANHAIYA LAL v. GAURA.* 22 A. L. J. 890 : 1925 All. 19.

——— *Partition — Institution of suit by two minor plaintiffs — Decree — No severance of interest between plaintiffs — Interest.*

If in a suit for partition instituted by one or more members of a joint Hindu family a decree is passed, the effect of the decree on the status of the remaining co-parceners must be determined by the terms of the decree. Where two minor brothers represented by a next friend sued for partition and a compromise decree was passed allotting two-thirds share of the whole family property to both the plaintiffs without specifying their individual share, *held*, that the decree did not effect a severance in status between the plaintiffs *inter se*. 45 M. L. J. 355 ; (P.C.) 30 Cal. 231, 253 ; 31 M. L. J. 472 ; 33 M. L. J. 759 relied on. (*Spencer, O. C. J. and Kumaraswami Sastri, J.*) *SENGODA GOUNDAN v. MUTHU GOUNDAN.*
19 L. W. 533 : 1924 Mad. 625 ;
(1924) M. W. N. 376 : 78 I. C. 927 ;
47 Mad. 567 : 46 M. L. J. 404

——— *Partition — Joint business — Dissolution — Cause of action.* MT. JATTI v. BATWARI LAL.
28 C. W. N. 785.

——— *Partition — Lists allotting properties to the sharers — Admissibility in evidence without registration. See REGISTRATION ACT, Ss. 17 (2) and 49.* 19 L.W. 494.

——— *Partition — Minor co-parceners.*

A partition can validly take place among minor co-parceners if they are properly represented by their guardians. If there is nothing to show that such partition was unfair, it is binding on them. (*Krishnan, J.*) *DEVARAJULU NAIDU v. KONDAMMAL.*
80 I. C. 929 : 20 L. W. 754

——— *Partition — Onus — Joint Hindu family — Coorgs — Maintenance in shares.*

Where the parties lived among Coorgs and they had adopted the system of maintenance in shares, it could not amount to a division in status. According to ordinary Hindu law if a division of ancestral property is alleged, the onus of proving it will ordinarily lie upon those who assert the division. (*Watson, J. C.*) *LAKSHMIAM v. GANGADHARIAH.*
2 Mys. L. J. (B. and C.) 16.

——— *Partition — Partial partition — Suit if maintainable — Property in the hands of tenants*

In a partition suit the plaintiff omitted several properties belonging to the family, but in the hands of tenants. *Held*, the suit as framed was

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bad, but opportunity should be given to amend the plaint. (*Devadoss and Jackson, JJ.*) *GOOTY AGRAHARAM SUBRAMANIAM v. RAMACHANDRA RAO.* 47 M. L. J. 908.

——— *Partition — Partial separation of some members — Effect on others*

Where one member of a joint Hindu family separates from the co-parcenary an agreement among the remaining members of a joint family to remain united or to reunite must be proved like any other fact, 30 C. 725 Rel. (*Baker, O.J.C.*) *BABOOLAL v. DHIRA.* 7 N. L. J. 77

——— *Partition — Provision for future marriage or janeo.*

Where joint family properties are partitioned, it is not allowable to make provision for marriage or janeo in anticipation. (*Wazir Hasan and Neave, A.J.C.*) *GAYA PRASAD v. GIRJA SHANKER.*
11 O. L. J. 286 : 78 I. C. 574 : 1924 Oudh 360.

——— *Partition — Portion left undivided — Right of widow of one of the members to demand partition.* 77 I. C. 914.

——— *Partition — Presumption.* MT. JATTI v. BANWARI LAL. 28 C. W. N. 785.

Partition — Presumption.

10 O. A. L. R. 33 : 1924 Oudh 46.

——— *Partition — Property set apart for trust acquired by one member — Claim of the other.* 1924 Rom 239.

——— *Partition — Relinquishment by father — Provision for maintenance — Effect of.*

A family does not continue to be joint in cases where there is a relinquishment by the father of his share subject to a provision for maintenance, 6 Mad 71 Doubted. (*Ramesam and Jackson, JJ.*) *TADURI RAMACHANDRA JAGANNATHA RAO v. VADREVVU VISWESAM.* 19 L. W. 691 :
1942 Mad. 682 : 80 I. C. 228 : 47 Mad. 621 :
46 M. L. J. 590.

——— *Partition — Re-union — When effected — on status.*

For a re-union according to Hindu law two things are essential ; firstly, that one can re-unite with his father, brother or paternal uncle only ; secondly, the reunion must take place after separation so that the parties seeking to re-unite must have separated before the re-union.

The effect of a re-union is to place the united co-parceners in the same position as they would have been in, had no partition taken place, with rights of survivorship. Where after a partition two brothers agreed to live together and hold the property in certain specified shares. *Held*, it does not amount to a re-union under the Hindu Law. (*Jwala Prasad and Ross, JJ.*) *NENA OJHA v. PARBHU DUTT OJHA.* 5 Pat. L. T. 284 : 75 I. C. 508 :
1924 P. 647.

——— *Partition — Right of member of a joint Hindu family — Suit for declaration of right*

It is not open to a member of a joint family to sue for a declaration that he has a particular share in the property. The exact extent of his share can only be determined at the time when

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the separation actually takes place. (*Walsh A.C.J. and Sulaiman, J.*) *RAMSARUP v. MT. KATAULA*.
L. R. 5 A. 723.

———*Partition—Severance of interest—Notice to other coparceners if essential.*

An unequivocal expression of an intention to become divided in status constitutes a severance in Hindu law. For the severance of interest to take place, notice to other coparceners of the intention to separate unequivocally expressed is not a condition precedent. The separation is an act of individual volition and does not depend for its effect on the consent or agreement of the other coparceners. 43 I. A. 151; 41 I. A. 159; 49 I. A. 168; 49 I. A. 358 Ref. A separation may take place even in the absence of other coparceners. (*Wazir Hasan and Neave, A. J. C.*) *MT. RACHHPALI v. MT. CHANDRESAR DEI*.

10 O. L. J. 595; 78 I. C. 256;
27 O. C. 114; 1924 Oudh 252

———*Partition—Sisters—Survivorship—Right to, when lost.*

Two step-sisters, who inherited their father's properties after the death of his widow, divided his immoveable properties under a partition deed which after reciting a prior partition of moveables allotted various items of land to each of the sisters and closed with the following clause:—"Henceforth the only relationship between us will be one of friendship and not of property". Held, on a construction of the document, that the parties intended not merely to give their present right to the properties, but to exclude the right of succession by survivorship in case one of them predeceased the other. 3 M. 290; 14 M. L. J. 175; 26 M. L. J. 479 dist. (*Krishnan and Waller, JJ.*) *RUKMANI AMMAL v. NARASIMHACHARIAR*.

19 L. W. 465; 1924 Mad 696;
34 M. L. T. (H. C.) 29; 78 I. C. 173;
46 M. L. J. 285.

———*Partition—Step mother—Right to share—Mitakshara.*

At a partition between a father and his sons, the step-mother is entitled to a share under the Mitakshara law. 31 B 54 foll. (*Macleod, C. J. and Shah, J.*) *HOSBANNA DEVANNA v. DEVANNA SANNAPPA*.

26 Bom. L. R. 424;
48 Bom. 468; 80 I. C. 463; 1924 Bom. 444

———*Partition—Unequal shares—If legal.*

There is no absolute rule that a partition must be in equal shares although generally it is so. A member of a joint Hindu family may of his own free will accept a smaller share than he is entitled to. (*Baker, J.C. and Predeaux, A. J. C.*) *SAWAI SINGAI BALCHAND v. SAWAI SINGAI LACHMAN PRASAD*.
1924 Nag. 148.

———*Partition—Unilateral declaration—Institution of suit—Withdrawal of.*

When there has been an unequivocal declaration of his intention to become divided by a member of a joint Hindu family and this intention has been communicated to the other members of the family, this declaration effects a division in status. The filing of a suit is such a declaration but where a suit for partition is filed and is subsequently withdrawn by the plaintiff who continued in a state of jointness with the

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others members of the family, the intention to divide must be deemed to have been abandoned and no division in status is effected. 33 M. L. J. 759; 11 L. W. 611 followed. (*Phillips, J.*) *KRISHNASWAMI NAIDU v. PERUMAL ALIAS NAMMAYYA*.
20 L. W. 540;

(1924) M. W. N. 742; 1925 Mad. 112.

———*Religious Endowment—Idol—Right of suit—Shebait—Adverse possession—Running of—Position of shebait—Absence of shebait—Effect of. See ADVERSE POSSESSION.*

51 C. 953.

———*Re-union—Who can reunite—Effect of re-union.*

A reunion can only be effected validly as between the parties or some of them who made the original separation. 3 B. C. R. 69, 30 C 725; 35 C 721 Ref. To constitute a reunion in the technical sense there must first have been a separation between the parties who afterwards reunite. (*Chandrasekhara Aiyar, C. J., and Plumer, J.*) *RAMACHAR v. SHAMANNA*.
2 Mys. L. J. 89.

———*Reversioners' interest not protected by widow.*

The reversioners are not barred by the decision against widow where she does not avail of opportunity to protect the reversionary interests (*Le Rossignol and Harrison, JJ.*) *BAJRANG DAS v. GHANI RAM*.
1923 Lah. 299 (2).

———*Reversioner—Remote reversioner—Rights of.*

A remote reversioner of a deceased Hindu is entitled to have an alienation made by his widow declared not binding after the death of the widow, when the nearer reversioner is in collusion with the widow. (*Neave, A. J. C.*) *ANANDI DIN v. RAM SAHAL*.
10 O. & A. L. R. 305.

27 O. C. 173; 11 O. L. J. 236;
1 O. W. N. 24; 1924 Oudh 381.

———*Reversioner—Right to sue to set aside alienation.*

Under the Hindu Law the daughter and her son are admittedly the next reversioners and these having given consent to an alienation the remote reversioners have no right to question it. (*Abdul Raoof and Martineau, JJ.*) *ARJAN v. HARI RAM*.
6 Lah. L. J. 93;

80 I. C. 522; 1922 Lah 464.

———*Religious endowment—Pujaree Mahomedan.*

Held, the Mahomedan Mali who was also one of the pujaries was entitled to continue his right acquired by custom. The rights of receiving offerings and performing the duties of pujari which were very simple were connected and the Mahomedan pujari was entitled to both. (*Stuart, J.*) *BABU v. SUKHA*.
1923 All. 165.

———*Stridhan—Inheritance—Marriage in approved form.*

The heir of a woman to her stridhan property is the nearest kinsman of her husband and not of her father, where the marriage is in one of the approved forms. (*Dalal, J. C.*) *MT. UMRAO KUAR v. SARABJIT SINGH*.

1 O. W. N. 579; 10 O. & A. L. R. 1030.

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———Succession. See HINDU LAW, INHERITANCE.

———Texts—Mitakshara silent—Other books—Value of.

Where on a particular topic, the Mitakshara is silent or not clear, Courts can go to other recognised authorities for the law on the subject. (Palsh, A. C. J. and Sulaiman, J.) KANHAIYA LAL v. GAURA, 22 A. L. J. 890 : 1925 A. 19.

———Trust—Failure to appoint trustee—Effect.

A trust, according to Hindu Law, cannot fail for want of the appointment of trustees and the Court can appoint a manager on the failure of those entitled to appoint him. (Abdul Ruoof, J.) KIDAR NATH v. WAZIR CHAND, 75 I. C. 903, 1924 Lah. 692.

Widow—Adoption by her—Suit by male reversioner to recover possession of estate on the death of widow disputing the adoption—Limitation—Art. 144 applicable. See LIM. ACT, Arts 118 & 144. 46 M. L. J. 598.

———Widow—Accretions—Savings from income—Intention.

The question whether any property acquired by a Hindu widow from the savings from income is an accretion to the estate is one of intention on her part. In the absence of anything indicting the contra, it may be presumed to be an accretion. (Martineau and Campbell, JJ.) MT. TEHL, KAUR v. AMAR NATH, 79 I. C. 670 : 1925 Lah. 2.

———Widow—Alienation—Acquiescence—Nature of—Proof.

A plea of acquiescence by inaction on the part of a reversionary heir must be very clearly made out, if it is relied on as a bar to the enforcement of his rights. Laches to bar a plaintiff's right must amount to waiver, abandonment or acquiescence and to raise a presumption of any of the evidence of conduct must be plain and unambiguous. (Kinkhede, A. J. C.) NARAYAN v. MT. TULSHI, 80 I. C. 607 : 1925 Nag. 104.

———Widow's alienation—Attestation by reversioners whether evidence of consent—Estoppel.

Where the reversioners, attested a mortgage deed executed by a widow before the Sub registrar, in respect of a debt for the reversioners themselves as principal debtors, held, that though mere attestation is not sufficient to fix a party with knowledge of the deed attested, the attestation combined with other circumstances may amount to evidence of consent. The reversioners were estopped from questioning the validity of the transaction as they were aware of the nature of the transaction. (Daniels, and Neare, JJ.) RAMADHAR v. BAGAWAN SINGH, L. R. 5 All. 644 (Civ.).

———Widow—Alienation—Benami—Nature of—Effect.

Though under the Hindu Law, a widow's alienation is only voidable, an alienation which is only a benami transaction has no legal effect. (Miller, C. J. and Multick, J.) BHIKARI BEHERA v. SITAMANI DEVI, 1924 P. 706.

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———Widow—Alienation—Consent of reversioner—Attestation—Estoppel—Receipt of benefit by reversioner—Ratification.

An alienation by a Hindu widow is not void but only voidable at the instance of the reversioners. If the reversioner before or after the reversion has fallen in, gets a benefit out of the transaction of alienation on the footing of its validity, he must be deemed to have ratified it. Very often attestation of persons having a possible interest in the property is taken with a view to make the transaction binding on them later on. The attestation of a person having a tangible interest in the property dealt with by the document may be taken as proof of his consent to and knowledge of the correctness of the recitals in the deed. (Kumaraswami Sastri, JJ.) NAYAKAMMAL v. MUNUSWAMI MUDALIAR, 20 L. W. 222 : 1924 Mad. 819.

———Widow—Alienation—Consent of reversioner—Effect of—Transfer in favour of reversioner.

The consent of the nearest reversioners to an alienation by a widow does not constitute absolute proof of the validity of the deed but it operates by raising a presumption that the deed was executed for legal necessity. Where the transaction is in favour of a person having a direct interest in obtaining it (i.e.) of the presumptive reversioner himself or as in the present case of his son, the presumption of the transaction being a proper one disappears. Where the deed is in favour of the son of the person whose consent is relied on it is necessary to offer other evidence in proof of the legal necessity. (Daniels, J.) TODAR MAL v. KISHEN LAL, L. R. 5 A. 395 : 79 I. C. 1007 : 1924 A. 919.

———Widow—Alienation—Co-widows—Gift to daughter—Death of daughter—Right to sue for possession from daughter's heirs.

Where two co-widows in possession of their husband's estate as his heirs, made a gift of a portion of the estate to the daughter by one of the widows and subsequently the daughter and her mother died. Held that it was not open to the surviving co-widow to sue for possession of the whole or moiety of the gifted property from the hands of the daughter's heirs. So long as one of the widows was living the interest which she had in her husband's estate would enure for the benefit of the daughter and her heir. The gift would be operative during the life-time of the survivor of the widows. (Macleod, C. J. and Shah, J.) DHANJI NATHA v. DHUMA HIRAJI MALI, 26 Bom. L. R. 277 : 80 I. C. 234 : 1924 Bom. 382.

———Widow—Alienation to daughter—Death of daughter—Effect.

Where a Hindu widow makes a gift of property to her daughter, the gift is valid for the life-time of the widow ; and if the daughter predeceases the widow, the *stridhanam* heirs of the former take the property until the death of the donor. (Kinkhede, A. J. C.) NARAYAN v. MT. TULSHI, 80 I. C. 607 : 1925 Nag. 104.

———Widow—Alienation—Gift to one of three daughters—Acceleration.

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Where a Hindu widow makes a gift of her husband's property to one of three daughters, it is not good as a valid surrender since a surrender to be valid must be in favour of all the reversioners nearest in degree if there are more than one of that class. 42 M. 523, 532; 36 M. L. J. 493; 22 A. L. J. 472, 42 B. 719, foll. (*Daniels and Neave, A. J. C.*) *BHUB PANDÉ v. MT. DALHMA*, L. R. 5 A. 661; 80 I. C. 4; 1925 A. 8.

—Widow—Alienation—Gift—Religious or pious purpose—Gift to Gaya priest—Validity of.

A Hindu widow has a larger power of disposition for religious or charitable purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely worldly purposes. 43 C. 574; 16 A. L. J. 646; 19 A. L. J. 499. Ref. A Hindu widow made a valid *Suphal Shunkalap* to a priest of Gaya of some property bearing a very small proportion to the total property inherited by her from her husband. Held that the gift was valid and binding on the reversioners. (*Lindsay and Kanhaiyalal, JJ.*) *BALDEO PRASAD v. RAJA FATEH SINGH*. 22 A. L. J. 490; 78 I. C. 654; L. R. 5 A. 270; 46 A. 533; 1924 A. 933.

—Widow—Alienation—Necessity—Liability to pay Revenue—Kebuttal. 1924 A. 149.

—Widow—Alienation—Necessity—Payment of decree-debt against her.

Mortgage was executed by a Hindu widow to pay off a decree debt against her and there was nothing to show either from the recitals in the deed of mortgage or otherwise the nature of the loan which formed the basis of the decree. No presumption as to the necessity for mortgage could be drawn from the lapse of time or the consent of the reversioner. (*Lindsay and Sulaiman, JJ.*) *BENAIK RAO v. PUTTAIN SINGH*. L. R. 5 A. 335; 79 I. C. 69; 1924 All. 929.

—Widow—Alienation—Necessity—Pilgrimage for benefit of husband's soul—Consent of reversioners—Effect of.

A mortgage by a Hindu widow for the purpose of performing a pilgrimage for the benefit of her husband's soul and the support of her dependent relations is justified by legal necessity. The circumstance that the only reversioners at the time gave their unqualified consent to the mortgage raises a strong presumption that the mortgage was justified by necessity. 44 A. 756, 44 C. 186, 42 M. 523, Ref. (*Mukerji and Dalal, JJ.*) *DARBARI LAL v. GOBIND SARAN*.

22 A. L. J. 753; L. R. 5 A. 556; 80 I. C. 31; 46 A. 822; 1924 A. 902

—Widow—Alienation—Necessity—Proof—Consent of reversioner—Female reversioner—Distant reversioner.

A Hindu widow inherited from her husband property sufficient to maintain herself. She alienated portion of the property with the consent of her daughters and some distant reversioners. At the time of the sale there was a daughter's son and the daughters themselves were young and capable of bearing children who would eventually be heirs to the property. Held that the consent of the daughters or of the distant reversioners

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raised no presumption as to the necessity for the alienation. Mere lapse of time since the alienation would not validate it especially where it was found that the widow had substantial properties and the vendee was a person well versed in law and had taken care to insert carefully prepared recitals of necessity in the deed of sale. (*Mukerji and Dalal, JJ.*) *MAHOMED NUH v. BRIJ BEHARI LAL*. 22 A. L. J. 650; L. R. 5 A. 424; 10 O. & A. L. R. 743; 82 I. C. 5; 46 A. 656; 1924 A. 939.

—Widow—Alienation—Necessity—Proof of—Recitals—Value of. 75 I. C. 281.

—Widow—Alienation—Necessity—Prudent act—Management of estate.

A Hindu widow as the manager of her husband's estate must have some latitude to make some arrangement which is in reality beneficial to it. Where a Hindu widow sold a portion of the husband's estate which was very difficult to manage and bought instead a house property in a city which would fetch a good rental, there is nothing improper in her dealing and the Court might uphold the alienation. (*Chandra Sekhara Aiyar, C. J. and Subbanna, J.*) *DODDA MOGA v. NARAYANA BHATTA*. 2 Mys. L. J. 157.

—Widow—Alienation—Pension for manager—Liability of executor or successor to estate. 77 I. C. 44; 1921 O. C. 652.

—Widow—Alienations—Powers of—Absence of reversioners—Effect of.

A Hindu widow's powers of alienation do not depend on the existence of reversioners. The limitations imposed on her are inseparable from her estate and if she alienates without legal necessity even subsequently born reversioners can question the same. (*Harrison and Zafar Ali, JJ.*) *LALCHAND v. MANOHRI*. 78 I. C. 717; 1925 Lah. 108.

—Widow—Alienation—Reversioner—Declaratory suit.

A decree in a declaratory suit by a reversioner impeaching in the widow's lifetime an alienation by her is conclusive of actual reversioner's rights. But the applicability of the principles is less obviously just where it operates to bind the ultimate reversioner by the result of a suit in which the plaintiff reversioner had failed. (*Lord Blanesburgh.*) *MAHARAJA KESHO PRASAD SINGH v. SHEO PRAGASH OJHA*. 46 A. 831;

40 C. L. J. 461; 1 O. W. N. 640; 51 I. A. 381; 82 I. C. 962; 1924 P. C. 247; 10 O. & A. L. R. 1105; 27 Bom. L. R. 130; 21 L. W. 295; 47 M. L. J. 824.

—Widow—Alienation—Reversioners joining in lease—Right to sue. *MOHENDRA NATH BOSE v. ABINASH CHANDRA*. 77 I. C. 364.

—Widow—Alienation—Right of reversioners to challenge separately.

A Hindu reversioner is not bound to file one suit challenging all alienations made by the widow therein—Where the alienees are different and the items different separate suits will lie. (*Sulaiman, J.*) *BANS LOCHAN RAI v. JAGANNATH LAL*. 1924 All. 838.

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———Widow—Alienation—Right of reversioners to avoid—Estoppel.

A reversioner in whose favour the succession had opened cannot be permitted to challenge the validity of a transfer by a limited Hindu owner when before her death he has elected to hold the transfer good. (*Neave, J.*) *MT BATKA v. MT. SITMAN*. L. R. 5 A. 401 : 82 I. C. 372 : 1924 All. 527.

———Wid. w—Alienation—Setting aside by presumptive reversioners—Redeeming of mortgages by alienee—Equity—Right to re-imbursement.

Where the presumptive reversioners seek to set aside a gift deed executed by a Hindu widow and it is found the donee has redeemed mortgages in favour of these reversioners by the widow, he is in equity entitled to get from them what he paid for redeeming the mortgages. (*Lindsay and Sulaiman, JJ.*) *RAGHUNANDAN SINGH v. TULSHI SINGH*. 46 A. 38 : 75 I. C. 244 : 1924 A. 315.

———Widow—Alienation—Sardha of husband's relation.

When a Hindu widow alienates property to meet the *Sardha* expenses of a near relative of her husband, and it is found she is in possession of his property, the alienation is for a legal necessity (*Miller, C. J. and Mullick, J.*) *RAMSUNDER KUER v. SATRUHAN PRA-SAD CHAUDHURI*.

1924 Pat. 591.

———Widow—Alienation—Suit to contest—Who can maintain.

Under Hindu Law a remote reversioner can sue challenging an alienation by a limited owner when the immediate reversioners were also holders of life estates. (*Le Rossignol, J.*) *JAWAHARA v. DATA RAM*.

79 I. C. 497 :

1925 Lah. 156.

———Widow—Alienation—Suit by presumptive reversioner, challenging—Representative nature of—Death of widow—Suit by actual reversioner for possession—If barred—Civil Procedure Code, S. 11 Expl. VI.

Where a Hindu widow makes an alienation and a contingent reversioner files a suit for declaring the same to be invalid, the suit is a representative suit on behalf of all the reversioners and the decision thereon is binding on all of them. Where such a declaratory suit is dismissed, a suit by the actual reversioner after the death of the widow for possession of the properties alienated is barred by *Res judicata*. 36 M. 405 : 41 M. 659 : 44 All. 19 : 49 Cal. 45 foll. (*Wallace and Jackson, JJ.*) *POGULA HUSSAIN REDDY v. VENKATTA REDDY*.

20 L. W. 552 :

1925 Mad. 86 : (1924) M. W. N. 730 :

47 M. L. J. 545.

———Widow—Alienation—Suit challenging—Compromise decree—Deposit to be made within time fixed—If period can be extended.

A compromise decree was passed in a suit by a reversioner to set aside an alienation by a widow, whereby she was to pay a sum of money to the plaintiff within a certain time and on default the alienation was to be set aside. She offered to pay the money a few days out of time. *Held* time was of the essence of the con-

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tract. (*Spencer, O. C. J. and Devadoss, J.*) *EL-LAMMAL v. VENKATARAMANA RAO*.

74 M.L.T. 283 (H.C.) : 79 I.C. 958 : 1924 Mad. 786.

———Widow—Alienation—Suit to challenge—Who can sue.

A suit challenging an alienation by a Hindu widow must ordinarily be brought by the reversioner nearest in succession at the time. If however he refuses or colludes with the widow or has precluded himself from suing, the next presumptive reversioner can sue. In the presence of daughters and a daughter's son, a remote reversioner cannot sue. (*Daniels and Neave, A. J. C.*) *BACHU PANDE v. MT. DULHMA*.

L. R. 5 A. 661 : 80 I. C. 4 : 1925 A. 8.

———Widow's alienations—Whether debts for continuing ancestral trade, speculating on new trade will bind reversion—Widow's completion of house left incomplete—Validity of.

In a suit by the reversioners, to set aside certain alienations made by the widow, with a view to complete a house, to improve the family trade, and to speculate on a new trade in yarn. *Held*, (1) Though a widow cannot start a new trade, she need not wind up a flourishing business left by her husband (26 Bom. 206 F. B. follow. d). She can contract a debt for the purpose of family business to which she has succeeded, and by a specific charge make it payable out of the assets of the business even as against reversioners. If she acts prudently she is entitled to bind the estate with the debts incurred in the course of such trade. (2) A Hindu widow is not entitled to speculate upon a new trade in yarn, and debts so incurred are not binding on the reversion. (3) A Hindu widow could complete a house left incomplete by the husband, by incurring debts. She is not entitled to build a new house to the prejudice of the reversion. A widow is not a trustee for the reversioner or a mere manager on behalf of the reversioner.

Per Spencer, J.—The reversioners are not entitled to approbate the accession to the estate caused by construction and at the same time to reprobate the debts incurred for the purpose of construction 26 B. 206 : 28 M. L. J. 696 : 42 A. 109 followed (*Spencer and Devadoss, JJ.*) *SUBRAMANYA CHETTY v. RAMAKRISHNAMMAL*. 20 L. W. 627 : (1924) M. W. N. 794.

———Widow—Compromise of dispute—Reversioners—Life interest to reversioners—Allowance to widow.

Certain disputes between a Hindu widow and reversioner were referred to arbitration and the award granted the widow a certain sum per year as maintenance and a life-interest in the property to the reversioner. On the death of the reversioner the property was to go to his son if one survived him and in default to the widow and another in equal shares. So long as the widow got her maintenance she would have no right to set aside the arrangement. *Held*, that the arrangement was a perfectly legal arrangement. The fact that the reversioner had alienated the property gave the widow no right to set aside the award and recover possession, so long as she got her allowance. The cause of action for a suit for possession accrued to the widow on the death of the

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reversioner without leaving a son. A suit brought by her against the transferees from the reversioner within 12 years of that date is not barred by limitation. (*Mukerji, J.*) *MT. DURGA KUNWAR v. MT. CHUNNA KUNWAR*. L. R. 5 A. 276 : 78 I. C. 633 : 1924 All. 862.

—Widow—Debts of—When binding on estate.

In circumstances of necessity, a widow can bind the estate by incurring debts. (*Jackson, J.*) *GABIMELLA VENKAYYA v. MOKKARALLA BANGARAYYA*. 82 I. C. 464

—Widow—Decree against for amount—Chargeable on her husband's estate—Execution of the decree against that estate in the hands of the reversioners.

It is settled law that if the nature of the debt which the widow incurs and for which the creditor obtains a decree against her is such as would bind her husband's estate, the decree with regard to such a debt can be executed against the estate even in the hands of the reversioners. 34 M. 188 followed. 30 A. 394; 45 All. 613 : 19 C. W. N. 313 referred to. (*Wazir Hasan, A. J. C.*) *BHUDHAR SINGH v. THAKUR GANGA BAKSH*. 1 O. W. N. 527 : 10 O. & A. L. R. 854 : 11 O. L. J. 754

—Widow—Decree against—Criterion for determining the binding nature of decree against the reversioners—Form of suit—Terms of the deed

In deciding whether a sale in execution of a mortgage decree against the Hindu widow would bind the reversioners or not the Court must look beyond the decree to the form of the suit or possibly even to the terms of the bond itself. 10 C. 985; 30 M. 3 and 34 M. 188 ref. to.

If the form of the suit is a claim based on a mortgage deed, the widow in defending such a suit is acting in defence of the estate and on behalf of the reversioners, whereas if the suit is a claim on a personal bond she could not be held to be acting on behalf of the reversioners. (*Ken dall and Pullan, A. J. C.*) *MT. RAI KUNWARI v. MT. RANI MAHRAJ KUNWARI*. 82 I. C. 832 : 1 O. W. N. 710.

—Widow—Decree against—When binding on estate—Executability against reversioner.

There is always a distinction between a decree passed against a Hindu widow as representative of the last male holder in respect of a debt due by the last male holder, and a decree passed against her in respect of a debt incurred by herself. In the first case she is sued in her representative character, in the second she is before the Court in her personal capacity. A decree which directs recovery of the debt out of the assets of the deceased in the hands of the holders of the life estate though based on the confession of the widow cannot therefore be treated as being a decree against the widow personally. Although a personal decree against the widow may not bind the actual reversioner for very good reasons, a decree passed against her in her representative character would not be liable to be challenged on the execution side at the instance of the reversionary heir merely because it was passed on a confession. (*Kinkard, O. A. J. C.*) *BEHARI SINGH v. NAWAL SINGH*. 20 N. L. R. 24 : 78 I. C. 136; 1924 Nag. 81.

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—Widow—Execution sale—What passes—Purchaser in possession. L. R. 5 A. 11 (Rev) : 1924 A. 109.

Widow—Gift—Charitable purposes—Powers of

A gift forming a religious act considered essential for the soul of the deceased husband can validly be made by a Hindu widow even by selling property if income from the estate is not sufficient. For other pious observances which conduce to the bliss of the deceased's soul but not essential or obligatory, she can alienate only a small portion of the property. (*Martineau and Campbell, JJ.*) *MT. TEHL KUAR v. AMAR NATH*. 79 I. C. 670 : 1925 Lah. 2.

Widow—Gift by—Consent of nearest reversioner—Effect—Surrender—What is.

A gift by a Hindu widow of her husband's properties to a stranger even if it is with the consent of the nearest reversioner does not give him more than an estate for the life of the widow. A surrender by the widow can only be in favour of the next reversioners and consent which is presumptive evidence of necessity cannot apply to a case of gift. (*Newbould and Ghosh, JJ.*) *JNANENDRA NATH ROY CHAUDHURY v. RAM RANJAN BANERJI*. 1924 Cal. 988.

—Widow—Gift for—Spiritual—Welfare—When binding. 1924 Lah. 137.

—Widow—Gift of whole estate—Consent of next reversioners—Effect.

A Hindu widow can with the consent of the next reversioner gift away the whole of her husband's estate. The alienation is valid on the doctrine of surrender or relinquishment. (*Batten and Hallifax, A. J. C.*) *KUSHI BAI v. MANRAKHAN*. 79 I. C. 422.

Widow—Gift of whole estate to daughter on marriage—Effect—Death of daughter. *MT. SARTAN v. RAMJAS*. 1924 A. 166.

Widow—Gift—Power to make—Marriage possession for daughter.

It is competent to a Hindu widow to make a gift of a reasonable portion of the estate of her deceased husband for the purpose of dowry for her daughter's marriage. 37 C. 1 : 22 M. 113, Ref. (*Scott Smith and Fford, JJ.*) *JOWALA RAM v. HARI KISHEN SINGH*. 5 Lah. 70. 80 I. C. 690 : 1924 Lah. 429.

—Widow—Income from estate—Nature of—Decree for rent.

Accumulated savings by a Hindu widow from the income of her husband's property are presumed to belong to the estate unless she dealt with them as her own property. Mere obtaining a decree for a years of rent is not proof that she dealt with it in such a way as to show it was her property. (*Jackson, J.*) *PAVANI SUBBAMMA v. MUNGAMUR VENKATAKRISHNA ROW*. 80 I. C. 290 (2).

—Widow—Mortgage by—Legal necessity—Onerous terms—Suit by reversioners—Power of Court to grant declaration as to validity of mortgage and invalidity of terms—Issue as to legal necessity of mortgage, whether wide enough to include the point about items of the deeds.

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In a suit by the nearest reversioner against a Hindu widow for a declaration that the mortgage executed by her is void as against him, if the whole cannot be declared invalid there is no reason why that part of it which is invalid cannot be so declared. Where a deed of mortgage was executed by a Hindu widow for meeting the expenses of the marriage of the grand daughter of her deceased husband but contained onerous terms which were not proved by the creditor mortgagee to have been procured under the pressure of any legal necessity on the estate of the deceased husband, it is open to the Court to uphold the deed as being for legal necessity and further to grant a declaration that the particular onerous terms are not binding on the reversioners. A broad issue as to the legal necessity or otherwise of the mortgage as a whole embraces the question of necessity in respect to the various items of the mortgage transaction and no specific issue need be framed therefor particularly when the parties are well aware of the legal situation. 51 I. A. 278. (*Wazir Hasan, A. J. C.*) *MOHAN LAL v. MUSAMMAT KHAN KUAR*.

10 W. N. 744 : 10 O. & A. L. R. 1026.

—Widow—Mortgage by—Necessity—Inquiry by creditor, how far essential.

It is not sufficient for the creditor of a Hindu widow to assure himself that necessity existed for the loan but he must further assure himself that such necessity cannot be satisfied without borrowing.

He is, however, not bound to prove that the money advanced by him was really utilized in satisfying the necessity. (*Dalal, J. C.*) *KAMAN v. BARATI*. 10 W. N. 654 : 10 O. & A. L. R. 965.

—Widow—Mortgage suit—Compromise—Acceptance of exaggerated claim—If binding on reversion.

When a Hindu widow consents to a decree in a mortgage suit for a much larger sum than is due under the mortgage, the same is not binding on the reversioners. (*Nene, A. J. C.*) *BASAVAN v. NATHA*.

10 W. N. 319 : 82 I. C. 747 :

10 O. & A. L. R. 857 :

11 O. L. J. 452 : 1925 Oudh 30.

—Widow—Mortgage by—Suit to enforce, against reversioner—Plea by him of no necessity for bond—Scope of—Plea of no necessity for high rate of interest if included—Onus on mortgagee of proving such necessity—Shifting of onus—Conditions—Evidence of necessity for high rate of interest—Borrowing by same widow on other occasions at high interest if.

A *purdanashin* lady, who had only a widow's right in certain property, executed a mortgage in respect thereof for Rs. 775, with compound interest at 24 per cent. and half yearly rests. In a suit brought, after the lady's death, to enforce the mortgage bond against the reversionary heir who had succeeded to the property, the defendant raised a plea as follows :—

"The bond sued upon is entirely illegal and without passing of consideration and is without legal necessity."

Held, that the plea in general terms opened the defence that there was no necessity to borrow

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at the high rate of interest provided for in the bond, and that the onus of proving that there was such necessity lay on the lender.

Held, further that, as in all questions of onus, a certain amount of evidence might cause the onus to shift, and that evidence on the lender's part that the money could not, in the circumstances, have been raised at less interest would suffice to shift the onus so that, if the defendant led no evidence to controvert that statement, the lender would prevail, but that when there was no evidence and it was evident on the face of the document that the interest charged was far in excess of commercial rates, then undoubtedly the lender had not discharged his task.

Held, also that evidence that on one other occasion the same widow had borrowed at high interest was not in any way conclusive as of what she might have done on the occasion in question.

The only evidence tendered by the plaintiff before the trial judge consisted of two bonds granted by the same widow borrowing at a high rate of interest and decree obtained on one of the bonds, and of a witness to speak to the execution of one of the bonds, was rejected by the trial judge as unnecessary. *Held*, that the trial judge acted rightly in so doing. (*Lord Dunedin.*) *RAI RADHA KISHUN v. JAG SAHU*.

5 Pat. L. T. 434 :

26 Bom. L. R. 732 : 20 L. W. 285 :

L. R. 5 P. C. 129 : 80 I. C. 791 :

35 M. L. T. (P. C.) 177 : 22 A. L. J. 959 :

11 O. L. J. 652 : 1 O. W. N. 481 (P. C.) :

47 M. L. J. 329.

—Widow—Nature of estate—Tenancy rights—Relinquishment—Alienation.

A widow inheriting a tenancy inherits no more than a life interest and the property will devolve on her death on the reversioners. She would be bound by the Mitakshara law restricting the transfer of property and as a tenancy is property, she will not be able to alienate the holding inherited from her husband except for family necessity. The relinquishment of holding amounts to a transfer or alienation. (*Pullan, A. J. C.*) *SHEO NANDAN SINGH v. JAI RAM SINGH*.

10 O. & A. L. R. 445 :

11 O. L. J. 608 : 79 I. C. 1022 : 1 O. W. N. 287 :

L. R. 5 O. 143.

—Widow—Personal bond by the widow—Legal necessity—Reversioners, whether bound.

A widow's personal bond even for legal necessity does not bind the reversioners. 30 A. 394, followed 22 O. C. 260 : 34 Mad. 188 referred to. (*Kendall and Pullan, A. J. C.*) *MT. RAJKUNWAR v. MT. RANI MAHRAJ KUNWAR*.

22 I. C. 832 : 1 O. W. N. 710.

—Widow—Powers of.

A Hindu widow purchased an engine for constructing a ghat in a river and thereafter used it for driving an oil mill. She employed an engineer and in a suit by him against the reversioner for wages due, *held* the acts of the widow were binding on the estate. (*Baker, J. C.*) *THAKUR KALLU SINGH v. BHURAJI*.

1924 Nag. 884.

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—Widow—Prior suit regarding succession—Widows in possession for more than 12 years—Adverse possession—Nature of title prescribed for.

The widows of a Hindu obtained a judgment in their favour regarding succession to his estate and under it remained in possession for 40 years. Held, even if they were not entitled to the estate, their possession was adverse to those legally entitled and the rights of the latter were destroyed under S. 23, Lim. Act. The property does not however become their *stridhanam*, but enures to the benefit of the reversioners. (*Lord Dunedin*.) LAJWANTI v. SAFA CHAND. 22 A. L. J. 304.

1924 P. C. 121 : 5 Lah. 192 : L. R. 5 P. C. 94 : 20 L. W. 10 : (1924) M. W. N. 442 : 28 C. W. N. 960 : 80 I. C. 788 : 2 Pat. L. R. 245 : 26 Bom. L. R. 1117 : 6 Pat. L. T. 1.

—Widow—Re-marriage—Effect of—Succession to daughter.

A Hindu widow who has remarried can succeed to her daughter by her first husband who dies after her remarriage. 29 Bom. 91 foll. (*MacLeod, C.J. and Shah, J.*) BHIKU KRISHNA BADHADE v. KESHAN RAMJI BADHADE. 80 I. C. 512.

—Widow—Succession to holding on death of tenant—Relinquishment of holdings—Reversioner when bound.

A Hindu widow inheriting a tenancy inherits no more than a life interest and the property will devolve on her death on her reversioners. She will be bound by the rules of Hindu law restricting the transfer of property and, as a tenancy is property she will not be able to alienate the holding inherited from her husband except for family necessity. A relinquishment of the holding by the widow amounts to a transfer and it is certainly an alienation. The reversioners have a right to challenge the same. (*Pullan, A.J.C.*) SHEO NANDAN SINGH v. JAI RAM SINGH. L. R. 5 O. 143 : 10 O. & A. L. R. 445 : 11 O. L. J. 608 : 79 I. C. 1022 : 1 O. W. N. 287.

—Widow—Suit by reversioner after widow's death—Onus of proof—Acquisitions.

The onus of proof is on the person who comes into court to claim the property found in the possession of a Hindu widow to show it vested in the husband and if the claim is on the basis of savings from income he has to show the widow intended to make the acquisitions part of the estate. There is no presumption that transactions standing in the name of the wife are the husband's transaction. (*Kinkhede, A.J.C.*) JAIKRISHNA v. SAVITRI. 7 N. L. J. 187 : 79 I. C. 627 : 1924 Nag. 406.

—Widow—Surrender. 75 I. C. 625.

—Widow—Surrender—Acceleration—Necessity for.

The consent of the whole body of reversioners at the date of an alienation by a Hindu widow would afford presumptive evidence of necessity but would not estop the actual reversioners from disputing the alienation unless the consenting reversioners themselves were the actual reversioners at the date when the reversion fell due. A Hindu widow can renounce in favour of the nearest reversioner, if there be only one, or of all

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the reversioners nearest in degree, if more than one, at the moment and the surrender must be of the whole estate. A surrender to one of the reversioners, is not equivalent to a surrender to all the reversioners even if it is for the benefit of all the reversioners. (*Shah, A.C.J. and Kincaid, J.*) MANJAYA SANNAYA v. SHESHGIRI. 26 Bom. L. R. 1267 : 1925 Bom. 129 (2).

—Widow—Surrender—Co-widows—Power of one.

One of two co-widows in enjoyment and possession of the husband's estate cannot unless in conjunction with the other make a valid surrender. (*Krishnan, J.*) BODU ANNA NAIDU v. VARADA JAGGU NAIDU. 79 I. C. 646.

—Widow—Surrender—Essentials of.

For an alienation by a widow to the next reversioner to amount to an acceleration of the estate, she must divest herself of the entire interest in the estate. (*Baker, J.C.*) MT. BHAGVATI BAI v. DADU KHUSHIRAM. 81 I. C. 878 : 1925 Nag. 95.

—Widow—Surrender—Re-grant—Conveyance by reversioner.

Even though there is a release by the entire body of reversioners of all the properties in favour of the widow it cannot amount to a surrender and regrant. (*Kumaraswami Sastri, J.*) NAYAKAMMAL v. MUNUSWAMI MUDALIAR. 20 L. W. 222 : 1924 Mad. 819.

—Widow—Surrender—Relinquishment in favour of one out of several reversioners.

A relinquishment by a Hindu widow in favour of one out of several reversioners during her lifetime cannot be maintained. (*Daniels and Dalal, JJ.*) PRAG NARAIN v. MATHURA PRASAD. 22 A. L. J. 472 : L. R. 5 A 362 : 79 I. C. 575 : 1924 A. 740 (1).

—Widow—Will by—If entitles reversioner to sue for declaration.

If a Hindu widow executes a will purporting to deal with her husband's estate, that by itself does not entitle the reversioner to sue in her life time for a declaration of its invalidity. (*Martineau and Campbell, JJ.*) MT. TEHL KUAR v. AMAR NATH. 79 I. C. 670 : 1925 Lah. 2.

—Widow—Will—Power to make—Rights of legatee to sue for possession.

A person who claims to be a legatee under the will of a Hindu widow bequeathing her husband's property derives no title under the will even to maintain a suit in ejectment against trespassers. (*Hallace, J.*) SRINIVASACHARIAR v. RAGHAVACHARIAR. 46 M. L. J. 560 : 19 L. W. 621 : 79 I. C. 1011 : 1924 Mad. 676.

—Will—Construction of—Bequest to two persons jointly—Tenancy-in-common—Stridhan property, inheritance of—Marriage in approved form—Presumption.

Where a Hindu testator devises by will his property to his widow and the widow of his predeceased son, each of the legatees takes an absolute interest in the property as a tenant in-common and not as a joint tenant. 23 C. 670 P. C. relied upon. 11 M. 258 dissented from. (*Dalal, J.C.*) MUSSAMMAT UMRAO KUAR v. SARAJIT SINGH. 10 O. & A. L. R. 1030 : 1 O. W. N. 579.

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—Will—Construction—Bequest to wife and daughter with right of survivorship to each other—If a male is born to my daughter it will inherit real property given to my wife and daughter—Estates taken by wife and daughter and daughter's sons—Nature of—Only son of daughter born after testator's death and dying before daughter—Effect of—Validity of bequest to daughter's sons—Madras Act I of 1914—Applicability—Effect.

The will of a Hindu provided that the lands should be managed by his brother and half the income should be enjoyed by him in his own right. The testator gave also one house to his brother. Another house and the other half of his lands were given "to his (testator's) wife and daughter with the right of survivorship to each other, i.e., wife and daughter." Lower down the testator provided, "If my daughter does not beget male issue in her life-time half the land and the house given to my wife and daughter by this will shall after their lives go to my brother and his male heirs. If a male is born to my daughter it will inherit the real property given to my wife and daughter."

The testator died in 1877; a son was born to the daughter in 1881 and the boy died after living for a day; the testator's widow died in 1903, and his daughter in 1918;

On a construction of the will, *held* by Ramesam, J. (1) that it provided for an estate during the joint lives of the wife and daughter, to be taken by them as tenants-in-common with a remainder in favour of each or her life after the death of the other; (2) that in the events that happened, after the death of the testator's widow the daughter took an estate for life; (3) that the daughter's sons were included to be devisees under the will and not to succeed as on an intestacy; (4) that the will gave a contingent remainder to the daughter's sons, such contingent remainder being converted into a vested remainder after birth of the first daughter's son subject to its diminution as the number of daughter's sons was augmented by further births; and (5) that the disposition in favour of the daughter's sons was in the event that happened, void by the rule in the *Fagore Case* and was not validated by Madras Act I of 1914.

Held by Jackson, J.—The will made the male born to the testator's daughter heir to the real property given to his wife and daughter after their death and with an intention that the property should vest in him at birth and come to him by survivorship.

If however the alternative and perfectly reasonable construction is adopted, so that the property vested in the male issue from the moment of birth the disposition is invalid and cannot be validated by the retrospective operation of Madras Act I of 1914. (Applicability of Madras Act I of 1914. (*Ramesam and Jackson, JJ.*) T. S. SIVARAMA Aiyar v. T. S. GOPALA KRISHNA CHETTIAR

82 I. C. 1044; 1925 Mad. 88; 47 M. L. J. 337.

—Will—Construction—Father—Will disposing of properties in favour of sons subject to conditions—Defeasance clause—Compromise giving absolute estate—Effect of.

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A Hindu father possessed of considerable ancestral and self-acquired, properties bequeathed them to his three sons in three lots and directed that if the sons desired to partition the property each should take one lot. It was also provided in the will that if any one of the sons was sonless, he should adopt only his brother's son, failing which his share would pass to the other members as in the case of survivorship. After the death of the father, the eldest son sued for partition which suit was compromised. Though the compromise did not refer to the will it adopted most of its provisions and allotted one lot absolutely to each of the sons ignoring the limitation laid down by the other. This was in 1903. None of the three sons had male issue. In 1920 one of the sons died leaving his widow and daughter and a brother surviving him. The brother sued the widow to recover that share of his father's self-acquisition which had fallen to the deceased alleging that as regards that property the father's will was operative and under the conditions in the will the surviving brother was entitled to that share. *Held*, that there was a grant of an absolute estate to each of the sons under their father's will subject to defeasance on the happening of a contingency namely dying sonless and without adopting a brother's son; that there being no brother's son in existence the condition was impossible of performance and could not be given effect to; and that the absolute partition among the brothers estopped the plaintiff from now going behind it (*Lindsay and Kanhaiya Lal, JJ.*) PHULWANTI KUNWAR v. JANESHAH DAS. 22 A. L. J. 521; 46 A. 575; L. R. 5 A. 785; 1924 A. 625.

—Will—Construction—Gift to daughters in definite shares—Right of survivorship.

Where a Hindu father gifts his properties to his daughters in definite shares there is no longer any right of survivorship among them and on the death of one her heirs take. (*Campbell, J.*) TASADDUQ HUSSAIN v. RAM KISHEN.

79 I. C. 86; 1925 Lah. 59.

—Will—Construction—Gift to grand daughter—Absolute estate

A Hindu testator made a gift of his properties to his son's daughter. The operative words of the will were,—"you shall enjoy after my death all the property moveable and immoveable.—You can enjoy all the said property attending to my obsequies after my death and settling the matters of debts, etc., incurred by me." *Held*, that the donee took an absolute estate in the property gifted to her. The words used in the will were of sufficient amplitude to convey the fullest rights of ownership. (*Phillips and Odgers, JJ.*) YELLAPPA v. GOLLESWAMI.

20 L. W. 579; 82 I. C. 490; (1924) M. W. N. 895; 1924 Mad. 855.

—Will—Gift to unborn person—Power of appointment—Rule in the *Fagore Case* MATHURA NATH MUKHERJEE v. LAKHI NARAIN GANGULY.

1924 Cal. 68.

—Will—Construction—Gift to widow—Gift over—Vested interest.

A Hindu testator died leaving a will under which his widow was to inherit the estate and

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after her death a cousin of the testator. The Cousin predeceased the widow and the question arose whether the next reversioners of the testator or the heirs of the cousin were entitled to the estate on the death of the widow. *Held* that the cousin took merely a contingent estate and he not having survived the widow, the reversioners of the testator were entitled to take on the death of the widow. (*Patten, A. J. C.*) JAGMOHAN SINGH v. SHEO MANGAL SINGH.

11 O. L. J. 729 : 82 I. C. 583 : 1925 Oudh 127 : 10 O. & L. J. 843.

Will—Construction—Gift to wife—Gift over.

A Hindu testator made a will by which he gifted the property to his wife Lakshmi, and later on, in the second clause after setting out that it was his self acquired property he stated that he made the gift "in Order that you may enjoy myself-acquired property, as you are my wife and as you have no male issue". Later on, he once more recited that he had gifted away the house worth Rs. 1,000 and provided that out of the rent she was to pay Rs. 5 every month to a temple and, utilise the remainder for her maintenance. Then came the following clause in the will. "After your life time you shall leave the said manai, house and the document relating thereto to Rajammal, the eldest daughter of my second brother Samarapuri Chetty. That lady shall also do exactly what is done by the said Lakshmi Ammal. The rest of my heirs shall have no right, title or interest in the said property, which you shall hold and enjoy from this day getting certificate, etc.; for the property, in your name." *Held*, that there was a clean gift over to Rajammal absolutely, on the termination of the life interest of Lakshmi Rajammal took, vested remainder in the property and not a remainder contingent on her surviving Lakshmi. (*Coutts Trotter and Ramesam, JJ.*) RATNASABAPATHY CHETTY v. LAKSHMI AMMAL.

20 L. W. 243 : (1924) M. W. N. 593 : 80 I. C. 618 : 1924 Mad. 811

Will—Construction—Vesting—Life estate to daughter with remainder to her son—Vesting of—Estate in son—His surviving his mother if a condition precedent.

By his will a Hindu gave certain properties to his daughters, the material clause of the will being : "These (meaning the daughters) have no power to make sale, gift, mortgage, etc., of these two houses and grounds. After these their issue shall use and enjoy them from son to grandson and so on in succession so long as the sun and moon may last, with power of gift, mortgage, exchange and sale and they shall every year without default perform the aforesaid ceremonies, etc." *Held*, on the construction of the will, that a son of one of the daughters who had predeceased his mother took nothing under the will. Under the will it was a condition precedent to any estate vesting in the daughter's son that he should survive his mother. (*Coutts Trotter, C.J. and Ramesam, JJ.*) PERIYANAYAKI AMMAL v. RATHNAVELU MUDALIAR.

(1924) M. W. N. 516 : 20 L. W. 449 : 1925 Mad. 61 : 47 M. L. J. 310.

HINDU WIDOW'S REMARRIAGE ACT.

Will—Construction—Woman—Bequest to—Estate conveyed—Presumption—"Enjoy" imports limited estate—Bequest by person having absolute estate—Estate conveyed—No words limiting estate given—Effect.

The fact that a legatee is a Hindu woman does not raise any presumption that the estate given to her is only a life-estate. The question whether an absolute estate or a limited estate only was intended to be given must be decided on the language of the will taken as a whole. The will of a Hindu, who had an absolute estate in the properties purporting to be bequeathed thereby stated : "The following are the particulars as to how each of the legatees should enjoy after my life time." It then set out the list of properties which the testator desired his elder sister (P) should enjoy, and then of the properties which he desired his adopted sisters, A and V and her daughter, S, should enjoy. The testator made no provision whatsoever for any gift over or any remainder passing to any one. There were no words whatsoever to restrict the scope of the estate given to a life estate. There were, however, also no words authorising the legatees to alienate the property.

Held, on a construction of the will, that it gave whatever rights the testator had in properties to legatees, and that was an absolute estate. The word "enjoy" in the will means "enjoy the benefit of the ownership of property" and not merely the income of the property. When a person who has got an absolute estate makes a disposition of his properties, unless there is something to indicate that he was limiting, the estate given by him in some manner, it is right to take it that he passes the whole of his estate by his gift. (*Krishnan and Odgers, JJ.*) RAJAMANICKAM CHETTIAR v. MANICKAM CHETTIAR.

20 L. W. 672 : 1925 Mad. 254 : 47 M. L. J. 723.

Will—If requires registration—Dharma—Vagueness.

A Hindu will need not be registered, and the terms of a registered will can be varied by an unregistered codicil.

A bequest for dharma is void for uncertainty. (*Bilaram, A. J. C.*) SHAMBAI v. GOVERDHAN.

78 I. C. 249.

Will—Validity of bequest for Dharmadakam.

A bequest of properties for dharmadakam or in charity is void for uncertainty. Case-law reviewed. (*Aston, A. J. C.*) FAKIRO RAMJI v. VALABDAS GANGARAM.

76 I. C. 209.

HINDU WIDOW'S REMARRIAGE ACT (XV OF 1856)—If overrides old customs of Punjab.

The Hindu Widow's Remarriage Act does not override the customs prevailing in Punjab as regards non forfeiture of widow's rights over her deceased husband's property by virtue of S. 7 of Act 4 of 1872 (Punjab Laws Act) (*Kennedy, J. C. and Raymond, A. J. C.*) SANT SINGH v. RARIBAI.

1924 S. 17.

Scope of. MT. PALT v. NIRDHAN GOPE.

1924 P. 233.

HINDU WIDOW'S REMARRIAGE ACT, S. 1.

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———(XIV OF 1856), S. 1—*Re-marriage of Hindu widow—Right to succeed to property of son by first husband.*

A remarried Hindu widow succeeds to the property of her son by her first husband, whether or not the Hindu Widow's Remarriage Act applies. 11 W. R. 52 Foll. (*Woodroffe and Ghosh, JJ.*) JAMINI KUMAR SEAL v. THAKUR DHAN BAIKSHAN.

79 I. C. 1048 : 39 C. L. J. 88.

———S. 2—*Gift by father-in-law to widowed daughter-in-law—Re-marriage—Effect on gift.*

Where a Hindu father-in-law makes a gift of immovable property to his widowed daughter-in-law empowering her to enjoy the property during her life time and she subsequently remarries, she does not thereby forfeit her rights to the property. There was no reason for implying that the property was given to her for use during her widowhood. As re-marriage of a widow is an exceptional event, it is not likely that the donor would have contemplated his daughter-in-law re-marrying. As the immovable property was gifted to her by her father-in-law and was not obtained in the manner referred to in S. 2 of the Hindu Widows' Remarriage Act, the interest was not determined under that section on re-marriage. (*Spencer, O. C. J. and Kumaraswami Sastri, J.*) CHINTALAPALLI SETHA SASTRULU v. KOVIVENKAMMA

(1924) M. W. N. 456 : 1924 Mad. 600 : 34 M. L. T. (H. C.) 168 : 19 L. W. 510 : 47 M. L. J. 1.

HIRE-PURCHASE—Contract of sale—Distinction between—Rights of vendor.

The form of contract known as hire-purchase agreement is not one that originated in this country. It is clearly a form of agreement which originated in England and has been created by those engaged in the trade or particular articles. In the case of a hire-purchase agreement proper, the hirer of a chattel has only an option to purchase the goods and he is under no obligation to purchase. Notwithstanding the fact that the parties speak of a hire purchase agreement, if it contains an obligation to pay the purchase money it is an agreement to buy. A hirer of chattels under a hiring agreement which gives him an option to purchase them upon payment of all the agreed instalments of rent, but imposes upon him no obligation to do so is not the owner of the chattels. *Held* on the construction of an agreement relating to certain motor lorries that it was an agreement to sell and not a hire-purchase agreement that the property in the motor lorries had passed to the purchaser, and that the remedy of the vendor was to sue for the balance of the price. (*Marten, J.*) CECIL COLE v. NANA-LAL MORARJ DANE.

26 Bom. L. R. 880 : 1925 B. 18

INAM—Enfranchisement—Statement before Inam Commissioner—Value of—Inam Register entitled to greater weight. See C. P. CODE, S. 92.

46 M. L. J. 245.

———*Grant of—Rights of grantee to minerals—Grant by Government.*

For services rendered by the ancestors of the respondent as shipbuilders, the East India Company in the year 1783 granted certain lands in the

vicinity of Bombay yielding annually 40 Mooras of Toka-Batty. Under the terms of the grant the grantees were placed in possession of the Batty grounds in the district of Parel with their foras and perteneas of the said grant which will yield the above quantity of Toka Batty and they were to be kept in possession of the same without molestation. The Board of Directors of the East India Company in 1795 confirmed the said grant "with a due proportion of foras and perteneas to their family and their descendants" In certain land acquisition proceedings the question arose whether the representatives of the original grantees who had opened quarries on the land and quarried stones right up to the date of the acquisition were entitled to compensation in respect of their subsoil rights. *Held*, that the grant conveyed to the grantee not merely the produce of the land but also the soil including the rights to mines and minerals in the subsoil and that the respondents were entitled to compensation on that footing. (*Shah, A. C. J. and Fawcett, J.*) SECRETARY OF STATE FOR INDIA v. SHANTARAM NARAYAN.

26 Bom. L. R. 847 : 1925 Bom. 12.

———*Grant—Presumption—Claim of kudivaram by tenant—Burden of proof.*

Where the kudivaram is found to be in the holder of a service inam, the burden lies on the tenant to prove that his holding is other than that of a tenant from year to year, and if he is not able to establish this, he is liable to ejectment on proof of a proper notice to quit. A permanent lease of inam service land no more diverts the land than does an ordinary tenancy from year to year. 33 M. 340, 43 M. 567 : 7 L. W. 194 : 41 M. 749 : 43 M. 165 Ref. (*Krishnan and Venkatasubba Rao, JJ.*) VEERASAMI MUDALI v. PALANIPAPPAN.

34 M. L. T. (H. C.) 175 : 19 L. W. 513 : (1924) M. W. N. 466 : 1924 Mad. 626 : 46 M. L. J. 515.

———*Grant by Government—Saranjam grant—Resumption by Government—Rights of mirasidars—Occupancy rights of Khatedar—Effect on.*

In any alienated village the Inamdar or saranjamdar has full right of disposal with reference to holdings which are either relinquished or forfeited for any valid reason. Whenever there is any relinquishment on any ground or forfeiture of land for non-payment of the royal share of the revenue, the land would be at the disposal of the Saranjamdar and he may dispose of it by giving the mirasi or the occupancy right to any third person or by taking it up himself. It is also possible that the Mirasi or occupancy right would be acquired for consideration. Where there are no heirs, the saranjamdar cannot take possession for whether it be a saranjam village or inam village the right in such a case would belong to the Crown and the Crown only in the absence of any statutory provision to the contrary. A saranjamdar who takes possession of any mirasi or occupancy holding in this manner would hold it wrongfully and adversely to the Crown. Where there is a grant of the royal share of the revenue and the Government resume the inam, they do not acquire the mirasi or occupancy right which is a heritable and transferable right in holdings of which the saranjamdar has obtained possession

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by surrender or forfeiture. 28 B. 276 : 50 I. A. 49 : 10 B. 112 : 11 B. 235 : 41 B. 408 Rel. (*Shah, A. C. J. and Fawcett, J.*) SECRETARY OF STATE FOR INDIA *v.* GOJIBAI SHIVDEO RAO.

26 Bom. L. R. 1173.

——— *Service inam—Enfranchisement and issue of a title-deed—Creation of a new title in favour of grantee—Exclusive possession against grantee prior to enfranchisement—Effect of—Adverse possession.*

The enfranchisement of a service inam and the issue of an inam title-deed create a new title in the grantee.

Where 1st defendant was in exclusive possession of the service inam lands from 1905 and the inam was enfranchised in 1911 and a title deed was then issued in favour of the plaintiff, the 1st defendant and others, and the 1st defendant continued even after in exclusive possession, the period of exclusive possession from 1905 to 1911 will not count as adverse possession against the plaintiff as regards the title conferred by the inam title-deed of 1911, provided that the Government's right to resume the lands in 1911 was not barred. 14 M. L. J. 438 : 38 M. L. J. 320 Rel. (*Wallace, J.*) MANTRIPRAGADA GOURI KANTAM *v.* MANTRIPRAGADA RAMAMURTHY.

80 I. C. 557 :

34 M. L. T. (H. C.) 234 : 19 L. W. 663 :

1924 Mad. 783 : (1924) M. W. N. 565 :

46 M. L. J. 482.

——— *Service inam—Enfranchisement in the name of one member of Hindu family—Effect.*

The enfranchisement of service inam lands in the name of one member alone of a joint Hindu family makes it his absolute property and not joint family property (*Ayling and Odgers, JJ.*) MAYANDI SERVAI *v.* SANTHANAM SERVAI.

20 L. W. 813 : 81 I. C. 1031 : 1925 Mad. 303.

INCOME TAX ACT (I OF 1886), S. 39—SUPER-TAX ACT, S. 8—Levy of super tax after the year of assessment is closed—Suit for refund—Maintainability.

Where supertax is charged and collected from a person after the year of assessment is closed, it is neither "charged, recovered and paid" in the year of assessment and a suit to declare its illegality is not barred under S. 39, Income-Tax Act read along with S. 8 of the Super tax Act. (*Raymond and Kennedy, A. J. Cs.*) SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* SETH KHEMCHAND THAOOMAL.

78 I. C. 438 : 1925 S. 67.

——— (VII OF 1918)—*Applicability—Notice issued under—New Act coming into force—Effect.*

Where the proceedings, such as issue of notice, etc., were taken under the Income Tax Act of 1918 the subsequent coming into force of Act XI of 1922 does not make the latter applicable. (*Baker, J. C.*) ARJUN KHEMJI & Co., *In re.*

80 I. C. 362.

——— *Unregistered firm—Loss—If can be deducted from income of partner.*

Under Act VII of 1918, the share of a partner's loss in an unregistered firm of which he is a partner can be deducted from his other income for purposes of income tax. (*Baker, J. C.*) ARJUN KHEMJI & Co., *In re.*

80 I. C. 362.

INCOME TAX ACT, S. 2.

——— S. 3 (4)—*Partnership—Temple as partner—Liability to tax.*

Where a temple has a share in a partnership the income derived from the partnership cannot be said to be income derived from property held under trust for a religious or charitable purpose and hence is not exempt from taxation. (*Walsh, A. C. J. and Ryves, J.*) LATCHMAN DASS NARAIN DASS OF CANNPORE, *In the matter of.*

22 A. L. J. 913 : L. R. 5 A. 640 : 1925 A. 115.

——— (VIII OF 1918), S. 2, Cls. 6 and 7—*Machinery sold as not obsolete—Loss sustained by sale—Deduction from annual profits—Assessee's right to—Statute—Punctuation marks if and when part of.*

An assessee, who carried on various businesses two of which consisted of rice mills, sold those mills, and wished to bring into account the difference between the purchase price of the machinery at those mills and the sale price, giving credit for the amounts if any, allowed to him in previous years for depreciation. That Commissioner found as a fact that the machinery was sold as not obsolete. On a question referred by him whether the assessee was entitled to the deduction from the annual profits of the loss sustained by the sale *Held, that*, on the true construction of S. 2, Cls. (vi) and (vii) of the Income-Tax Act of 1918, the assessee was not entitled to the deduction claimed.

Where a statute has been punctuated, the punctuation marks must be taken as part of the statute. (*Schwabe, C. J. and Wallace, J.*) THE SECRETARY TO THE BOARD OF REVENUE, MADRAS *v.* RAMANATHAN CHETTIAR.

19 L. W. 34 : (1924) M. W. N. 142 :

33 M. L. T. (H. C.) 252 : 1924 Mad. 455 :

79 I. C. 608 : 46 M. L. J. 42.

——— S. 12 (1)—*Losses incurred as member of firm—if a deduction for purposes of calculating taxable income.*

Losses suffered by an assessee as a member of a company or firm are to be taken into account in fixing the amount of his taxable income. (*Baker, O. J. C. and Hallifax, A. J. C.*) SETH BALKISHAN NATHANI *v.* COMMISSIONER OF INCOME-TAX.

1924 Nag. 153.

——— S. 2—*Registered Firm—Assessment—Mode of—Registration in the year.*

1924 A. 137 : 75 I. C. 339 : 46 A. 1.

——— (XI OF 1922), Ss. 2, 4 (3) 6 and 66—*Agricultural income—Pasturage—Income of permanently settled estate—Fisheries—Thaljat dues—Liability to tax—Difference of opinion among members of a division bench to whom case is referred—Procedure—Letters Patent (Cal.). cl. 36.*

Income derived from pasturages is agricultural income and cannot be assessed to income tax. But income derived from fisheries and from thaljat (i. e.) land used for storing timber, is not "agricultural income" or "income derived from land used for agricultural purposes" and are therefore not exempt from tax as such.

(*Per Rankin, J. (Page, J. dissenting.)*)

Income derived from non-agricultural sources, e.g., fishery and thaljat, by the owner of a

INCOME TAX, ACT S. 2.

permanently settled estate from the lands in the estate, is not exempt from income tax by the operation of Regn. I of 1793.

Where there is a difference of opinion among the members of a Division Bench by whom a case is tried under S. 66 of the Income-Tax Act is decided, cl. 36 of the Letters Patent applies and the opinion of the senior Judge will prevail. S. 98, C. P. C., has no application to the case. 50 I. A. 212; 45 B. 718 *Ret. (Runtia and Page, JJ)* EMPEROR *v.* PROBHAT CHANDRA BARNIA.

51 Cal. 504; 1924 Cal. 638.

—Ss. 2 (15) 16 and 55—Company—Profits—No declaration of dividend—Profits distributed as bonus shares—Super tax—Liability of shareholders.

Where a limited company instead of distributing its profits as dividend among the shareholders passed a resolution to the effect that the undivided profits should be distributed to the shareholders in the form of fully paid bonus shares and the shareholders had no option to take the profits in any other form. *Held*, that such a transaction did not result in any income, profits, or gains to the shareholders so as to make them liable for super-tax. *Inland Revenue Commissioners v. Birt* (1920) 1 K. B. D. 114; *Bouch v. Sproule* (1887) A. C. 385 *fol.* *Swam Brewery, Ltd. v. The King*, (1914) A. C. 231 *dist.* (*Robinson, C. J. Heald and Beasley, JJ.*) STEEL BROS. & CO., LTD. *v.* GOVERNMENT. 2 Rang. 211; 82 I. C. 665; 1924 R. 337.

—Ss. 2 (15), 16 and 55—Supertax—Partner of firm—Increase of share at time of assessment—Total income—What is.

Supertax being calculated on the income of the previous year, the fact that the assessee became entitled to a larger share in a firm at the time of assessment does not enable the tax being calculated on such increased share.

The total income for the purpose of S. 16 means the total amount of income, profits or gains from all sources including (1) certain receipts on which an assessee is exempt from paying income-tax and (2) the amount of tax deducted at the source by companies when paying dividends. (*Macleod, C. J. and Shah, J.*) THE COMMISSIONER OF INCOME-TAX *v.* MELLOR.

26 Bom. L. R. 366; 81 I. C. 489; 48 Bom. 504; 1924 Bom. 361.

—S. 3—Supertax—Liability for—Undivided profits—Capitalisation of—Bonus shares newly issued on basis of—Super-tax on value of—Shareholders' liability for.

A company called the Deccan Sugar and Abkari Co., Ltd. was incorporated in 1897 with a share capital of 10 lakhs in shares of Rs. 500 face value each. In 1908 the capital was increased to 22 lakhs by adding 7,000 preference shares of the A Class of Rs. 100 face value each and 5,000 preference shares of the B Class also of Rs. 100 face value each. In 1908 in pursuance of a resolution passed in June the ordinary share capital was reduced to Rs. 1,66,672, thus making the total capital of the Company something over 13 lakhs. Messrs. Binny & Co., Ltd., held 200 ordinary shares of Rs. 125 each in this Company. In

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1921 the Deccan and Co., had on its books a surplus accumulation profits undistributed practically 5 lakhs of rupees. In July 1921, by a special Resolution which was confirmed in the following month, the Articles of the Company, were amended, one of the first amendments enabling the Company, by a special Resolution, to subdivide or consolidate its shares or any of them; the other was a new Article by which the Company by a special Resolution might at any time take to itself the power to capitalise undivided profits or reserve fund. In pursuance of the new Article the Company capitalised the undivided profits. Each holder of share of Rs. 124 became the holder of three additional shares. The capital of the Company was increased by 1,328 shares of Rs. 375 each. The result was that Messrs. Binny & Co. for 200 shares of Rs. 125 each got 200 shares of Rs. 500 each and in 1921, scrip carrying out that change of position was issued. On a question arising whether the issue of new shares to the shareholders representing their share in the accumulated surplus was taxable as income, *Held*, that Messrs. Binny & Co. was not liable to pay super-tax on the value of the shares newly issued by the Deccan Sugar and Abkari Co., Ltd., in the year 1921. (*Coutts Trotter, C. J. and Ramesam, J.*) THE COMMISSIONER OF INCOME TAX, MADRAS *v.* MESSRS. BINNY & CO., LTD.

(1924) M. W. N. 531; 20 L. W. 611; 1924 Mad. 802; 82 I. C. 17; 47 Mad. 837; 47 M. L. J. 242.

—Ss. 4, Sub-S. (1) and 66—British subject—Receipt of money in Native state—Money credited with bank.

The assessee was a British Indian subject. He took service in the Nizams Dominions and had an account with the Hyderabad branch of the Imperial Bank of India. A sum of one lakh sixty thousand and odd rupees was paid to the assessee into the Hyderabad branch of the Imperial Bank. From there the amount was transferred to the Patna branch of the Imperial Bank where the assessee was residing. The Commissioner of Income-tax at Patna sought to assess him to income-tax in respect of the one lakh sixty thousand and odd rupees. *Held* that the receipt of the income first took place in Hyderabad outside British India and it was not assessable to income-tax. 3 Lah. 349; 46 M. 706 *fol.* (*Miller, C. J. and Mullick, J.*) SAYYID ALI IMAM *v.* EMPEROR.

1924 P. H. C. G. 349.

—S. 4—Finance Act, Sch. III, Part 2—Joint family property—Impartible estate—Income of.

The Finance Act, Sch. III, Part 2, 1922, contemplates the larger deduction for purposes of super-tax only in a case where the income is that of the undivided family in which they are all jointly interested and not in the case of an impartible estate where the income is the sole property of the holder for the time being. Once it is admitted that the estate is impartible, it must be assumed that the members of the joint family have none of the rights of co-parcenership except a right of survivorship by survivorship limited by the rule of impartibility which allows only one member at a time to hold. They cannot demand partition or assert any right to any individual share in the estate nor can they restrain alienations. The

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income of the estate is that of the incumbent for the time being nor does the fact that he is bound to maintain his sons entitle him to treat the income as that of the undivided family. (*Miller, C. J. and Foster, J.*) SRI SRI KAJA SHIVA PRASAD SINGH v. EMPEROR. 1924 P.H.C.C. 234 :

5 Pat. L. T. 497 : 82 I. C. 653 :
2 Pat. L. R. (Cr.) 233 : 1924 P. 679.

—Ss. 4 and 42 (1)—*Liability to income-tax—Foreign Company—Business connection.*

The assessee was an incorporated company with its head-quarters at New York in the United States. The company was incorporated in the United States of America. The company had a branch office in Calcutta to buy gum, shellac and other Indian products and a factory in the United Provinces. No sales were conducted in India by the company : their transactions were limited to the purchase of shellac and other goods, some of which were purchased on account of a certain Gramophone Company which paid the company a fixed percentage on the purchase plus expense, while the balance was sold in the open market. It was admitted that no part of the company's income accrued, arose or was received in British India, but it was contended that the income arising or accruing to the company out of British India through or from its business connection in British India should be deemed to be the income accruing or arising within British India. Held, that the company was liable to income-tax and supertax under S. 42 read with Ss. 4 and 6 of the Income-tax Act, 1922, 46 M. 360 not foll. (1896) A. C. 325. (1922) 1 A. C. 417 distinguished. So far as the factory was concerned the company were liable to be taxed in the respect of the profits of their manufacturing branch. The English Income Tax Acts lay down territorial limit. In Acts VII of 1918 and XI of 1922 the Indian legislature appears to have gone beyond that limit. Having regard to the essential difference in language between the English and Indian Acts upon the point under consideration in English cases are of no authority in India.

Per *Mukerjee, J.*—The income-tax Act of 1918 effects a radical change in the scheme and scope of operation of this branch of the law. The Act of 1918 proposes to be a consolidating and amending statute ; on any point specifically dealt with in the Act the law is to be ascertained by interpreting the language used in the statute in its natural meaning, uninfluenced by considerations derived from the previous state of the law. 22 C. 788 : 23 C. 563 Ref. (*Chatterjee, Mukerjee and Cholsner, JJ.*) ROGERS PRATT SHELLAC CO. v. SECRETARY OF STATE FOR INDIA. 40 C. L. J. 110 :

28 C. W. N. 1074 : 1923 Cal. 34.

—S. 4—*Royalty—Payment of lump sum—Mining lease—Liability to tax.*

Salami paid at the inception of a mining lease for 999 years once for all and not of a recurring kind represents the purchase price of an out and out sale of the property and the sum so received by the lessor is not income within the meaning of the Income Tax Act. But if the lease reserved a rent or royalty payable periodically it

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is income. (*Miller, C. J. and Foster, J.*) SRI SRI RAJA SHWA PRASAD SINGH v. EMPEROR.

1924 P. H. C. C. 234 : 5 Pat. L. T. 497 :
82 I. C. 653 : 2 Pat. L. R. (Cr.) 233 : 1924 P. 679.

—S. 4, Sub. S. (3) (viii)—*Agricultural income—Income from fishery, hat and ghatlagi—Taxability—Permanent Settlement Regulation (I of 1793)—Effect of.*

Income derived from jalkar, hats and ghatlagi is not agricultural income and is not exempt from income-tax under S. 4, Sub. S. (3) (viii) of the Income Tax Act.

Per *Dawson Miller, C. J. (Mullick, J. contra.)*—Where income from certain sources was taken into account in fixing the Jama of a permanently-settled estate under the Permanent Settlement Regulation I of 1793, such income is not liable to pay income tax, for the permanent settlement exempted the zemindar from all further taxation on such sources and there is nothing in the Income Tax Act to take away that exemption. 45 M. 518 : (1916) 2 H. C. 429 Rel. (*Miller, C. J. and Mullick, J.*) MAHARAJADHIRAJ OF DHARBANGA v. COMMISSIONER OF INCOME-TAX.

3 Pat. 470 : 1924 P. H. C. C. 69 : 78 I. C. 783 :
2 Pat. L. R. 25 (Cr.) :

5 Pat. L. J. 459 : 1924 P. 474.

—Ss. 6, 10 and 24—*Assessee—Set off—Right of—Trade in individual capacity—Trade as member of unregistered firm—Loss incurred in latter—Set off against profits made in former—Right of—S. 24 (1) and (2)—Applicability and effect.*

A person who carries on two different trades, one individually and the other as a member of an unregistered firm, is entitled to set-off (for income-tax purposes) the loss incurred by him in respect of the partnership trade against the profits made by him in his individual capacity.

Though the practice is to assess firms as such each partner in a firm is an assessee in respect of the profits and gains of the business which he carries on in partnership.

The word "any" in S. 10 of the Income Tax Act means "each and every" ; and an assessee is therefore entitled to set-off in one business against losses in another. For this purpose there is no distinction between what an assessee earns alone and what he earns in partnership.

A partnership is, for income-tax purposes, not an entity known to the law ; and there is, for this purpose, no distinction between registered and unregistered firms. (*Schwabe, C. J. and Waller, J.*) THE COMMISSIONER OF INCOME-TAX, MADRAS v. M. AR. AR. ARUNACHALAM CHETTIAR.

19 L. W. 125 : (1924) M. W. N. 326 :
34 M. L. T. (H.C.) 332 : 1924 Mad. 474 :
47 Mad. 660 : 77 I. C. 772 : 46 M. L. J. 68.

—S. 10, Cl. (2), Sub-Cls. (6) and (7)—*Business profits—Assessment based on income of the previous year—Deduction for obsolete machinery.*

An assessee who had been allowed deduction of a certain amount for obsolescence of machinery in calculating his profits for the year 1921-1922 is entitled, in making his returns for the year 1922-1923 on the basis of his income-profits and gains for the year ending 30th June 1921, to deduct

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the allowance for obsolescence under S. 10 (2) (7) of the Income-Tax Act, 1922. (*MacLeod, C. J. and Shah, J.*) THE RAJA GOKALDAS MILLS, LTD. In re. 48 Bom. 389 : 26 Bom. L. R. 312 : 80 I. C. 282 : 1924 Bom. 346.

—S. 10 (2) (viii) and (xix)—*Business profits—Deductions—Colliery—Cess on output of coal or coke—Local rates and cesses—Bihar and Orissa Mining Settlement Act, 1920, S. 23 (3)—Jharia Water Supply Act, 1914, S. 45.*

The assessee, a colliery company, paid a cess under the Jharia Water Supply Act and a tax under the Mines Board of Health Act and claimed that those payments were business expenditure or taxes within the meaning of S. 10 (viii) of the Income-Tax Act which should be deducted in calculating profits for the purpose of assessment to income tax. Held, that these items of expenditure did not fall under S. 10 (viii) but could be deducted under cl. (ix) in arriving at the profits of the colliery on which income tax was payable. From a commercial standpoint these rates imposed upon the proprietor of the business would be deducted in the company's balance sheet before any profits could be shown as the profits of the business. (*Miller, C. J. and Jwala Prasad, J.*) SELECTED COAL COMPANY OF MANBHUM in the matter of. 3 Pat. 295 : 1924 P. 670.

—S. 10 (2) (iii)—*Business profits—Deductions—Interest taken by partners.*

46 A. I. 75 I. C. 339 : 1924 A. 137.

—S. 10, Sub-S. 2, cl. (9)—*Company—Rights—Business allowance—Tax on Companies—Madras District Municipalities Act (V of 1920), S. 92.*

Tax on companies levied under S. 92 of the Madras District Municipalities Act (V of 1920) can be deducted as a business allowance under S. 10, Sub-S. (2), cl. 9 of the Indian Income Tax Act in calculating the profits of a Company for purposes of income tax. *Smith v. Lion Brewery Co.* (1911) A. C. 150, *Usher's Wiltshire Brewery, Ltd. v. Bruce*, (1915) A. C. 433 Relied on. (*Coutts Trotter, C. J. and Wallace, J.*) THE COMMISSIONER OF INCOME TAX, MADRAS v. THE NEDUNGADI BANK, LTD., CALCUT. 20 L. W. 87 : 1924 M. W. N. 580 : 81 I. C. 454 :

1924 Mad. 693 : 35 M. L. T. (H. C.) 53 : 47 Mad. 667 : 47 M. L. J. 160.

—ACT (XI OF 1922), S. 10 (2)—*Obsolete—What is—Absolute unfitness of machinery.*

The word "obsolete" in S. 10 (2) must be taken to include cases of unfitness from whatever cause. The question whether the total destruction of machinery which renders it unfit for the purpose it was originally intended for, entitles the owner to claim deduction from income tax is a question on which a reference can be made under S. 66 (*Kumarasamy Sastry, J.*) RATNA SINGH MOTOR SERVICE, In re 20 L. W. 859 : 1925 Mad. 157.

—S. 14—*Income derived as a member of a Hindu undivided family—Assessment along with personal income—Liability. See INCOME TAX ACT, S. 66.* 2 Pat. L. R. 122 (Cr.).

—S. 14—*Taxable income—Income derived by assessee as a member of a Joint family.*

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Income personally derived by an assessee as a member of a Joint family is not taxable under S. 14 of the Act. (*Miller, C. J. and Foster, J.*) SACHITANANDA SINHA v. EMPEROR.

2 Pat. L. R. 180 Cr. : 5 Pat. L. T. 609 : 3 Pat. 664 : 1924 P. 644.

—S. 23 (2)—*Assessment without notice—Case for reference.*

An assessee whose return is disbelieved and who is summarily taxed without being given notice under S. 23 (2) can apply to the High Court to have a case stated under S. 66 (2) as the question raised challenges the very foundation of the assessment. (*Suhravardhy and Chakravartty, J.J.*) NIRMAL KUMAR SINGH NOWALAKSHA v. COMMISSIONER OF INCOME TAX. 29 C. W. N. 28 : 1925 Cal. 173.

—Ss. 27 and 66—*Ex parte assessment—Non-appearance—Sufficient cause.*

It would be for the income-tax officer to decide whether on the particular facts of the case, sufficient cause has been shown by the assessee for not appearing in time and as to whether his failure to appear and produce his accounts in time is justified by sufficient cause. Even if the High Court thinks that the action of the income-tax officer is arbitrary and harsh and that the assessment had been made *ex parte* without sufficient materials or justifications, it cannot interfere under S. 66 of the Income Tax Act. (*Kumaraswami Sastri, J.*) SIVA PRATAB BHATTANU v. THE COMMISSIONER OF INCOME TAX. 20 L. W. 395 : 1924 M. W. N. 785 : 1924 Mad. 880.

—S. 33—*Review—Supplemental demand—Notice to assessee.*

Where a commissioner reviews his decision under S. 33 of the Income Tax Act and issues a supplemental demand he must give a sufficient and reasonable opportunity to the assessee to be heard. (*Miller, C. J. and Foster, J.*) SACHITANANDA SINHA v. EMPEROR. 2 Pat. L. R. 180 (Cr.) : 5 Pat. L. T. 609 : 3 Pat. 664 : 1924 P. 644.

—Ss. 34 and 68—*Amending Act of 1923—Effect of—Assessment to supertax in 1922-1923 for income of 1921-1922—Legality of.*

Assessments to supertax for 1921-1922 on the income of 1921-1922 could be made in 1922-1923 under the heading of adjustment in cases in which during provisional assessment proceedings, it was found that the assessee's income was below the taxable amount for purposes of supertax, but the real income was ultimately found in proceedings under S. 68 of the Income-Tax Act, 1922, as amended by S. 3 of the Act of 1923, to be large enough to be assessed to supertax. (*Schwabe, C. J. and Waller, J.*) COMMISSIONER OF INCOME TAX, MADRAS v. CHIDAMBARAM CHETTIAR.

(1924) M. W. N. 35 : 19 L. W. 129 : 79 I. C. 798 : 1924 Mad. 485 (2).

—S. 52—*Suit contesting validity of assessment order—If maintainable—Jurisdiction of civil court.*

The Income Tax Act creates a special jurisdiction and provides a special remedy against order of assessment. Where the Collector professes

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to tax income only and has not levied an assessment on any of the classes of income excepted under the Act, he exercises only a jurisdiction under the Act and a suit will not lie in a civil court challenging his order, even if there are errors in calculation. (*Raymond and Kennedy, A. J. C.*) DAYARAM RAMDAS v. SECRETARY OF STATE FOR INDIA. 78 I. C. 940 : 1925 S. 130.

— Ss. 55 and 59—*Super tax—Income from dividends—Liability to pay super tax in the hands of recipient.*

There is nothing in the Income Tax Act of 1922, from which it can be inferred that in computing the taxable income of individuals for purposes of super tax dividends upon which super tax has been paid by a company should be deducted. Under Ss. 55 and 56 of the Income Tax Act, super tax is levied on the total income and 'total income' under S. 16 includes dividends payable to an assessee by a company. No exemption could be claimed by an assessee from payment of super tax in respect of dividends received by him even though the Company has paid the tax. (*Miller, C. J. and Mullick, J.*) MAHARAJADHIRAJ OF DARBHANGA v. COMMISSIONER OF INCOME-TAX. 3 Pat. 470 : 1924 P. H. C. C. 69 : 78 I. C. 783 : 2 Pat. L. R. 25 (Cr.) : 5 Pat. L. T. 489 : 1924 P. 474.

— S. 66—*Application to state case—Commissioner if can delegate duty—Procedure*

When an application is made to a Commissioner of Income Tax to state a case to the High Court under S. 66 he cannot refuse to pass any order on the application or to delegate his authority to any Subordinate Officer. The jurisdiction of the High Court under S. 66 (3) arises on a refusal to state the case on whatever grounds it may be based. (*Moti Sagar, J.*) THE FIRM GOKUL CHAND, JAGANNATH v. THE COLLECTOR OF INCOME-TAX, SIALKOT. 1924 Lah. 662 (2).

— S. 66—*Application to Commissioner to refer questions of law—Fee payable.*

Where an application to the Commissioner of Income Tax to refer a case for the opinion of the High Court and the applicant raises more than one point of law, he need deposit a fee of 100 Rs. for each point of law. It is sufficient if the application is accompanied by a fee of 100 Rs. (*Robinson, C. J. and Buguley, J.*) A. R. A. R. S. M. CHOKKALINGAM CHETTY v. THE COMMISSIONER OF INCOME TAX. 1925 Rang. 94 : 2 Rang. 579

— Ss. 66, 33 and 14—*Commissioner of Income Tax—Statement of case to the High Court—Points of law.*

The High Court directed the Commissioner of Income Tax to refer a case on the following points as they were questions of law deserving of a decision by the High Court :

(1) Whether the Commissioner of Income Tax having once passed an order under S. 33 of the Income Tax Act, has power to review his own order on sufficient grounds being shown? (2) Whether the requirements of the proviso to S. 33 (2) of the Income Tax Act, in regard to giving the petitioner reasonable opportunity of being heard, were complied with in the case on hand? (3) Whether in view of the provisions of S. 14 of the

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Income Tax Act, income derived as a member of a Hindu undivided family can be assessed jointly with the petitioner's personal income. (*Jwala Prasad and Kulwant Sahay, JJ.*) SACHCHIDANAND SINHA v. THE COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA. 2 Pat. L. R. 122 (Cr.).

— S. 66—*Reference under—Statement of case—Form of.*

While it is quite proper for the Income Tax Commissioner in making a reference to express his opinion on the questions involved, it is his first duty to state clearly and fully the material facts admitted or proved in evidence before him. To adopt any other course must in most cases result in embarrassment and uncertainty, when the matter comes before the Court for its decision, the Court being bound by the findings arrived at. (*Miller, C. J. and Foster, J.*) SRI SRI RAJA SHIV PRASAD SINGH v. EMPEROR. 1924 P. H. C. C. 234 : 5 Pat. L. T. 497 : 82 I. C. 653 : 2 Pat. L. R. (Cr.) 233 : 1924 P. 679.

— S. 68 (1)—*Assessment reduced after the passing of the Act—Party if entitled to refund.*

The applicant was assessed to Rs. 1,125 under the Income Tax Act of 1918 on the 17th February 1922. He appealed and on remand of the case the final assessment in July 1922 was fixed at Rs. 828-3-0. The applicant claimed a refund of the difference between these two amounts but this was refused on the ground that he was not entitled to it under Act XI of 1922 which came into force on the 1st of April 1922 prior to the making of the final assessment.

Held, that he had an existing right of refund which was expressly saved by the new Act, S. 68 (1). (*Baker, J. C. and Hallifax, A. J. C.*) THE COMMISSIONER OF INCOME TAX, C. P. v. DHARAM CHAND DALCHAND. 1924 Nag. 24

INDEMNITY—*Right to—Implied Contract—Agency.*

A right to indemnity generally arises from contract, express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. It may arise for instance in the case of an agent and principal irrespective of contract. (*Lord Wrenbury.*) EASTERN SHIPPING CO., LTD. v. QUAH BENG KEE. 34 M. L. T. 90 (P. C.).

INDIAN SOLDIERS (LITIGATION) ACT (IX of 1918), S. 10—*Compromise—signed by some of the agents—Application to set aside—C. P. Code, O. 47, R. 1.* 75 I. C. 262.

— S. 4—*Soldier appearing by pleader—Default—Notice if necessary.*

No notice under S. 14, Indian Soldiers Litigation Act, to the prescribed authority is necessary in a case where an Indian Soldier appears in a case through his own pleader, who however refused to produce evidence but continued to attend the case. (*Stuart, J.*) FAKIRULLAH KHAN v. BALDEO SAHAL. 79 I. C. 225.

INDIAN TARIFF ACT (VIII OF 1894), AS AMENDED BY ACT (IV OF 1916)—*TARIFF DUTY—S. 10, Sale of goods ex-godown—Reduction of tariff value*

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by Government Notification—Consequent reduction of duty—Whether buyer entitled to deduct from the contract price—Duty in S. 10 of the Tariff Act, meaning of—Payment under duress—Recovery of D. C. 801. 47 Mad 222: 77 I. C. 70 : 1924 Mad. 236.

INJUNCTION—Legislative Council—President—Supplementary estimate—Injunction restraining President from putting a motion before the council—Power of court to issue. See GOVERNMENT OF INDIA ACT, S. 72. 40 C.L.J. 515.

—**Possessory title—Suit against trespasser for injunction.**

A person is long and peaceable possession is, until the contrary is shown, presumed to be the owner and is entitled to an injunction against a stranger who threatens to disturb such possession. 20 M. 514: 20 C. 834 : 31 M. 531: 1 L. W. 853 Rei. (Wallace, J.) PERIASAMI MUTHIRIYAN v. ANAN DAYI AMMAL. 20 L. W. 14. 80 I. C. 82: 1924 Mad. 722.

—**Gift — Registration — Injunction against donee registering gift deed.**

Where a gift of immovable property requires registration for its validity, it is open to the donor to revoke the gift before its registration. If the donee refuses to hand back the document, the donor can obtain an injunction restraining the donee from registering the document. (Macleod, C. J. and Shah, J.) SUBBA RAMA v. VENKAT-SUBBA. 26 Bom. L. R. 427: 80 I. C. 477 : 48 Bom. 435 : 1924 Bom. 434.

—**Suit against Government — Enhanced assessment—Declaration of illegality by civil court—Injunction unnecessary. See MAD. REV. RECOVERY ACT, S. 58. 49 M. L. J. 780.**

INSOLVENCY—Breach of contract prior to adjudication—Right to sue for damages—If vests in Receiver.

Both under the Provincial and Presidency Towns Insolvency Acts, the right to sue for damages for breach of contract which accrued prior to adjudication vests in the Official Assignee and Receiver. (Raymond, A. J. C.) THE OFFICIAL ASSIGNEE, BOMBAY v. FIRM OF CHANDULAL CHIMANLAL. 1924 S. 89.

—**Proceedings in—Evidence taken before Official Receiver—Evidence in the trial—Consent of parties.**

In proceedings to set aside an alienation, where the parties agreed to the evidence recorded by the Official Receiver being treated as evidence in the case, the procedure though highly improper is validated by such consent. The procedure is improper because first a court should see the witnesses giving evidence and secondly the interest and duty of the Receiver may conflict in the conduct of the proceedings. (Olafeld and Devadoss, J.J.) KRISHNA AIYAR v. THE OFFICIAL RECEIVER, TRICHINOPOLY. 75 I. C. 445.

—**Receiver—Remuneration.**

Though generally the remuneration of a Receiver is calculated by the method of percentage or commission, a court has jurisdiction in its discretion to fix a monthly payment in lieu thereof. It must be paid out of the insolvent's estate and the

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legal representatives cannot be made personally liable. (Sanderson, C. J. and Richardson, J.) SREPAT SINGH v. KAM SARUP SURYA PRASAD. 76 I. C. 583.

—**Right of action in respect of tort or breach of contract—If passes.**

A right of action in respect of a tort or of a breach of a contract resulting in injuries wholly to the person or feelings of a bankrupt does not pass to the trustee for his creditors but remains in the bankrupt; if it results in injuries wholly to the estate of the bankrupt the right of action passes to the trustee. (Raymond, A. J. C.) THE OFFICIAL ASSIGNEE, BOMBAY v. FIRM OF CHANDULAL CHIMANLAL. 1924 S. 89.

INSURANCE—Condition in policy that if claim is not brought within a certain time policy would be forfeited—Validity. 1924 Cal. 186.

—**Fire — Suit for damages — Defence that policy was not existent and that its conditions had not been complied with.**

In a suit for recovery of money due upon a policy of fire insurance, it is open to the defendants to plead that there was no policy of insurance in force at that time of the fire, and further that as no claim containing the details of the loss had been submitted in writing within 15 days of the fire, they were absolved from all liability. Where the defendants had issued a protection note subject to the conditions attached to the policy of insurance one of which was notice of claim should be given within fifteen days of the fire it was the duty of the plaintiff to have got the policy and looked into the conditions in question and if he failed to do so it was his own fault. (Robinson, C. J. and May Oung, J.) HAMEED & CO. v. THE UNIVERSAL FIRE INSURANCE COMPANY. 2 Rang. 144 : 1924 R. 317.

—**Fire—Condition in original policy of forfeiture in case of omission to sue within three months of rejection of claim—Reinsurance—Condition whether implied.**

Even assuming, without deciding, that a clause in a fire insurance policy to the effect that the claim under the policy shall lapse in case a suit is not commenced within three months of the rejection of the claim, is valid and binding such a clause is not imported by implication in a contract of reinsurance. (Robinson, C. J. and Brown, J.) THE HIMALAYA ASSURANCE CO., LTD. v. THE BURMA FIRE AND MARINE INSURANCE CO., LTD. 3 Bur. L. J. 122 : 1924 R. 350.

INTEREST—Banker and customer—Compound interest—Half-yearly rests—Liability of Bank—Guarantors also liable.

Promissory notes executed by a bank to plaintiff stated that interest at 11 per cent. would be charged. The bank throughout credited interest in its accounts with half-yearly rests, and not only did it so in its own accounts, but it made the same entries in the plaintiff's pass book. Some of the directors of the bank who had guaranteed payment of the debt were aware of this practice. In a suit by the plaintiff on the promotes charging compound interest as above, the defendants pleaded that the promotes did not provide for the same. Held,

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that the bank by its own action led the plaintiff to believe that it was crediting him with compound interest and that their action in doing so led him on to allow the account to run. The wording of the promissory notes did not exclude the payment of compound interest. The defendant Bank itself having read it as meaning that compound interest would be charged on any amount not paid by due date, and having written up the pass-book of the plaintiff accordingly were now estopped from urging that this was merely a clerical mistake and that both parties understood that simple interest only would be charged. The guarantors were Directors of the Bank and as such presumably cognizant of all that the Bank did and the method in which it conducted its business. Consequently they too were liable for compound interest. (*Harrison and Zafar Ali, JJ.*) **BHARAT NATIONAL BANK, LTD., DELHI v. BANARSI DAS.** 5 Lah. 129.

———*Liability for—Co-owners—Appropriation of profits by one co-owner.*

Where one of several co-owners has appropriated the profits of the common property for a number of years, it is open to the Court on equitable grounds to make him liable for interest on the amount due to the other co-owners. 23 C. W. N. 488; 35 B. 255, 41 M. 316, 42 M. 661, 3 C. 654, 38 A. 581 Ref. (*Miller, C. J. and Mullick, J.*) **INGLIS v. SARJU PRASAD MISSEER.**

3 Pat. 311 : 1924 P. 633.

———*Post diem—Mortgage—No provision for payment of interest after due date—Effect of.*

1924 Oudh 118 (2).

———*Power of Court to award—Case not coming within the Interest Act. See CONTRACT ACT, S. 91*

47 M. L. J. 312.

———*Rate of—Relief against—Absence of undue influence—Hardship.*

Where there is no undue influence proved, it is not open to a court of law to give relief against a rate of 24 per cent. interest agreed between the parties merely on the ground of hardship even where the transaction is improvident. (*Raymond and Bilaram, A. J. Cs.*) **RAM SINGH v. IBRAHIM.**

78 I. C. 418 : 1925 S. 136.

———*Right to—Express or implied contract—Demand—Necessity for. See CONTRACT ACT, S. 73 ILN. (n).*

22 A. L. J. 558.

INTEREST ACT (XXXII OF 1839)—If exhaustive—Awarding interest discretionary.

The Interest Act is not exhaustive of all cases in which interest is allowed, 42 Mad. 601 followed. The award of interest, is more or less a matter of discretion of the Court and not a matter of law. (*Wallace, J.*) **VENKATACHALAM CHETTIAR v. PONNUSWAMI AIVANGAR.**

20 L. W. 195; (1924) M. W. N. 499 : 1925 Mad. 46 : 81 I. C. 536 : 47 M. L. J. 312.

———*S. 1—Not exhaustive—Discretion of Court to award interest on claim. See CONTRACT ACT, S. 91.*

47 M. L. J. 312.

INTERPRETATION OF STATUTES—Construction of Statutes.

1924 Lah. 155.

INTERPRETATION OF STATUTES.

———*Fiscal Acts.*

Fiscal Acts should be construed as far as possible in favour of the subject. (*Baker, J. C. and Hallifax, A. J. C.*) **THE COMMISSIONER OF INCOME-TAX, C. P. v. DHARAM CHAND DALCHAND** 1924 Nag. 24.

———*Fiscal Statutes.*

In fiscal statutes courts must look to the letter of the law and not introduce equitable considerations. All charges upon the subject must be imposed by clear and unambiguous language because in some degree they operate as penalties. (*Raymond and Kennedy, A. J. Cs.*) **SECRETARY OF STATE FOR INDIA v. SETH KHEMCHAND THAOOMAL.**

78 I. C. 438 : 1925 S. 67.

———*Fiscal Statutes—Strict construction.*

Statutes which impose pecuniary burdens are subject to the rule of strict construction, and it is a well-settled rule that all charges upon the subject must be imposed in clear and unambiguous terms, as they tend to operate as penalties. The subject is not to be taxed unless the language of the statute clearly imposes the obligation. (*Mookerjee and Chotzner, JJ.*) **THADDEUS NAHA-PIET v. SECRETARY OF STATE FOR INDIA.**

39 C. L. J. 209 : 81 I. C. 751 : 1924 Cal. 987.

———*Fiscal Statutes—Technicalities—Construction.*

Technicalities in a fiscal statute must be strained in favour of the subject and not against him. (*Baker, O. J. C. and Hallifax, A. J. C.*) **SETH BALKISHAN NATHANI v. COMMISSIONER OF INCOME TAX.**

78 I. C. 572 : 1924 Nag. 153.

———*Taxing enactment—Strict construction.*

It is a well-known rule of construction of Taxing Acts that no one is to be taxed except by express words, taxing statutes must be construed strictly and the Crown seeking the tax must bring the subject within the letter of the law. Otherwise the subject is free. There is no equitable construction admissible in fiscal statute. (*Plumer and Subbanna, JJ.*) **COMMISSIONER OF INCOME TAX, MYSORE v. NANDIDROOG MINES, LTD.**

2 Mys. L. J. 41.

———*Illustrations—How far a guide in construing a section—Repugnancy—Observations in (1916) 2 A. C. 575. See.*

79 I. C. 1026.

———*Interpretation of Statute—Illustrations—Value of.*

If the meaning of the enactment itself were doubtful, a reference to the illustration in order to clear the meaning, would be justifiable. But, if there be any conflict between the illustrations and the main enactment, the illustrations must give way to the latter. (*Mukerjee, J.*) **SAJID-UN-NISSA v. HIDAYAT HUSAIN.**

22 A. L. J. 425 : L. R. 5 A. 291 : 80 I. C. 896 : 1924 A. 748.

———*Includes—Scope of.*

Where in an interpretation clause it is stated a term includes so and so, the meaning is that the term retains its ordinary meaning and the clause enlarges the meaning of the term and makes it include matters which the ordinary meaning would not include. (*Raymond, A. J. C.*) **THE OFFICIAL ASSIGNEE, BOMBAY v. FIRM OF CHANDULAL CHIMANLAL.**

1924 S. 89.

INTERPRETATION OF STATUTES.

— English decisions.

Rules relating to procedure under an Indian Act should not be interpreted by reference to decisions relating to another statute in England even where the language of the two statutes is the same. (*Newbould and Ghose, JJ.*) *PROJOLAL BANERJEE v. SHARAJUBALA DEBI.*

51 Cal. 745; 1924 Cal. 864.

— Indian enactments—Point under law of India—Reference to English law is unnecessary.

Where the point to be decided arises under the law of India reference to English law is unnecessary. (*Lord Shaw.*) *THE INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD. v. THE DEKHARI TEA COMPANY.*

28 C. W. N. 302;

(1924) M. W. N. 158; 19 L. W. 277;

34 M. L. T. (P.C.) 53; 22 A.L.J. 173; 51 Cal. 304;

26 Bom. L. R. 571; 10 O. & A. L. R. 591;

L. R. 5 P. C. 121; 51 I. A. 28 (P.C.);

1 O. W. N. 267; 80 I. C. 1038; 1924 P. C. 40.

INTERPRETATION—Statute law in India—English Law application of—Guiding principles.

The statute law in India is no doubt based on the principle of English law but in its application the Courts should follow the opinion of Indian Courts acquainted with Indian ways of life and thought and not of English Courts which deal with people widely different from Indians in their social habits and intellectual development. (*Dalal, J. C. and Neave. A. J. C.*) *SYED MOHAMMAD HASAN v. SYED ALI HYDER*

1 O. W. N. 803; 10 O. & A. L. R. 1929.

— Grammatical Construction—Intention of legislature.

Where the ordinary grammatical construction of a word leads to an apparent contradiction of the purpose of the enactment, the rules of grammar must yield to common sense and a meaning consistent with the intention of the legislature should be given. (*Raymond and Aston, A. J. Cs.*) *HYDERABAD MUNICIPALITY v. FAKHRI DIN.*

25 Cr. L. J. 646; 81 I. C. 134; 1925 S. 90

— Intention of the Legislature—Meaning of words used—Plain Construction.

1924 Lah. 65.

— "May"—What is ultra vires.

"Discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice not according to private opinion, according to law and not humour. It is to be not arbitrary, vague and fanciful but legal and regular. And it must be exercised within the limit to which an honest man competent to discharge his office ought to confine himself. (*Shah, A. C. J. and Kemp, J.*) *BHAGCHAND DAGADUSHA v. SECRETARY OF STATE FOR INDIA.*

48 Bom. 87;

26 Bom. L. R. 1; 1924 Bom. 1.

— New enactment—Effect on rights under the previous law—Common Law. *NADERSHAW v. SHRINIBAI.*

1924 Bom. 264.

— Penal statutes—Strict construction to be adopted. *See CRL. LAW AMENDMENT ACT, Ss 15 AND 17.*

5 Lah. 1.

JUDGMENT.

— Punctuation marks—Value of. *See INCOME-TAX ACT, S. 2 (6) and (7).*

46 M. L. J. 42.

— Rights of appeal if affected by repealing statutes.

Under the ordinary law vested rights including rights to appeal and to demand a reference that have already accrued are not taken away by the repeal of any Act, but the procedure would be under the new Act. The rule regarding vested rights is not confined to substantive rights but extends equally to remedial rights or rights of action including right of appeal. 38 Mad. 101 Foll.; 41 Cal. 1125 Ref. (*Baker, J. C. and Hallifax, A. J. C.*) *THE COMMISSIONER OF INCOME-TAX, C. P. v. DHARAM CHAND DAL CHAND.*

1924 Nag. 24

— Retrospective operation—Statutes taking away Vested right. *MT. LAHINI v. BALA.*

77 I. C. 798.

— Retrospective operation—Intention to take away vested rights.

1924 Pat. 183.

— Rules of Court—Construction.

In construing a Rule of Court the Court has to abide by the words of the rule which has the force of law without attempting to reform it according to the supposed intentions of the legislature or attempting to exclude cases which fall within the express meaning of the rule in order to make the law reasonable. If the rule is not in conformity with the declared intentions of the Legislature, it is for the Legislature to amend or alter the rule. (*Kennedy, J. C., Raymond and Bilaram, A. J. Cs.*) *HIRIOMAL v. HAZARISINGH.*

78 I. C. 583; 1925 S. 49.

— Scope and object of section or Act—When to be considered.

Where a section, or an Act, is capable of two renderings or is said to mean less, or more, than it says, it is a maxim of interpretation that one must look at the scope and object of the enactment. (*Walsh, Ryves and Mookerjee, JJ.*) *MUBARAK HUSAIN v. AHMAD.*

L. R. 5 A 201;

22 A. L. J. 321; 46 A. 489; 1924 A. 328.

— Statement of objects and reasons—If may be looked into.

For construing an Act, a court may refer to the statement of objects and reasons. (*Baker, J. C.*) *MEGHRAJ v. RAMGOPAL.*

78 I. C. 743;

20 N. L. R. 103; 1924 Nag. 249.

JOINT TENANCY—Incidents—Change of—Survivorship—If can be put an end to.

The incidents of a joint tenancy can be changed and a member of the joint tenancy may sever his connection by effecting partition of his interest and after this is done the rule of survivorship will not apply, but the ordinary rules of succession. (*Jwala Prasad and Macpherson, JJ.*) *GOPAL OJHA v. RAMADHIR SINGH.*

82 I. C. 204; 1925 P. 228.

JUDGMENT—Events after suit. 75 I. C. 786.

— Suit on—Maintainability of C. P. Code, S. 47.

JUDGMENT.

No action lies in India on an executable judgment and the remedy of the judgment-creditor is by execution. But where a judgment creates a new obligation without providing for execution a suit on the judgment is maintainable. 6 B. H. C. R. 231; 9 C. W. N. 952 relied on. 27 M. 243 : 8 Bom. 1. 27 C. W. N. 58 ; 43 A. 170 distinguished. (*Ramesam and Jackson, JJ.*) *RAMASWAMI v. M. P. M. MUTHAYYA CHETTI.* 21 L. W. 75 : 1925 Mad. 279 : 47 M. L. J. 829.

Validity—Officer refusing to exercise jurisdiction—Nullity. See C P CODE, O. 20, R. 2. 76 I. C. 170.

JURISDICTION—Agreement of parties—Effect. 75 I. C. 590.

Appeal beyond the pecuniary jurisdiction of the Court deciding it—Decree, whether void—Consent of parties—Disposal of appeal when prejudicially affected by a change of forum—Suits Valuation Act (VII of 1887) S. 11—Defect of jurisdiction, when cured.

Under ordinary law parties cannot invest a Court with jurisdiction even by their agreement and the decree of a Court would be void when the valuation of a suit is beyond the jurisdiction of that Court. A change of forum by itself cannot affect the disposal of an appeal on its merits prejudicially. In every case it should be decided whether the change of forum has affected the disposal of the suit on its merits prejudicially or not. There is a clear case of prejudice when a litigant who is entitled to have the merits of his case considered on the facts by a Bench of two Judges of a High Court, has his appeal decided by a District Judge sitting singly specially as the word used in clause (b) of Section 11 of the Suits Valuation Act is 'disposal' and not 'decision'. Under S. 11 of the Suits Valuation Act the lack of jurisdiction is cured in case when there has been no prejudice in a Court wrongly assuming jurisdiction. (1923 46 M. L. 631; 45 M. L. J. 185; (1923) M. W. N. 489 16 L. W. 1. 73 I. C. 87, disented from. 5 P. L. J. 397 : 1 Pat. L. T. 390 : 56 I. C. 762; 36 Bom. 628 and 43 Bom. 507 referred to. 24 Cal. 661, 2 O. C. 103, 16 O. C. 257 and 36 A. 58 distinguished. (*Dalal J. C. and Wazir Hasan, A J. C.*) *SHIBORAI SINGH v. MUST. PHULBASA KUER.* 10 W. N. 900 : 10 O. & A. L. R. 1314

Civil and Revenue Court—Partition—Sites appertaining to Zamindari share—Buildings on—Partition of.

In a suit for partition of certain building it was found that the buildings were on sites which were appurtenant to a Zamindari share. The defendant urged that the civil court could not be allowed to partition the buildings until the revenue courts had first partitioned the sites on which they stood. Held, that the contention of the defendant was untenable. Revenue courts are incompetent to partition buildings in proceedings under the Land Revenue Act. (*Daniels and Neave, JJ.*) *MULTAN SINGH v. PADHAN MAN SINGH.* L. R. 5 A. 244 (Rev.) : 22 A. L. J. 744; 1924 A. 854 (1).

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Civil or Revenue Court—Appeal—Forum. 76 I. C. 521 (1).

Civil or Revenue Court—Occupancy holding—Suit for possession. 77 I. C. 630.

Civil and Revenue Court—Partition of Mahal—Right to share in a Mahal.

L. R. 5 O. 18; 10 O. & A. L. R. 146 : 77 I. C. 358; 1924 Oudh 149.

Civil and Revenue Courts—Suit for declaration of title and joint possession. *NOHAR AHIR v. PRATAB AHIR.* L. R. 5 A. 1 (Rev.). 1924 A. 231.

Criminal Court—Power to break open door. *IVID v. SETH CHANDA BHAN.* 76 I. C. 650 : 25 Cr. L. J. 218.

Civil Courts—Liability to pay Government revenue.

Where a plaintiff comes to court and asks for the fixing of the liability of defendants in regard to Government revenue for which the plaintiff is liable to the Collector, the suit is of a civil nature and there is no enactment which prevents a civil court from taking cognizance of it. (*Das and Ross, JJ.*) *GULAB CHAND v. DUKHI RAI.* 1924 P. 795.

Civil Courts—Powers of—Declaration only rights recognised after an Act of State but not even rights agreed up between high contracting parties—Documents granted by former Sovereign—Use of—Act of State.

When a territory is acquired by a sovereign state for the first time that is an Act of State. It matters not how the acquisition has been brought about it may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can only make good in the municipal courts established by the new sovereign such rights as that sovereign has through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights that does not give a title to these inhabitants to enforce these stipulations in the municipal courts. The right to enforce remains only with the High Contracting Parties. Where Scindia of Gwalior ceded certain districts in exchange for other districts to the British Government and both parties agreed to maintain intact rights of private subjects, on a suit by certain persons for a declaration that they were Taluqdars,

Held, the whole object of enquiry is to see whether after cession, the British Government has conferred or acknowledged as existing the proprietary right which the plaintiff claimed. The view of the officials of the Government as to documents would influence them to make up their minds as to what title should be given or recognised, but even then it is what they did after investigation, not what they thought at investigation that is matter of moment; a mere general statement that existing rights would be upheld could never prevail against exact determinations. Any statement in general terms that

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rights will be respected must necessarily mean as these rights are on investigation determined by the Government officials. To suppose that by such general statements in a proclamation the Government renounced their right to acknowledge what they thought right and conferred on a Municipal Court the rights to adjudicate as upon rights which existed before cession, is to misapprehend the law as above set forth. (*Lord Dunedin.*) *NAYAK VAJESINGJI v. SECY. OF STATE FOR INDIA.* 26 Bom. L. R. 43 :

22 A. L. J. 951: L. R. 5 P. C. 199:

4) J. L. J. 473: 82 I. C. 779: 43 Bom 613:
51 I. A. 357: 21 L. W. 28.

(1924) M. W. N. 694: 1924 P. C. 416:

47 M. L. J. 574

—*Civil and Revenue Court—Allegations in plaint—Effect of.*

The plaintiffs cannot be permitted to choose the jurisdiction of the Court by the nature of their allegations. The Court has to see the remedy which the plaintiffs really desire. (*Dalal, J.*) *BIDIYA MISIR v. MT. DARYAI KUAR.*

L. R. 5 A. 184 (Rev.): 79 I. C. 566 :
1924 A. 678 (1).

—*Civil Courts—Municipal tax levied—Recovery of—Omission to take action under Municipal Act.*

The fact that a person from whom municipal tax has been levied illegally has not resorted to the remedies open to him under the Municipal Act, does not deprive a Civil Court of its jurisdiction to entertain a suit for recovering the same from the municipal authorities. (*Broadway, J.*) *THE MUNICIPAL COMMITTEE, PIND DADAN KHAN v. BHAGWAN SINGH.* 1924 Lah. 619

—*Civil and Revenue Court—Partition—Building Standing on Joint site.*

A suit was brought for partition of certain buildings. The buildings were in a village and the sites on which they stood were appurtenant to a Zemindari share. *H. Id.*, that the Civil Court could entertain the suit and it was not necessary that the parties should get the sites of the buildings partitioned in a Revenue Court before coming to the Civil Court. (*Daniels and Neave, JJ.*) *MULTAN SINGH v. PODHAN MAN SINGH.*

22 A. L. J. 744 : L. R. 5 A. 244 (Rev.):
1924 A. 854 (1).

—*Allotment of lands by the partition Court whether challengeable in a Civil Court—Non-compliance with directions given in tarz taqsum—Remedy open to the party aggrieved.*

The final proceedings of the partition Court in the matter of the allotment of lands are conclusive and cannot be challenged in a Civil Court. If the directions given in the tarz-taqsum are not in any manner complied with in the actual carrying out of the partition, the party aggrieved has a right of appeal. (*Wazir Hasan, A. J. C.*) *BHAWANI PRASAD DUBE v. BAIJNATH SINGH.*

10 W. N. 658 : 10 O. & A. L. R. 1140.

—*Civil Court—Settlement Court—Mortgages executed after annexation of Oudh.*

The jurisdiction of the Courts of the first Regular Settlement was not confined to mortgages

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executed prior to the annexation of Oudh by the British Government in 1856 but also extended to those executed subsequently. (*Dalal, J. C.*) *CHANDAN SINGH v. SHEO NARAIN SINGH.*

10 O. & A. L. R. 13 : 10 O.L.J. 606 : L. R. 5 O. 92:
80 I. C. 698 : 1924 Oudh 245.

—*Civil or Revenue Court—Co-sharers—Dispossession of one by others—Suit for joint possession.*

A tenant abandoned a holding and the parties who were co-sharers began to cultivate the land jointly but subsequently the defendants dispossessed the plaintiff. In a suit for joint possession by the plaintiff, *held*, that the plaintiff was entitled to sue for joint possession in the Civil Court and that there was nothing which restricted his right to a claim for a share of profits in the Revenue Court. (*Sulaiman, J.*) *BASDEO PANDE v. MOHAN PANDE.* L. R. 5 A. 113 (Rev.):
1924 A. 865 (2).

—*Objection to—Irregular exercise of jurisdiction—Want of jurisdiction—Distinction between.*

Where jurisdiction exists requiring only to be invoked in the right way the party who has invited or allowed the Court to exercise it in the wrong way cannot afterwards challenge the legality of the proceedings. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) *SHAMA RAO v. VENKATAPPA.* 2 Mys. L. J. 62.

—*Objection to—Late stage—Duty of Court to notice it*

The Court is bound to take notice of an objection to the jurisdiction, however, late in the day it may be raised, if it be that on the facts admitted or proved it is manifest that there is a defect of jurisdiction. (*Lord Phillimore.*) *RAMLAL HARGOPAL v. KISAN CHANDRA.*

7 N. L. J. 62 : 20 N. L. R. 33: 34 M.L.T. (P.C.) 62 :
19 L. W. 549 : 22 A. L. J. 386 : 51 Cal. 361 :
26 Bom. L. R. 586 : 51 I.A. 72 : 1924 M.W. N. 79 :
1924 P. C. 95 : L. R. 5 P. C. 216:
28 C. W. N. 977 : 46 M. L. J. 628.

—*Objection to—Want of jurisdiction—Irregular exercise of jurisdiction—Distinction between.*

Jurisdiction in relation to the proceedings of a Court, means the authority of a Court to decide a particular cause or matter. Where the authority exists, the proceedings are binding on the parties until set aside by some process known to the law. They cannot be set aside or disregarded in a collateral proceeding. There is a fundamental distinction between the existence of jurisdiction and exercise of jurisdiction and those proceedings only can be declared null and void and therefore disregarded which have been conducted by a Court not having any authority to conduct them, but where the complaint is as to the mode in which the jurisdiction has been exercised, the appropriate procedure provided for the removal of the grievance must be pursued if the complainant is to have any remedy for the injury done or supposed to be done to him. (*Das and Macpherson, JJ.*) *JAGDISHWAR NARAIN v. MD HAZIQ HUSSAIN.* 1924 P. H. C. C. 142: 77 I. C. 851:
5 Pat. L. T. 473 : 1924 P. 537.

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—Power of Court to give directions—
Disposal of suit winding up.

A Court which appoints a Receiver has authority to pass orders necessary to wind up his charge even though the suit has been disposed off. (*Campbell, J.*) *GANGA RAM v. NATHA RAM* 1924 Lah 583.

—Revenue Court—Adverse possession—
Plea of.

A plea of adverse possession, if raised in a Revenue Court has to be decided on the evidence adduced and there is nothing in law to prevent a Revenue Court going into the question; but the decision therein will not be conclusive in a Civil Court. (*Wazir Hasan, J. C.*) *SURAJ MAL v. MOHAMMAD TAQI* 80 I. C. 650 : 1925 Oudh 153.

—Revenue Court—Partition proceedings—
Pendency of proceeding in Civil Court—Jurisdiction.

In a suit in a civil court for partition, the question of previous partition was pleaded and a declaration was asked for that the Revenue Court had no jurisdiction to proceed with the partition proceedings pending before it until the determination of the civil suit. *Held*, that the *status quo ante* should be maintained until the decision of the civil suit. This was a matter entirely discretionary with the Court and it did not appear that parties would be put to any inconvenience or be prejudiced on account of such a stay. By taking part in the partition proceedings one could not possibly confer jurisdiction to the Revenue Court. (*Ross and Ven, JJ.*) *GURSHAI MAHTON v. SHEIKH MUHAMMAD SAYAD* 2 Pat. L. R. 266 (Div.) : 1925 P. 187.

—Objection to—Small cause suit—Filed on
the regular side—Subsequent objection—Estoppel.

Where the plaintiff files a suit of a small cause nature on the regular side of the Munsif's court and fails in that court and on appeal, he cannot in second appeal be permitted to plead want of jurisdiction in the Munsif's court to try the suit and claim to have the suit tried in a less regular way on the small cause side. (*Dalal, J. C.*) *MAHARAJ DIN v. BALBHADDAR PRASAD* 10 O & A. L. R. 1326.

—Pecuniary—Valuation of a set off.

The valuation of a set off for the purpose of jurisdiction must be taken as relating to the whole of the ascertained sum so pleaded and without reference to any portion of the Plaintiff's claim which the defendant admits. *Brojendra Nath Das v. Budge Budge Jakhmills* 20 Cal. 527 followed. (*Lentaigne, J.*) *O. S. ABAHIMM COV. v. IBRAHIM EDRA BOY* 2 Rang 492 : 1925 Rang. 65.

—Submission to—Court having jurisdiction
—Absence of formality immaterial.

76 I. C. 194.

—Suit disposed of—Power to levy court fee

After a suit or appeal is disposed of, the court becomes *functus officio* and cannot thereafter pass an order to ask a party to make up a defi-

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ency in court fee which was discovered only later. (*Martineau, J.*) *ABDULLAH v. SECRETARY OF STATE FOR INDIA* 82 I. C. 588 (1) : 1925 Lah. 131 (1).

—Test of.

The jurisdiction of a Court to entertain and decide upon a cause of action depends upon the nature of the claim put forward by the plaintiff as his cause of action and the matter involved in it. It does not depend upon what the defendants may assert by way of defence. It may turn out at the trial that the subject of contest is not properly represented by the form in which the plaintiff has chosen to put his claim but it will not affect the jurisdiction under which the suit is brought by the plaintiff itself. (*Kinkhede, A. J. C.*) *LABHUA SAO v. CHATAN* 20 N. L. R. 145 : 79 I. C. 161 : 1924 Nag. 275.

—Test of—Plaint allegations.

Jurisdiction in a case is governed by the allegations made in the plaint and not by the defence set up. (*Pipon, J. C.*) *MIAN FEROZE SHAH v. SOHBAT KHAN* 78 I. C. 423.

—Test of—How determined.

Jurisdiction does not depend on the result of the suit or on the defence set up but on the nature of the claim as brought. If a suit could be filed in a court only in the exercise of special jurisdiction, the plaintiff must state facts showing the existence of such special powers. (*Kinkhede A. J. C.*) *HARBAX v. LACHMAN* 82 I. C. 201.

KARACHI MUNICIPAL RULES AND BYE-LAWS

—Appendix D, Rule 6 (c)—*Ultra vires*—Terminal tax—Power to frame rules.

Rule 6 (c) of Appx. D of the Karachi Municipal Rules and Bye-laws is not *ultra vires*, as it does not cut down an exemption allowed by the legislature but only lays down conditions under which a legislative exemption will be granted. (*Kennedy, J. C. and Aston, A. J. C.*) *KARACHI MUNICIPALITY v. M. R. D'SA* 80 I. C. 990.

LAMBARDAR—Suit in ejectment—Loss of office—Effect.

One of two *lambardars* can sue in ejectment on behalf of the proprietary body without joining the other and a decree can be passed in favour of the latter, even if the plaintiff happens to be removed from office pending suit. (*Hallifax, A. J. C.*) *MAROTI KUNBI v. SITARAM* 78 I. C. 722 : 1925 Nag. 32.

—Surrender of occupancy rights to—
Claim of co-sharers—Laches.

Where occupancy rights are surrendered by a tenant to a *lambardar* the other co-sharers can recover their share on paying the proportionate charges of acquiring the right without any delay. The right is one in equity and if they are guilty of laches, they lose their rights. (*Prideaux, A. J. C.*) *MAHADEO v. SONBA* 78 I. C. 532 : 1925 Nag. 51.

—Tenancy by—Consideration—Right to
challenge after long time.

A tenancy created by a *lambardar* twenty-five years before cannot be challenged except on the

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ground it is a mere paper transaction. The question of consideration in such a case is immaterial (*Baker, J. C. and Hallifax, A. J. C.*) **RADHABAI v. PANDURANG**, 78 I. C. 535 : 1925 Nag. 63.

— — — *Who can be appointed as.*

It is only persons having a proprietary interest that can be appointed *lambardar* and when that capacity is lost, they cease to be *lambardars*. (*Prideaux, A. J. C.*) **MOTILAL GULABSAO v. GANPATRAO**, 1924 Nag. 211.

LAND ACQUISITION — Compensation — Toka land — Compensation for interest of tenants — How fixed. 77 I. C. 137.

LAND ACQUISITION ACT, S. 9—*Service of notice—Three brothers—Service on one, if sufficient.*

It is incumbent on the Collector in a land acquisition proceeding to serve a notice upon each of the persons interested and it is not sufficient to serve a notice merely upon one of three brothers each of whom was equally interested in the compensation to be awarded. Nor can it be said that by reason of their relationship one brother was a person authorised to act for or on behalf of his brother. The mere fact that one of the brothers accepts notice on behalf of all does not raise a presumption that he had any authority to do so (*Miller, C. J. and Foster, J.*) **NITAI DUTT v. SECY. OF STATE FOR INDIA**, 3 Pat. 304: 81 I. C. 676 : 1924 P. 608.

LAND ACQUISITION ACT (1 OF 1894), S. 18—*Acquisition of land—Compensation—Sub-tenancy—Apportionment.*

A sub-tenant is interested in the land and his interest is capable of valuation. He is consequently a person entitled to have an adjudication upon the question of the inadequacy or otherwise of the compensation awarded. A tenant or subtenant even though his interest is not transferable except with the sanction of the Superior Landlord has an interest which entitles him to be heard upon the question of adequacy of compensation. 28 C. 146; 28 C. 152; 17 C. 144; 7 Cal. 585; 40 C. 64; 31 C. L. J. 65 Ref. (*Mookerjee and Chotner, JJ.*) **JAGADISWAR SANJAL v. COLLECTOR OF GOALPARA**, 39 C. L. J. 574.

— — — **S. 18**—*Apportionment of compensation—Question of genuineness of will—Stay of proceedings pending decision of Probate Court—Desirability of.*

In a land acquisition case several Mahomedan claimants applied for reference to the Court basing their claims on a will. An application was made for stay of the land acquisition case proceedings pending the decision of the High Court in proceedings for obtaining probate of a will whose genuineness was disputed. The Court refused to stay proceedings and dismissed the reference for non-production of the will.

Held, that the court ought not to have dismissed the reference without giving the claimant an opportunity to secure the production of the original will which had been lodged in the High Court.

The proceedings before the Land Acquisition tribunal should be stayed pending the disposal of the probate proceedings by the High Court. In the first place it is not the primary function of

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the improvement tribunal to investigate controverted questions of title and adjudicate upon testamentary disputes. In the second place, there is every likelihood of a more comprehensive and searching investigation of the matters in issue by the High Court in its testamentary jurisdiction than by the tribunal. Lastly the probate Court, can issue citations upon all persons claiming to have any interest in the estate of the deceased who may not be parties in the apportionment proceedings in the tribunal. (*Mookerjee and Chotner, JJ.*) **SYED ABDUL ALIM v. BADARUDDIN**, 28 C. W. N. 295 : 1924 Cal. 757.

— — — **Ss. 18 and 19**—*Award—Objections to—Fresh objections on other grounds after reference—Permissibility*

It cannot be laid down that where an objection has been taken under one of the headings mentioned in S. 18 of the Land Acquisition to the Collector's award and a reference is made in consequence it is nevertheless open to the claimant to attack the award upon an objection falling under some other heading. The questions of measurement and compensation are distinct. But fresh objections belonging to the same category may be allowed to be gone into. 12 C. L. J. 489 : 30 B. 341 Ref. Even if a fresh objection of a different category is entertainable, the court is entitled to reject it on the ground of delay. (*Pearson and Graham, JJ.*) **PROMOTHA NATH MULLICK v. SECRETARY OF STATE FOR INDIA**, 40 C. L. J. 105 : 82 I. C. 3 : 1924 Cal. 1036 (2).

— — — **S. 18**—*Failure of landlord to demand reference—Tenant obtaining extra—Right of party.* 75 I. C. 203 (1).

— — — **S. 18**—*Market value—Assessment of—Sale-deeds—Relevancy of.*

In considering the market value of land acquired under the Land Acquisition Act, the sale deed which is nearest in date to the acquisition should be taken as the standard. (*Das and Ross, JJ.*) **SECRETARY OF STATE FOR INDIA v. MANMATHA NATH DEY**, 2 Pat. L. R. 268 : 1925 P. 129.

— — — **S. 18**—*Mortgaged property—Acquisition of—Mortgagee's rights and remedies in case of—Payment of compensation money to mortgagee—Mortgagee's remedy in case of—Suit to recover money from Crown—Maintainability—Cause of action—Costs awarded to mortgagee in suit on mortgage—Crown's liability for.*

Where property subject to a mortgage is acquired under the Land Acquisition Act, the Crown can make its award giving the compensation money to the mortgagor, the person in possession and the ostensible owner of the property, and is not bound to recognize the mortgagee as such at all. The remedy of the mortgagee in such a case is to apply under S. 18 of the Act to have the matter referred to the Civil Court. Where he fails to do so and the compensation money is paid to the mortgagor, his only remedy is to sue under S. 31 of the Act the mortgagor to whom the money was wrongly paid. He has no cause of action against, and cannot sue, either the Secretary of State or the Collector.

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Costs awarded to the mortgagee in a suit brought by him on the mortgage can, in no event, be recovered from the Crown. (*Schwabe, C. J. and Waller, J.*) THE SECRETARY OF STATE FOR INDIA v. KUPPUSAMI CHETTY.

(1924) M. W. N. 138 : 1924 Mad. 521 :
33 M. L. T. (H. C.) 272 : 78 I. C. 52 :
46 M. L. J. 36.

—S. 18—Reference to Court—Order refusing—Propriety—Revision against order—Right of—Civil Procedure Code, S. 115—Government of India Act, S. 107—Effect—Arbitrary refusal to refer—Remedy in case of—Necessity—Amendment of S. 18—Court—Court subordinate to High Court—Acting judicially—Meaning.

The High Court has no power under S. 115, C. P. Code or S. 107 of the Government of India Act to revise the order of a Collector acting under the provisions of the Land Acquisition Act refusing to refer to the Court an application under S. 18 of the same Act by a person interested requiring him to refer the matter for the determination of the court.

Per Chief Justice and Ramesam, J.:—The Act should be amended so as to give a remedy to the subject in respect of possible arbitrary acts of Land Acquisition officers in declining to refer under S. 18.

Per Chief Justice:—The Officer acting as Collector under the Land Acquisition Act decided that certain land to be acquired by the Government was Government land, and that, therefore, no compensation was payable to anybody. One of the persons claiming to be interested in the land asked the Collector under S. 18 to refer the matter to the District Judge; but the Collector refused to do so on the strength of the decisions that the land was Government land. Held, that the Collector was wholly wrong in the course he took.

Discussion of the questions whether the Collector exercising his functions under S. 18 acts (1) judicially; (2) as a Court, and (3) as a Court subordinate to the High Court. (*Schwabe, C. J., Phillips and Ramesam, JJ.*) ABDUL SATTAR SAHIB v. SPECIAL DY. COLLECTOR, VIZAGAPATAM HARBOUR ACQN.

34 M. L. T. (H. C.) 18 : (1924) M. W. N. 224 :
1924 Mad. 442 : 47 Mad. 357 : 46 M. L. J. 209.

—S. 23—Acquisition of land by Government—Permanent tenancy—Condition as to resumption without compensation—Government's right as landlord—Tenancy at will—Valuation of.

Respondents held certain property under a grant made in their favour by the Collector in 1881. The settlement was permanent but a clause was added at the end of the lease in the following terms: "If any portion or the whole of this land be required for the Government, we shall give up the same without any compensation." The Government, as landlord, never exercised its power to resume the land by virtue of this clause.

The Government proceeded to acquire the land under the Land Acquisition Act for the purposes of the Calcutta Corporation. A question arose as regards the apportionment of compensation and the Land Acquisition Officer awarded the

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capitalised value of the revenue as compensation and awarded one-eighth of the amount to the Government as landlord. Held, that the award was fair. Even a tenancy-at-will may have an appreciable market value. (*Mookerjee and Rankin JJ.*) SECRETARY OF STATE FOR INDIA v. BIJOY KUMAR ADDY.

40 C. L. J. 303 : 1925 Cal. 224.

—S. 23—Compensation—Right to—Permanent tenant holding on condition from Government—Acquisition for the Corporation of a City.

Land was permanently given to the appellants by Government subject to one condition that, if it or a part thereof was required for Government it must be returned. The Government proceeded to acquire the land under the Land Acquisition Act for the purposes of a Municipal Corporation. Held, that the Government was claiming the land not under the terms of the lease as landlord but under the Land Acquisition Act and therefore the appellants were entitled to compensation. The stipulation in the lease that the appellants by Government for resuming the land whenever required did not make the tenancy one at will. (*Woodroffe and Cuming JJ.*) BEJOY KUMAR ADDY v. SECRETARY OF STATE FOR INDIA.

40 C. L. J. 301.

—S. 23—Existence of right of way does not destroy ownership—Less or iron age injuriously affects back—Construction of police lines—Superior holders' interests. 1924 Bom. 54.

—S. 23—Market value—Fixing of—Consideration—Prices of adjacent lands—Special adaptability—Offers—Evidentiary value of.

In finding out the market value of land for purposes of the Land Acquisition Act, the standard to be taken is that of an owner willing to sell and a purchaser willing to buy. Evidence of genuine sales at the date of notification in respect of the same land or portions thereof or precisely parallel lands would be the ideal that could be put in. The adaptability of agricultural lands as building sites can be taken into consideration, and the owner is entitled to the most lucrative and advantageous way in which such land can be laid out at the time of acquisition. Too much importance cannot be attached to evidence of officers in ascertaining the market value. (*Raymond and Bilgrami, A. J. C.*) GOBINDRAM VORHOMAL v. ASSISTANT COLLECTOR OF SHIKARPUR.

79 I. C. 376.

—S. 23—Market value of land—Opinion of experts—Weight due to.

On a question of valuation of land compulsorily acquired by Government, though the opinion of experts is admissible in evidence, the opinion of brokers is of no value, where they give no data in support of their opinions. 11 C. W. N. 875, 577; 10 Bom. L. R. 907, 913; 33 B. 325. Ref. *Broadway and Ffordes, JJ.* SECRETARY OF STATE v. SHRIMATI SARLA DEVI.

5 Lah. 227 : 79 I. C. 74 : 1924 Lah. 548.

—S. 23—Market value—What is—Considerations in fixing—Speculation.

48 Bom. 190 : 1924 Bom. 161.

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—S. 24 (5)—*Acquisition of land—Compensation—Indirect benefit accruing from other lands acquired.*

The basis on which compensation for lands taken is to be assessed is the value of the lands to the owner as it existed at the date of the notice to take and not their value, when taken, to the promoters.

All advantages which land possesses present or future in the hands of the owner may be taken into consideration and the owner is entitled to have the price assessed in reference to those advantages which will give the land the greatest value. The value of an owner's interest is not properly compensated by assessing the amount of pecuniary benefits obtained by past user in disregard of possible benefits in the future. The probability of a more profitable future use is one such advantage which may be taken into consideration. Thus land which may probably be used for building purposes must not be valued on the same basis as purely agricultural land. But although prospective value is a necessary element in the assessment of compensation, such value must be entirely excluded where it would arise from the construction of the particular works authorized by the Act which gives compulsory powers.

It is recognized principle to exclude from the assessment of compensation any enhancement or diminution in value consequent on the construction of works authorized by special Act under which the assessment is made. (*Moorejee and Rankin, JJ.*) *MANMATHA NATH MULLICK v. SECY. OF STATE FOR INDIA.* 28 C. W. N. 461 : 83 I. C. 442 : 1924 Cal. 574.

—S. 54—*Order of District Judge rejecting application for revision of Collector's award—Appeal*

Where a district Judge rejects an application for revision of the Collector's award in a land acquisition case, his order is one confirming the award in substance and is therefore appealable under S. 54 of the Land Acqn. Act. (*Miller, C.J. and Foster, J.*) *NITAI DUTT v. SECY. OF STATE FOR INDIA.* 3 Pat. 304 : 81 I. C. 676 : 1924 P. 608.

—S. 55—*Sale of land—Acquisition for Railway—Lands not subsequently required—Re-sale by Government without public auction through Tahsildar.*

Certain lands were acquired by Government for a railway company and subsequently found not to be required for the purpose. The lands so relinquished were sold by the Tahsildar without public auction. *Held*, that the Tahsildar had power to sell the lands under the orders of the Collector and the non-observance of the rules as to sale of lands by public auction did not vitiate the sale by the Tahsildar in the absence of any fraud or misrepresentation or mistake (*Mudhayan Nair, J.*) *KARAPURATHIRAKKAM RAMA KURUP v. RYNU KURUP.* 20 L. W. 608 : 35 M. L. T. (H. C.) 122 : 1924 Mad. 911 (2).

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—*Abandonment of holding—Proof of—Death of Tenant.*

Where a person who would be entitled by succession to a share in a holding never made any claim he must be held to have abandoned it. (*Fremantle, S. M. and Burn, J. M.*) *BHAGWATE PRASAD v. BAQAR ALI.* L. R. 5 A. 238 (Rev.).

—*Abandonment of holding—Grant to another—Rights of parties.*

Where a tenant abandons his holding and the landlord lets it out to another the old tenant cannot get into possession without the landlord's consent. The new tenant if forcibly ejected can sue for possession. (*Kanhaiya Lal, J.*) *SYED ZAHUR HASAN v. SHAKER BANOO.* 78 I. C. 189 : 1925 A. 29.

—*Abandonment—Occupancy rights—Claim of proprietary rights at settlement.*

The summary settlement of a village was made with the plaintiff's predecessor who claimed under-proprietary rights :

Held, that this amounted to an abatement of the plea of occupancy rights. (*Fremantle, S. M. and Burn, J. M.*) *CHANDRABHAN PRATAP SINGH v. SHEO BAHAL SINGH.* L. R. 5 O. 72.

—*Abandonment—Proof—Leaving village without arranging for cultivation.*

The new tenant has in order to prove abandonment, to prove not only that the former tenant had left the village but also that he had done so without making arrangements for the cultivation. (*Fremantle, S. M.*) *HIRA CHAUDHRI v. TIRBENI KAHAR.* L. R. 5 A. 106 (Rev.).

—*Abandonment by tenant—Benefit of, enures to all the landlords*

Where a land occupied by a tenant is given up by him it enures for the benefit of all the co-sharers entitled to it. (*Sulaiman, J.*) *BASDEO PANDE v. MOHAN PANDE.* L. R. 5 A. 113 (Rev.) : 1924 All. 865 (2).

—*Abandonment—Tenant leaving village leaving holding in the hands of a near relation—Death—Presumption—Evidence of.*

The recorded tenant of a holding left the village and the sub-tenant who was a member of his *biradar* continued in possession of the holding. There was no evidence that the sub-tenant took the holding direct from the Zamindar. *Held*, that it could not be said that the tenant had abandoned the village and his name could not be struck off unless he was proved to be dead. Death could not be presumed in the absence of clear proof that he had not been heard of for seven years. (*Fremantle, S. M. and Burn, J. M.*) *JAGDEO SINGH v. KAWALPAT CHAUBE.* L. R. 5 A. 9 (Rev.).

—*Adverse possession—When possession of tenant is adverse. See ADVERSE POSSESSION* 79 I. C. 59.

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— — — *Agricultural village—Right of tenant to sell house*

A tenant of an agricultural village has no right to sell his house together with the right of residence. He can only sell the materials. In this respect there is no distinction between a sale to another tenant and a sale to a stranger (*Daniels, J.*) *MT. CHAMPA KUNWAR v. TULSHI RAM.*

L. R. 5 A. 140 (Rev.) 79 I. C. 954 : 1924 A. 921.

— — — *Arrears of revenue—Sale—Default by proprietor.* 77 I. C. 564.

— — — *Bhurgdar—Status of—Servant cultivator—Not a tenant.* See PROV. SM. C. C. ACT. SCH. I, ART. 8. 40 C. L. J. 197.

— — — *Cess—Arrears of rent—Amount due.*

Where a certain amount is recorded as payable as "Raam Siwai" by the tenant at the last settlement, the amount is recoverable from tenants in a suit for arrears of rent. (*Mukerji, J.*) *NEMA SINGH v. KULSUM-UN-NISSA.*

L. R. 5 A. 209 (1) (Rev.)

— — — *Cess—Artisan cess abadi.* *MT. BAKSHI v. HYDER KHAN.* 75 I. C. 270.

— — — *Consent of Zemindar—Long possession by tenant.*

Mere length of possession of land by a cultivator is not sufficient to raise a presumption of the Zemindar's consent. (*Burn, J.*) *MAHANT KUNJ BEHARI DAS v. BIRWA MEHNAUN.* L. R. 5 O. 31.

— — — *Contract of tenancy—Prohibition against sale—Prohibition against mortgage—Pre-emption.*

Under the terms of an agreement entered into between a Zemindar and his tenant the latter was permitted to convert his occupancy holding into a grove on condition that the zemindar was to be the owner of three fourths of the grove while the tenant was to be the owner of the remaining one fourth. The tenant's ownership was restricted in several ways and he was not given liberty to sell his shares to any person except to the zemindar. *Held*, that the Zemindar was not obliged to give the tenant leave to plant trees. If he did give leave, it is perfectly open to him to make that permission subject to conditions which the tenant himself accepted and which were embodied in a binding agreement. The agreement giving the Zemindar a right to get a sale of the share of the tenant is very similar to an agreement giving a right of pre-emption. The court must construe the contract which the parties have made and is not at liberty to make a fresh contract on their behalf because it thinks that they might have intended to lose certain things which they have not expressed in their written agreement. Sale and mortgage are two quite different things and a prohibition against one does not necessarily import prohibition against the other. It is impossible to maintain the view that the tenant remained an occupancy tenant notwithstanding the agreement as to the

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planting of the groves. 43 All. 606 referred to. (*Daniels, J.*) *GULZARI LAL v. HAR PRASAD.* L. R. 5 A. 260 (Rev.) : 1925 A. 97.

— — — *Contract of tenancy—Threshing floor—Right to—Onus—Presumption.*

Where it is proved that a piece of land had been held by the tenant and used by him for the purposes of threshing corn there is a presumption that he held the land as a part of his contract of tenancy. The burden of proving that the land claimed as threshing floor was not held in fact as a part of the contract of tenancy is on the landholder. (*Sulaiman and Mukerjee, JJ.*) *JAGESHWAR PRASAD v. SURAJ BALI SINGH.*

L. R. 5 A. 253 (Rev.) : 1925 All. 16.

— — — *Covenant against alienation—Forfeiture clause—Alienation of portion of lease property—Effect of—Principles of construction.*

A lease deed contained a clause for forfeiture if the rights under the term were alienated. Some of the items comprised in the lease were alienated and the landlord claimed to enforce his right of forfeiture. *Held*, it could not be enforced as the clause did not refer to partial alienations but only to alienation as a whole. A clause for forfeiture must always be construed strictly as against the person who is trying to take advantage of it and effect should be given to it only so far as it rendered absolutely necessary to do so by the wording of the clause. A covenant against assignment does not prevent from assigning for any part of the terms or from assigning any portion of the premises and unless the covenant is expressly worded to exclude a partial alienation of the premises, a partial alienation will not work forfeiture. (*Krishnan, J.*) *VENKATRAMANA BHATTA v. KISHNA BHATTA.* 20 L. W. 294 : (1924) M. W. N. 668 : 1925 Mad. 57 : 35 M. L. T. 90 (H. C.) : 31 I. C. 1003 : 47 M. L. J. 307.

— — — *Covenant for renewal—Assignee from tenant—Right to enforcement—Stipulation as to rent being increased—Vague and unenforceable.* *NAVA KISHORE DAS v. MADAN MOHAN DAS GOSWAMI.* 1924 Cal 346 (2).

— — — *Death of tenant—Heir holding over—Zemindar's failure to eject in a reasonable time—Effect of.*

Where on the death of a tenant, the landlord takes no steps to eject the heir in a reasonable time, the latter must be held to have been admitted. When he is admittedly a statutory tenant he cannot be ejected by notice. (*Fremantle, S.M.*) *MD. ZAKI v. SUKHAL.* L. R. 5 O. 164 (Rev.).

— — — *Easement—If can be acquired by prescription.* 1924 A. 159.

— — — *Ejectment—Agreement by tenant to pay fair rent—Compromise of disputes—Zemindar estopped from ejecting tenant.*

With reference to land which was formerly unrented and in which the tenant claimed occupancy right a compromise between the Zemindar and the tenant was filed to the effect that the tenant had agreed to pay Re. 1-8-0 rent and

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6 annas per biswa for land which might accrue by alluvion and in return the Zemindar agreed not to eject him as long as he paid rent. The order of the Court was the defendant has agreed to a rent of Re. 1-8-0 and the plaintiff withdrew the suit for ejectment which was dismissed. In a subsequent suit by the Zemindar.

Held, that the compromise being neither registered nor incorporated in the decree of the Court was not admissible in evidence and did not bind the Zemindar. The defendant having agreed to pay a fair rent for the land which he was bound to do in any case and there being no consideration for the grant of occupancy rights, the proceedings did not estop the Zemindar from subsequently ejecting the tenant. (*Fremantle, S. M. and Burn, J. M.*) *BADRI NARAIN v. NAND BAHADUR.* L. R. 5 A. 100 (Rev.).

—————*Ejectment—Building erected by tenant—Knowledge of landlord—Renewal of buildings—Acquiescence.*

The plaintiff-appellant was the Zemindar of a village and the defendant respondents were two blacksmiths living in the same village. The plaintiff sued to eject the defendants from a *saiban*, a *dalan* and a shed on the allegation that these were recent constructions upon his land. The defendants were tenants and residents in the village in which they had a house. They carried on business as blacksmiths there.

The trial court found that one of these structures was an old one and dismissed the suit in respect of it but decreed the blacksmiths' ejectment from the two others. The blacksmiths appealed to the lower appellate which dismissed the whole of the suit holding in effect that constructions similar to these had existed for some twelve years for the convenience of these blacksmiths upon the sites on which they now stood, and the only conclusion to be drawn from the fact that the blacksmiths worked in the village was that these constructions were for their use in carrying on their trade or business or in some way necessary to it. *Held*, affirming the decision of the lower appellate Court that as the original constructions had been made many years ago, the obvious presumption was that the Zemindar not only had acquiesced in their having been made but accepted them as a reasonable appurtenance of the blacksmith's dwellings and when those constructions came to an end, the blacksmiths had every right to replace them as they were before. (*Stuart, J.*) *ISH NARAIN UPADHIA v. RAMESHAR LOHAR.* 22 A. L. J. 244 : L. R. 5 A. 91 (Rev.) : 78 I. C. 164 : 1924 A. 433.

—————*Ejectment—Cause of action at a later date—Admission to occupancy rights.*

The plaintiff was ejected by the defendant on 31-3-21. In an ejectment suit filed in the Civil Court, by the defendant the date of the cause of action was shown to have arisen in the beginning of January 1922.

Held, that the statement in the Civil Court plaint did not amount to an admission that the defendant had readmitted the plaintiff to occupancy rights (*Burn, J. M.*) *CHHEDA v. SAHU RAM GHULAM.* L. R. 5 All. 317 (Rev.).

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—————*Ejectment—Encroachment—Tenancy—Remedy of landlord.*

If a person without the consent of the Zemindar is holding land not included in his rented holding without paying rent therefor, the Zemindar may assert his right at any time and either eject him or have the land assessed to rent. (*Fremantle, S. M. and Burn, J. M.*) *SHEO DIAL v. GOURI SHANKAR.* L. R. 5 A. 95 (Rev.) : 10 J. L. J. 628.

—————*Ejectment—Licensee from Zemindar—Erection of buildings—Estoppel.*

In a suit by the transferees from a Zemindar to eject the defendants from a plot of land it was found that by consent of the Zemindars for more than 12 years the defendants were permitted to occupy the plot as licensees for storing manure, pressing sugarcane, etc., and had in pursuance of the license erected constructions of a permanent character. *Held*, that the defendants must be left in undisturbed enjoyment of the land as licensees. (*Lindsay, J.*) *NATHU v. TULSI RAM.* L. R. 5 A. 98 (Rev.) : 78 I. C. 316 : 1924 A. 434.

—————*Ejectment—Notice of—Claim of underproprietary or occupancy rights.*

Plff. claimed underproprietary or occupancy rights in the alternative in a suit to contest a notice of ejectment. *Held*, that the court was bound to decide whether plaintiff had underproprietary rights and the suit could not be disposed of merely on the finding that the plaintiff had shown that he was not a thekadar. (*Fremantle, S. M. and Burn, J. M.*) *RAJA BHAGWAN BAKHSH SINGH v. JANG BAHADUR SINGH.* L. R. 5 O. 123.

—————*Ejectment—Notice of—Suit to contest—Acquisition of occupancy right—Agreement if admissible in evidence.*

In a suit to contest a notice of ejectment the mukhtear-am of the Zemindar applied to the court stating that the tenant had acquired occupancy rights in a certain plot and that the notice of ejectment should be cancelled. *Held*, that the agreement not being registered was inadmissible in evidence and that the tenant not having paid any premium and the rent not having been enhanced, there was no estoppel against the Zemindar. (*Fremantle, S. M.*) *BINDESHWARI PRASAD v. PHULCHAND.* L. R. 5 A. 180 (Rev.).

—————*Ejectment—Recognition of occupancy rights—Estoppel.*

Where the sister's son of a former tenant having no right to succeed to the tenancy was recognised by the zemindar as occupancy tenant, this is equivalent to the conferment of occupancy rights and he could not be ejected. (*Fremantle, S. M. and Burn, J. M.*) *KUNWAR BAHADUR v. SHAMBHU DAYAL.* L. R. 5 A. 165 (Rev.).

—————*Ejectment—Relationship of parties—Mortgage—Unregistered document—If can be pleaded.*

In a suit in ejectment, the defendant can set up even an unregistered mortgage deed to show that he was in possession as mortgagee and not as tenant. (*Sulaiman, J.*) *KESRI SINGH v. CHANNO.* 1924 A. 837.

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— *Ejectment—Status of tenant to be ascertained.*

Where a person contests a notice of ejectment describing him as an ordinarily tenant on the ground that he has superior rights, the Court should ascertain and decree definitely the rights which it finds the plaintiff entitled to (*Fremantle, S.M. and Burn, J.M.*) *RAJA BHAGWAN BAKHSH SINGH v. MATHURA SHUKUL* L.R. 5 O. 108 (Rev.) 10 O. & A. L. R. 717. 11 O. L. J. 656.

— *Ejectment—Sub tenancy—Admission of tenancy up to a certain time—Subsequent denial—Effect of.*

In a suit by the plaintiff to eject the defendant as his sub-tenant the plaintiff's position as a tenant in-chief up to a certain time was not denied by the defendant. At the time of the institution of the suit the plaintiff's name was still recorded in the papers. *Held*, that the burden was on the defendant to show that the plaintiff's tenancy had come to an end in a manner recognized by law. The mere fact that the plaintiff had not cultivated the land for 8 years raised no presumption that he had ceased to be a tenant of the land (*Fremantle, S. M. and Burn, J. M.*) *MUTSADDI LAL v. GAJOLA*. L. R. 5 A. 58 (Rev.).

— *Ejectment—Sub tenant—Claim by third person—Payment of rents—Evidence as to.*

In a suit by an exproprietary tenant to eject a sub-tenant from some of the plots comprised in the holding, a third person intervened and asked to be impleaded on the ground that the plaintiff had lost all rights to the holding by long disposssession and that he was in possession and had sub-let the plots to the defendant. *Held*, that the plaintiff had failed to show that he was an exproprietary tenant and that he was ever in possession of exproprietary rights. (*Fremantle, S. M. and Burn, J. M.*) *RAGHUNATH v. KHUMAN*. L. R. 5 A. 150 (Rev.).

— *Ejectment—Sub-tenant—Mortgage from Zemindar—Plea of—Duty of Court.*

Plff. a tenant sued to eject the defendant as sub-tenant. Defendant pleaded that he held the land as mortgagee of the Zemindar. The Court decided the case on the single issue whether the defendant was a sub-tenant of the plaintiff. *Held*, that it was not sufficient for the decision of the case and it was necessary for the Court first to decide the defendant's contention that he held as mortgagee of the Zemindar. (*Fremantle, S. M. and Burn, J.*) *RAM JAS OJHA v. RAM PALAT OJHA*. L. R. 5 A. 330 (Rev.).

— *Ejectment—Thekadar—Lease—Proof of.*

Suits to contest notices of ejectment must not be dismissed on vague findings as this leaves the door open for future litigation. A theka cannot be proved by the production of a kabuliyat. (*Fremantle, S. M. and Burn J. M.*) *RAJA BHAGWAN BAKSH SINGH v. SHEO DAYAL MISRA*. L. R. 5 O. 195.

— *Ejectment—Two brothers one of whom accepted lease from Zemindar.*

One of the two brothers forming a cultivating partnership took from the Zemindar a seven years' lease in common interest to avoid ejectment. In a suit by the Zemindar for ejectment, *Held*,

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that lease was binding on both the brothers and both were liable to ejectment on its termination (*Fremantle, S. M.*) *PARTAB v. BALDEO DAS*. L. R. 5 A. 102 (Rev.).

— *Ejectment—Underproprietor—Thekadar—Status of.*

In a suit to contest a notice of ejectment as thekadar, plaintiff claimed that he possessed rights superior to those of a thekadar and the Court decided merely that the plaintiff had such rights. *Held* that it was an imperfect finding and that the Court ought to have found the status definitely. (*Burn, J. M.*) *RAJA BHAGWAN BAKHSH SINGH v. RAM RATAN*. L. R. 5 O. 106 (1) (Rev.).

— *Ejectment—Village shopkeeper—Rebuilding shop.*

A member of a village community who is allowed to keep a shop in permissive occupation of the site and the mere fact that he puts up a masonry building on it does not render him liable to ejectment. (*Piggott, J.*) *UDAL v. GULAB RAI*. 1924 A. 727.

— *Entry of one's name as "Sharik Kasht" in a rent receipt—Whether amounts to partnership in tenancy.*

Partnership in cultivation is by no means equivalent to partnership in tenancy and the entry of one's name as "Sharik Kasht" in the receipt is not sufficient to prove that an agreement existed between the Zamindars and tenants in regard to their position in the holding. (*Burn, J. M.*) *MT. DALLO v. NEHAL SINGH*. L. R. 5 A. 310 (Rev.).

— *Escheat—Onus of proof—Lands granted by Zamindar—Right of the Crown.*

1924 Pat. 168.

— *Expiry of lease—Duty of tenant to restore possession—Covenant, implied in a lease.*

A covenant by the lessee to give vacant possession to his landlord after the expiry of the lease is implied in every lease. A notice given to the landlord by the tenant that he had vacated the demised premises and that the landlord should take possession of the same is a sufficient intimation of relinquishment so as to put the owners in a position to resume possession. (*Moti Sagar, J.*) *RAM GOPAL BHAGWAN DAS v. PARMESHWRI DAS*. 6 Lah. L. J. 197 : 1924 Lah. 474.

— *Expropriatory right—Abandonment of—Usufructuary mortgage—Mortgagee in possession—Subsequent dispossession—Suit for restoration.*

Defendant executed in favour of the plaintiff a usufructuary mortgage of certain *sir* and *Khudkast* plots and subsequently allowed plaintiff to remain in actual possession of the land without claiming any right as an expropriatory tenant for 6 years. The defendant thereafter paid a portion of the mortgage money and with the consent of the plaintiff took possession of a portion of the land proportionate to the amount paid up. Later on defendant dispossessed plaintiff of the remaining portion of the land. In a suit for possession by the plaintiff the defendant set up a claim of expropriatory right. *Held*, that in the circumstances of the case the expropriatory rights which arose in favour of the defendants must be

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considered to have been abandoned and the plaintiff was entitled to be restored to possession. (*Daniels and Dalal, JJ.*) *TOLAI MISSIR v. MUNE. SHAR KOERI.* 22 A. L. J. 463 : L. R. 5 A. 167 (Rev.), 1924 A. 737.

— *Expropriatory rights—Accrual of—Oudh Laws Act, S. 25—Sale of property by one, whether binding on the other—Effect of continuous possession.*

C and S were brothers owning a proprietary holding. S while joining the army gave a power of attorney in favour of his brother. C mortgaged and then sold the equity of Redemption in favour of his Zamindars. Subsequently S returned from the army and cultivated the land, previously cultivated by his brother. In an ejectment suit by the Zamindar, against S, calling him a trespasser,

Held, dismissing the suit, (1) that both the brothers were bound by the sale, (2) and that one of the brothers having been continuously in possession of the land, under S. 25, O. dh Laws Act, they were entitled to occupancy rights. (*Fremantle, S.M. and Burn, J. M.*) *RAM KARAN v. SUFAJ PAL.* L. R. 5 O. 159 (Rev.)

— *Expropriatory rights—Effect of failure to claim.*

Expropriatory rights do not lapse by failure on the tenant's part to claim them. (1) It may be claimed so long as the expropriator retains possession of the holding. (2) Expropriatory rights can be acquired on land which is either 'Sir' or has been held by the expropriator, as khuckasht for 12 years. (*Fremantle, S. M.*) *GANGA SAHAI v. DWARKA SINGH.* L. R. 5 O. 157 (Rev.)

— *Forfeiture—Covenant against alienation—Sale by lessee of his interest—Lessee continuing in possession under lease from his vendee—Effect of forfeiture.*

Where a tenant holding under a permanent lease which contained a clause for forfeiture in case of alienation transferred his interest in favour of a third person and again took a lease from the transferee and continued in possession, *held*, that the permanent lease was forfeited by means of the alienation and that the effect of the forfeiture was to determine the original lease as well as the under-lease. (*Spencer, O. C. J. and Kumaraswami Sastri, J.*) *GOPALA KUDUVA v. SHEIK MAHOMED HAMZA SAHIB.* 19 L. W. 545 : 34 M. L. T. (H. C.) 339 : 1924 M. W. N. 477 : 1924 Mad. 776.

— *Forfeiture—Decree for payment of rent and forfeiture on default—Amount increased on appeal—Effect on forfeiture clause in decree.*

Where forfeiture is sought to be enforced by a landlord under the terms of a decree, he should prove conclusively that the decree which he is executing has given him that right. The Court ought to be in favour of the tenant against forfeiture rather than in the landlord's favour in such cases. The first Court decreed a suit for enforcing a forfeiture and for arrears of rent by holding that if the tenant paid the arrears within one month there was to be no forfeiture. The tenant paid the rent decreed but on appeal the amount of rent was enhanced and nothing was said about forfeiture. *Held*, that the forfeiture clause was

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not part of the appellate decree and forfeiture should not be enforced. (*Krishnan and Waller, JJ.*) *AKKAMMA SHETTATI v. CHANDRA SHETTI.* (1924) M. W. N. 92 : 78 I. C. 1007 : 1924 Mad. 649.

— *Forfeiture—Denial of title—Waiver—Notice to quit—Dispute between rival landlords—Tenant willing to pay lawful landlords—No disclaimer of title.*

Where in a suit for rent the tenant pleaded that as both the plaintiff and a third person claimed the rent, he was ready to pay the rent to the one whom the Court found entitled to, it is not a disclaimer of the landlord's title so as to work a forfeiture of the tenancy. Where the landlord in a suit for ejectment on the ground of forfeiture of the tenancy makes an alternative claim that the notice given by him should be regarded as determining the tenancy, *Held*, that the landlord was estopped from relying on the forfeiture inasmuch as the claim based on a notice to quit amounted to a waiver of the forfeiture and an assertion that the tenancy was subsisting. (*Evans v. Davis*, 10 Ch. D. 747 holds. (*Pratt and Fawcett, JJ.*) *RUKMINI v. RAYAH* 26 Bom. L. R. 672 : 48 Bom. 541 : 1924 Bom. 454.

— *Grove land—Abandonment by tenant—Sale if amounts to.*

According to the usual custom prevailing in the province of Oudh when a grove is held by a tenant, who is not the owner thereof, it reverts to the landlord when it is abandoned by the tenant. A sale of half the grove amounts to an abandonment of that half even though the tenant was still in possession of the entire grove jointly with the defendants to the extent of one half. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) *MAHABIR PRASAD v. UMAN SHANKAR.* 10 O. & A. L. R. 1310.

— *Grove—Planting of—Non-occupancy lands—Permission of Zemindar—Effect of.*

The planting of a grove on non-occupancy lands with the permission of the Zamindar puts an end to the tenancy and the old tenant becomes a grove holder with powers of transfer. (*Daniels, J.*) *SULTAN HUSAIN KHAN v. JWALA.* 1924 A. 831.

— *Grove—What is—Babul or Shisham trees—Ejectment.*

There can be a plantation of babuls or of other trees such as shisham which are usually self-own and such plantations, if enclosed or otherwise protected by the owner, may have the characteristics of a grove and the landholder may be debarred from ejectment. But in the present case there had been no such nurture of the trees as would entitle the possessor to protection from ejectment. (*Fremantle, S. M. and Burn, J. M.*) *GANGA SAHAI v. SARDAR.* L. R. 5 O. 110 : 10 O. & A. L. R. 681.

— *Grove—What constitutes.*

Where a holding had 11 old trees in it which works to about 9 or 10 trees per acre, the Court may find it to be a grove. Where a person is recorded as in possession and is admitted to be in possession of the holding he has the rights of a groveholder and so long as the plot comes within

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the definition of a grove he is not liable to be ejected from it (*Fremantle, S. M.*) SHEO PARSHAN SINGH v. BALRAM SINGH

L. R. A. 59 (Rev.).

———*Heir holding tenancy after the death of previous tenant—Landlord's acquiescence—Effect of pending partition proceedings.*

If an heir has held for some time after the death of the late tenant and no steps are taken to eject him he must be considered to have been admitted as statutory tenant. The circumstance that litigation is going on regarding the proprietary right with which a tenant has no concern, is not such a special circumstance. (*Fremantle, S. M.*) MD. ZAKI v. DUJAL. 5 O. 165 (Rev.).

———*Holding over—Conditions of—Notice to quit.*

Where under the terms of the lease in respect of a shop for more than one year no notice to quit was required to determine the tenancy and the tenant continued in possession after the expiry of the lease, it must be presumed that he continued under the same terms as before and no notice to quit was necessary. (*Wazir Hasan, J. C.*) LAL MAN v. MT. MULLO. 10 O. & A. L. R. 397; 81 I. C. 592; 1925 Oudh 173 (1).

———*Holding over—Damages.*

When a tenant holds over wilfully and contumaciously, Courts can award reasonable damages and the penalty laid down in England by statute of double the rent may sometimes be taken as a fitting standard (*Campbell, J.*) RURE KHAN v. GHULAM MUHAMMAD. 1924 Lah. 643.

———*Holding over—Lessor and lessee—Lessee continuing in possession after expiry of lease—Liability to pay rent—Extent of.* See T. P. ACT, S. 116. 48 B. 341.

———*Landlord's title defective or title with third person, whether open to tenant to deny.*

A tenant who has been let into possession, cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. Even where the title rests with a third person the tenant is estopped from denying the landlord's title. (*Dalal, J. C.*) DHANI RAM v. MAIKOO LAL. 1 O. W. N. 957.

———*Land recorded as expropriatory in partition proceedings—Effect of.*

Where a Zamindar sued to eject a recorded expropriatory tenant, on the ground that the land was not cultivated by the former 'sir' holder after partition, as required by S. 126. L. R. Act.

Held, relying on S. D. 6 of 1923, that the land was allotted to the plaintiff's mahal as expropriatory and must be treated as such whether it fulfils the definitions of expropriatory land or not. (*Fremantle, S. M.*) RAMJAS AHIR v. DADHU LAL RAI. L. R. 5 All. 285 (Rev.).

———*Lease—Construction—Religious endowment—Trustee—Absence of words importing permanency—Duration of lease.*

Where the trustee of a religious endowment in South Canara grants a lease, but there are no

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words, such as *mulgeni* indicating a permanent grant, Courts should put a liberal construction on the same and carry into effect the intention of the parties. Such leases where no period is fixed must be recognised as valid for the life of the lessor or trustee and words apparently wider in import must be read as limited to the life-time of the lessor qua trustee. A suit for recovery of the properties within 12 years of the death of the lessor trustee will be in time. (*Coutts Trotter, C. J. and Ramesam, J.*) VRNKATARAMANA PAI v. SAMPA. 47 M. L. J. 256. 1924 Mad. 827.

———*Lease—Period of seven years—Burden of proof.*

Where a Kabulivat is executed after the beginning of the revenue year it is for the zemindar to show that an agreement to lease had been entered into before the year began. (*Burn, J. M.*) MOHAN LAL v. SUBHAMA. L. R. 5 A. 237 (Rev.).

———*Mortgage of trees, planted by the tenant on his holding with landlord's consent—Decree in favour of mortgagee before ejectment of tenant—Suit by landlord for a declaration that trees could not be brought to sale.*

Where under the special custom of the village, a tenant, whether he is or is not an occupancy tenant, plants trees upon his holding with the consent of the landlord, they are transferable by the tenant, and landlord's suit, for a declaration that those trees could not be brought to Court sale, does not lie. 3 All. 567 Dist. 10 All. 159 Foll. (*Stuart, J.*) HAR DAYAL SINGH v. GUR DAYAL SINGH. 1923 All. 181.

———*Non-transferable—Transferee—Fraudulent decree enhancing rent—If can be set aside.* 5 Pat. L. T. 52; 3 Pat. 134; 75 I. C. 177; 1924 P. 250.

———*Notice to quit—Agricultural lease—Sufficiency of notice—Usage.*

Where a notice to quit given to a tenant holding under an agricultural lease gave the tenant a reasonable period and was in accordance with the usage of the country, it is not bad on account of the fact that it does not expire with the year of the tenancy, 6 L. W. 491 foll.; 42 M. 654 Dist. (*Madhavan Nair, J.*) JARU POOJARI v. SOMAKKE. 20 L. W. 941.

———*Notice to quit—Legality of—Point not to be allowed for the first time in second appeal.*

Where in a suit for ejectment after service of a proper notice to quit the defendant did not either in the written statement or in the trial court question the validity or sufficiency of the notice to quit, it will not be open to him to raise in appeal or second appeal for the first time that the notice to quit was invalid. If the plea is allowed the plaintiff would be prejudiced as he would lose the advantage of withdrawing the suit when he finds that his notice was not a proper notice and of bringing a fresh suit at once after giving a proper notice. 15 I. C. 584; 4 L. W. 168; 10 L. W. 137; 13 L. W. 397 referred to. (*Krishnan, J.*) NALLURI P. K. RAMAN MENON v. SECY. OF STATE FOR INDIA. 20 L. W. 433; 1924 M. W. N. 830; 82 I. C. 956; 1924 Mad. 904.

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———*Notice to quit—Necessity for—Lessee holding on after expiry of term without consent of lessor or payment of rent.*

Where a tenant after the expiry of the term of a lease continues in occupation of land without any express agreement with the plaintiff (landlord) and without his consent and without payment of any rent to the plaintiff, and in opposition to the plaintiff's express intimation that he must pay enhanced rent or vacate the land, the defendant is a mere tenant on sufferance and it is well-established law that such a tenant has bare possession without right and without privity between himself and the owner. He has no right of notice to quit before he is ejected by the lessor (*Plumer and Subbaiah, JJ.*) LAKSHMIRAMANA SETTY v. RAMALINGAYYA. 2 Mys. L. J. 73

———*Notice to quit—Validity of—Provision for ejectment and damages if tenant did not quit—Effect of—Notice signed by authorized agent—Legality of.* See T. P. ACT, S. 106.

L. R. 5 A. 294.

———*Occupancy holding—Usufructuary mortgage by tenant—Rights of mortgagee*

There is no contract between the mortgagee of an occupancy tenant and the land lord and because the tenant is prohibited by law from making a valid transfer, he by the very fact of the transfer, cannot convert the transferee into a tenant in his own place.

Even in the case of a fixed-rate tenancy, the mortgagee does not become a tenant of the landlord even if he paid the rent with his own hand. The payment would be payment on behalf of the mortgagor. 15 A. 219; 15 A. 231; 19 A. L. J. 702 Ref. (*Mukherji, J.*) KISHUN DAYAL SAHI v. SAHIBZADA RAVI PRATAP NARAIN SINGH.

22 A. L. J. 232; 78 I. C. 389.

L. R. 5 A. 209 (2) (Rev.) 1924 All. 908 (2).

———*Occupancy rights—Acquisition of—Compromise giving pukhtadare rights.*

At the first Regular Settlement in Oudh the person in possession of land claimed under proprietary rights and the talukdar agreed to give him for his life and the life of a son rights which were described as pukhtadari and were similar to those of an under proprietor except that they were limited to two lives. On the evidence it was held that the rights would not be described as under-proprietory. What was really granted was a lease for two lives at a rate of rent which depended on the revenue. There was no bar to the acquisition of occupancy right after the expiry of the term of the lease. (*Fremantle, S. M. and Burn, J. M.*) CHANDRABHAN PRATAP SINGH v. SHEOBAHAL SINGH.

L. R. 5 O. 72.

———*Occupancy right—Acquisition of—Acceptance of invalid lease.*

The fact that a lease, which is subsequently found to be invalid, was accepted as a lease by the tenant does not prevent the acquisition of occupancy rights by him. (*Fremantle, S. M. and Burn, J. M.*) SUNDARMAN TEWARI v. BADRI NARAIN PANDE.

L. R. 5 A. 204 (Rev.)

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———*Occupancy rights—Acquisition of—Separation of holding—Effect of.*

Where with the consent of the Zemindar there was a division or separation of the holding, it amounts to a change of tenant and the period prior to the division could not be counted towards the acquisition of occupancy rights. (*Fremantle, S. M.*) ACHHAIBAR KURMI v. ACHFRAJ PANDE. L. R. 5 A. 234 (Rev.)

———*Occupancy rights—Portion of a proprietary right mortgaged to tenant—Whether mortgagor entitled to count the term of mortgage for acquisition of occupancy rights.*

When the whole of the proprietary right is not mortgaged to a tenant, merger cannot take place, and a tenant remains as a tenant and does not get occupancy rights, as mortgage of land for proprietors. This being so, he may count the term of the mortgage towards the period necessary for acquisition of occupancy right (*Fremantle, S. M.*) LALTA PRASAD v. RAGHUNANDAN.

L. R. 5 All. 321 (Rev.)

———*Tenant—Permanent tenancy.*

75 I. C. 105.

———*Permanent tenancy—If can be acquired by prescription.*

No tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands. 1923 P. C. 205 F. II.

From the fact, that in some receipts given by servants of the Temple tenants of endowed lands in the village were described as "kudimiras" it cannot be presumed that the defendant had a right of permanent occupancy in the endowed lands. Nature of permanent occupancy right considered. (*Sir John Edge*) NAINAPILLAI MARACAYAR v. KAMANATHAN CHETTIAR. 47 Mad. 337;

22 A. L. J. 130; 34 M. L. T. (P. C.) 10;

(1924) M. W. N. 293; 1924 P. C. 65;

L. R. 5 P. C. 33; 10 O. & A. L. R. 464; 82 I. C. 226;

28 C. W. N. 809; 51 I. A. 83; 19 L. W. 259;

46 M. L. J. 546 (P. C.).

———*Permanent tenancy—Alteration of rent—Effect of.* NURUL HUQ v. MAHARAJAT BIRHENDRA KISHORE MANIKYA BAHADUR.

1924 C. 133.

———*Permanent tenancy—Elements of—Non-agricultural land—Erection of permanent buildings—Origin of tenancy unknown—Presumption.*

When a tenant claims to hold land as a tenant under the landlord, the tenant must prove the nature and the extent of the interest which the landlord, the owner of the full rights granted to him and thereby put a limitation to his own rights. The granting of a permanent right in land is a matter of considerable importance and usually is evidenced by appropriate deeds. The first principle is, that in cases where the origin of the tenancy is unknown and its inception is lost in antiquity the principle of a lost grant has been invoked by the tenant, and from the conduct of the parties and the surrounding circumstances, the court has been asked to presume that the tenancy was a permanent one. The conduct of the landlord in recognising succession, transfer and

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in standing by when *pucca* buildings have been raised upon the land, have been mainly relied on in finding out the terms of the lease at its inception. The second principle relied upon is that of equitable estoppel against the landlord from showing that the lease was a terminable one. To raise a presumption of permanent tenancy it must be established that the origin of the tenancy was unknown and that substantial *pucca* buildings were raised without objection by the landlord. Where the building consists of *pucca* stair and a privy within a municipal area, they are not structures which a reasonable landlord would object to in a municipal area, so long as the tenancy subsists. That fact does not give rise to the inference of a permanent tenancy. The mere fact that the tenant is allowed to continue in possession of lands for generations, without alteration of rent, is of common occurrence in this country and is usually attributable to the reluctance of the landlord to eject a tenant from his home so long as he does not make himself objectionable and does not commit default in payment of the rent. Mere forbearance to eject the tenant or enhance the rent, where the right to do so exists means nothing. The question whether on the facts found a permanent tenancy has been established is one of mixed law and fact and open for decision in a second appeal. (*Greaves and Chakravarthi, JJ.*) **ABDUL HAKIM KHAN CHAUDHURI v. ELAHI BAKSHA.** 1925 Cal. 309 : 29 C. W. N. 138.

— — — Permanent tenancy—Evidence of—Origin of tenancy known but not incidents—Inference from conduct.

Where in a suit by the landlord in ejectment, the tenant sets up a claim of a permanent tenancy and the date of the lease is known but its terms have to be gathered from the subsequent conduct of the parties and it was also found that there was a uniform payment of rent and succession and transfer of the holding. *Held* that under those circumstances the burden of proving that his claim of permanent tenancy was a reasonable one from these facts lay on the tenant. An assertion in a lease executed by the tenant that his right was a permanent tenancy is admissible in evidence under S. 13 of the Evidence Act. (*Ranjin, J.*) **JNANENDRA NATH DUTT v. NASEA DAS.** 39 C. L. J. 526. 1924 Cal. 991.

— — — Permanent tenancy—Origin of tenancy unknown—Uniform payment of rent—Erection of buildings. 1924 Cal. 465.

— — — Permanent tenancy—Presumption—Origin of tenancy unknown—Buildings erected by tenant.

The fact that the commencement of a tenancy cannot be determined coupled with the presumption of continuation of the tenancy, and coupled also with the fact that a permanent building had been erected on the land a long time ago raises a strong presumption that the tenancy was permanent. (*Pratt and Fawcett, JJ.*) **RUKMINI v. RAYANI.** 26 Bom. L. R. 672: 48 Bom. 541: 1924 Bom. 454.

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— — — Permanent tenancy—Proof—Onus.

The burden is upon the tenant who sets up a permanent tenancy to prove it. Neither length of possession nor the fact that the tenant had reclaimed forest land for cultivation, would be enough to confer a permanent tenancy. (*Krishnan, J.*) **BANDARU (HELLAMMA v. DUNGALA PENTAYYA.** (1924) M. W. N. 440 : 79 I. C. 845 : 20 L. W. 478 : 1924 Mad. 828.

— — — Permanent tenancy—Proof of—Thekadar.

Where the Commissioner held in all cases that as only *kabuliats* had been produced and no *patta* a *theka* had not been created. *Held*, that he was right. (*Frederic, S. M. and Burn, J. M.*) **RAJA BHAGWAN BAKSH SINGH v. SHEO DATT.** L. R. 5 O. 70.

— — — Permission by landlord to plant grove—Effect.

When permission is given by the *zemindar* to plant a grove on the non occupancy tenure the effect of this is to put an end to the tenancy as such and to substitute therefor a fresh contract between the parties by which the position of the tenant is converted into that of a grove-holder with transferable rights; the case is much stronger where the land is held with occupancy rights. It is most unlikely that the tenant would agree to spend the considerable sum of money necessary to convert the plot into a grove if he was still to remain liable to be turned out of the land and to loss of the trees at any time. (*Daniels, J.*) **SULTAN HUSAIN v. JWALA.** 1924 A. 831.

— — — Plea not open to tenant.

1924 P. 226.

— — — Possession—Suit for, against third parties—Tenancy subsisting—Effect of.

During the subsistence of a tenancy, a landlord has no right to sue for possession against third parties. His rights are to obtain a declaration of title and to obtain rent by virtue of the tenancy which subsists. (*Walmsley and Mukerji, JJ.*) **SRI-MATI KUMUDINI DAS v. SURENDRABALA DAS.** 82 I. C. 22.

— — — Relationship between—Agreement—Payment of rent. **MANOHAR LAL v. RAM RATAN.** 1924 Nag. 67.

— — — Relationship—Creation of.

The relation of landlord and tenant can be created by a mere grant or contract of tenancy. (*Kinkhede, A.J.C.*) **AMARCHAND v. SARDAR SINGH.** 82 I. C. 190 : 1925 Nag. 90.

— — — Relationship—Death of tenant—Lease for seven years to tenant's widow—Position of lessee.

Where the *Zemindar*, on the death of the tenant, granted a seven years' lease to his widow. *Held* that the widow became a tenant in her own right and not as heiress to her husband and her daughter was the heir to the holding and not her husband's collaterals. (*Burn, J. M.*) **RAM SAGAR v. RAM DAYAL.** L. R. 5 O. 120 : 11 O. L. J. 522.

— — — Relationship—Ejectment—Compromise—Enhance of rent.

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The Zemindar sued to eject a mortgagee from a deceased tenant. The parties compromised the case whereby occupancy right was conferred on the defendant and rent was enhanced. The court was of opinion that the grant of occupancy rights was illegal and refused to pass a decree but directed the defendant to be recorded as a non-occupancy tenant and the suit to be withdrawn. *Held* that the Zemindar was not thereafter prevented from suing in ejectment. (*Fremantle, S. M.*) *MUSAT KOERI v. SURAJ RAI. L.R. 5 A. 173 (Rev.)*

— *Relationship—Land recorded as held by one person—Possession with another—Admission of tenancy—Entry of names of each of three brothers in respect of different plots—Joint Hindu family.*

The entry of the defendants as in possession of the land, which was actually recorded as held by one person is not evidence that the defendants had actually been admitted to the holding of that land by the plaintiff during the year. Where there is nothing to show that certain brothers have separated after ejectment by the zemindar, the presumption would be that though the name of only one or two brothers is mentioned, the holding is that of the joint family. (*Fremantle, S. M. and Burn, J. M.*) *GOBIND PRASAD v. NIMMI. L. R. 5 O. 181.*

— *Relationship—Lessee for a term of years whether can create tenancy extending his term.* 77 I. C. 929.

— *Relationship—Proof—Admission.*

Where the fact of the defendant holding under a theka is admitted it is unnecessary to insist on proof. Acceptance of a theka does not invalidate any rights the thekadar may possess. (*Fremantle, S. M. and Burn, J. M.*) *RAJA BHAGWAN BAKHSH SINGH v. SHEO DATT. L. R. 5 O. 70.*

— *Relationship—Rent—Assignee of from zemindar—Ejectment of tenants—Right to.*

Where an assignee of rent from the zemindar sued to eject a tenant who had been cultivating the holding from a period anterior to the date of the assignment *Held*, that there was no relationship of landlord and tenant between the parties and that the suit in ejectment was not maintainable. (*Fremantle, S. M.*) *RAM NATH v. MOHAN SINGH. L. R. 5 A. 252 (Rev.)*

— *Relationship—Terms of tenancy—Determination of.*

In a case where the origin of a tenancy is unknown or where the document creating the tenancy is equivocal or ambiguous in its terms one has got to take into consideration the attendant circumstances, and evidence as to the mode of enjoyment of the tenancy is also admissible and may be considered in determining its terms. Another principle is that a tenancy created for a particular purpose may subsequently by conduct of parties be converted into a tenancy of a different character. (*Walmsley and Mukerji, J.J.*) *LAL GHOSH v. NILKANTHA DAS. 30 I. C. 898 : 1925 Cal. 340.*

— *Relinquishment—Vacant possession—Several landlords—Delivery to one—If enough.*

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A tenant giving up demised lands to his landlord is bound to give him vacant possession. If there are several landlords who are undivided, it is enough if delivery of possession is given to one of them. (*Moti Sagar, J.*) *FIRM RAMGOPAL-BHAGWAN DAS v. PARMESHWRI DAS. 78 I. C. 570.*

— *Renewal of lease—Invalid renewal—Rights of parties—Notice to quit given by one of the two Uralans—Validity of—Institution of suit by one Uralan without consulting co Uralan.*

Where the renewal of a lease is found to be invalid, the rights under the prior tenancy continue to subsist and the tenancy could not be determined by the landlord without a proper notice to quit. 15 M. 166 : 10 L. W. 427 referred to.

A notice to quit given by one of two Uralans (trustees) of a devaswom without consulting the other, is invalid and inoperative to determine a tenancy.

Per Ramesam, J.:—(Wallace, J., *dubitante*).

The principle that in any transaction which creates or destroys rights in trust property all the trustees must be consulted does not apply to suits. It is sufficient if, in a suit instituted by one trustee the other trustees are made parties. 26 M. 461 ; 34 M. 406 Referred to. (*Ramesam and Wallace, J.J.*) *CHETTIYOTAM KANNAN KOTTY v. VELU. (1924) M. W. N. 151 : 1924 Mad. 771 : 80 I. C. 139 : 19 L. W. 115 : 46 M. L. J. 122.*

— *Rent—Abatement of—Ouster by title paramount.* 39 C. L. J. 287.

— *Rent—Abatement—Uniform abatement for 53 years.* 75 I. C. 502 (2).

— *Rent—Agreement to pay enhanced rent—Notice by landlord demanding enhanced rate or in case the tenant was unwilling to pay the same, to vacate—Liability.*

The Plaintiffs landlords, served the defendant, tenant with a notice that they would charge Rs. 60 per month for the house from June 1923 and that if the defendant did not accept the proposed enhancement of rent he was free to vacate it by that date. The defendant did not vacate it but continued in occupation of the house. *Held*, that this clearly implied that he agreed to abide by the proposal made in the notice and that he was liable for the enhanced rent. (*Wazir Hasan, J.C.*) *BURGE v. MAHOMED INAMULLAH KHAN. 10 O. and A. L. R. 819 : 11 O. L. J. 561 : 82 I. C. 585 : 1 O. W. N. 408 : 1925 Oudh 189.*

— *Rent—Claim for—Excessive area—Back rents—Enhanced rent if claimable.*

In respect of excess lands in the occupation of a tenant the landlord is entitled to recover what is called back rent, in other words, the landlord is entitled in any litigation to have an enquiry as to the exact area in the occupation of the tenant, and the rent recoverable in respect thereof for the years in suit. During the pendency of the first suit where a claim was made for adjustment of rent in respect of additional land, the claim for assessment of rent at the enhanced rate could not possibly be taken to have suspended the assertion of a similar claim in respect of the subsequent period covered by the second suit.

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(*Mookerjee and Rankin, JJ.*) MANMATHA PAL CHOUHDURY v. SURENDRA NATH BOSE.
40 C. L. J. 538 : 1925 Cal. 463.

———*Rent—Enhancement of—Burden of proof.*

Where it has been established that the tenures have been held from the time of the Permanent Settlement, the burden is cast upon the landlord of proving that he is entitled to enhance the rent (*Newbould and B. B. Ghose, JJ.*) BIRENDRA KISHORE MANIKYA BAHADUR v. ALI AHAMED.
39 C. L. J. 605 : 1924 Cal. 1015.

———*Rent—Implied Contract—Payment of, lump sum for over 60 years.*

Where it is proved that for about 60 years the inamdars in a Zemindari have been paying a lump sum of Rs. 400 a year to the Zemindar in lieu of Kattubadi. *Held*, that whatever might have been the Zemindar's original claim the facts were sufficient to justify the inference that there was an implied contract between the Zemindar and the inamdars that the latter were to pay a sum of Rs. 400 jointly. (*Krishnan, J.*) SRI SRI SRI RAMACHANDRA v. TUMBANATHA BEHARA.
19 L. W. 49: 76 I. C. 730 : 1924 Mad. 480.

———*Rent—Non-payment of — Forfeiture — Relief against.*

In a proper case the Courts have the power to relieve against forfeiture for non-payment of rent. But that power will only be exercised if the defendant pays or tenders the rent in arrear with interest and costs at or before the hearing of the suit. (*Chandrasekhara Aiyar, C. J. and Subbanna, JJ.*) RAGHAVENDRA DASS v. CHALUVIAH.
2 Mys. L. J. 75.

———*Rent—Suit for— Question of title if can be investigated.*

It cannot be affirmed as a broad proposition of law that a question of title may not be incidentally investigated in a suit for arrears of rent. Where the tenant defendant disputes the extent of the title of the plaintiff to the arrears demanded, it is incumbent on the Court to determine the point before the claim is allowed or disallowed. 12 C. L. J. 428 Ref. But subject to this reservation, parties should not be added in a rent suit so as to alter its nature and scope and to transform it into a suit for determination of a complicated question of title to land. (*Mookerjee and Sukrawady, JJ.*) ABDUL GAFUR v. ALI MEAH.
82 I. C. 369 : 1925 Cal. 26 : 28 C. W. N. 805.

———*Rent suit—Question of title—Adjudication of.*

In a rent suit there is no rule of law that questions of title which require to be determined are not to be determined, but in general, questions of title as between plaintiff and third persons do not require to be determined. The relationship of landlord and tenant is however a relevant question. (*Rankin and Mookerjee, JJ.*) CHITPORE GOLABARI CO., LTD. v. GIRDHARI LAL SEROGI.
78 I. C. 353.

———*Rent—Registered Kabuliyat—Absence of lease—Damages for use and occupation.*

Wherein a suit for arrears of rent no written lease had been executed but defendant had executed a registered kabuliyat granting that he had

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taken a share of the Zemindari in lease from plff. and rent had been paid for a number of years in accordance therewith. *Held*, that though there was no tenancy, the defendant was liable to pay compensation for the use and occupation of land (*Daniels and Neave, JJ.*) NAND RAM SINGH v. HARISARAN DAS.
L. R. 5 A. 235 (Rev.) :
82 I. C. 296 : 1925 All. 100.

———*Revision. See.* 75 I. C. 676.

———*Right to possession—Return of deposit made by tenant—Tender—Duty of landlord.*

It is the duty of the debtor, in the absence of a specific contract to the contrary to seek out the creditor and to make payment where the creditor is ; he cannot compel the creditor to go and take the money at a place chosen by the debtor. The same principle applies where the landlord has to return money deposited with him, as the condition of obtaining possession of the property ; he must seek out the lessee and make or tender payment where he is. Otherwise the contract of tenancy is not validly terminated and the landlord is not entitled to obtain possession. (*Chandrasekhara Aiyar, C.J. and Subbanna, J.*) KUNDALMULL v. NAGAMMA.
2 Mys. L. J. 174.

———*Self grown trees on the occupancy holding—Whether zamindar entitled exclusively without proving custom or contract.*

The tree on a holding partakes of the nature of a holding, and a tenant in the absence of custom or contract to the contrary, has the same rights in respect of them as he has on the holding. A tenant is entitled to the fruits or fallen wood of self grown trees on his holding. A Zamindar must prove same custom or contract by which he is entitled to take such wood. (*Kanhaya Lal, J.*) SAGWA v. BAGWANDAS.
L. R. 5 All. 320 (Rev.) :
82 I. C. 385 : 1925 All. 119.

———*'Sir' land—Sale of share—Status of owner.*

A 'Sir' holder who sells his share becomes an proprietary tenant of the entire proprietary body, and not merely of his vendee. (*Daniels, J.*) LAGAN RAI v. RAJA RAI.
L. R. 5 A. 176 (Rev.) ;
79 I. C. 1025 : 1924 All. 507.

———*'Sir' land—Whether tenant can acquire occupancy rights.*

If a certain piece of land is entered in the Settlement records as 'Sir' land, occupancy rights cannot be acquired in it. (*Daniels, J.*) HAZARI v. RAM DULAR & OTHERS.
L. R. 5 All. 290 (Rev.)

———*Sub-tenant — Ouster of—Rent—Abatement—Covenant for quiet enjoyment—Scope of.*

Certain land was the property of a Mahomedan religious endowment and it had been leased to the plaintiff by the manager of the endowment. The defendant took a sub-lease of the land for four years at a yearly rental of Rs. 40 payable in advance. The lease deed contained no covenant for quiet enjoyment. The defendant did not pay the rent for the fourth year and a suit by plaintiff for recovery of the rent for the fourth year was dismissed on the ground that the

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manager of the endowment had evicted the sub-tenant at the beginning of the fourth year of the tenancy. *Held*, in the absence of anything to show that the manager of the endowment acted lawfully in dispossessing the sub-tenant or that he was justified by law in so doing, the eviction of the sub-tenant was no excuse for non-payment of rent due under the sub-lease. The covenant for quiet enjoyment protects the lessee only against lawful disturbance by persons having a paramount title. (*Subbanna, J.*) CHENNARAYAPPA *v.* MUNIAPPA. 2 Mys. L. J. 200.

—Sub-tenancy—Zemindar in same pathi.

There is no reason why a Zemindar should not be a sub-tenant of another Zemindar in latter's *sir* (*Fremantle, S. M.*) THAKUR SINGH *v.* MT. DAL KUAR. L. R. 5 A. 270 (Rev.).

—Sub-tenancy—Landholder if can be a sub-tenant.

There is nothing anomalous in a landholder or a person possessing a permanent lease being also sub-tenant of an ordinary tenant within the land he owns or holds on lease. (*Fremantle, S. M. and Burn, J. M.*) RANGAI *v.* DEOKINANDAN PANDEY. L. R. 5 O. 77.

—Sub-tenancy—Legality of—Tenant, not affected.

The question whether the sub-letting would be legal or illegal is immaterial as between a tenant and his sub-tenant and cannot affect the tenant's position. (*Fremantle, S. M. and Burn, J. M.*) MUTSADDI LAL *v.* GAJOLA. L. R. 5 A. 58 (Rev.).

—Sub-tenant—Rights of superior proprietor.

A superior proprietor cannot hold *sir* in a village which is sub-settled. (*Fremantle, S. M.*) RANI SUBHADRA KUAR *v.* BIKESHWARI PRASAD. L. R. 5 A. 96 (Rev.); 10 O. L. J. 703.

—Succession to tenancy—Minor tenant—Effect of absence.

It would not be equitable to consider that the rights of a minor to succeed to a holding can be cancelled owing to his absence in his sister's house. (*Fremantle, S. M. and Burn, J. M.*) MAHOMED NAZIM *v.* MT. LAUNGA. L. R. 5 A. 56 (Rev.).

—Tenancy at fixed rate—Creation of.

The facts that a document recites tenancy to descend from father to son and provides for extra rent in case on measurement excess land is found to have been included in the demise, do not prove a tenancy at fixed rate but they go a great deal to prove the permanent nature of the tenancy. If in law, the document does not create such a tenancy, a recital in the kabuliyat to that effect does not amount to an estoppel. (*Suhrawardy and Duval, J.J.*) ESHAQUB SHEIKH *v.* MATI AL MALO. 81 L. C. 1043 : 1925 Cal. 294.

—Tenancy—Proof of—Receipt of rent.

Admission to tenancy would ordinarily be held to have taken place on receipt of rent but where the Zilladar received the rent without knowing of the proceedings by way of notice of ejectment initiated separately by the mukhtear, the receipt of rent does not constitute an admission to the

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tenancy. (*Fremantle, S. M.*) SYED AFZAL HUSAIN *v.* MIRZA MD. JAFAR ALI KHAN. L. R. 5 O. 148 : 10 O. & A. L. R. 1038.

—Tenancy-at-will—Rent payable by year or with reference to aliquot parts of the year—Tenancy from year to year—If arises—Determination of tenancy—Notice—Ejectment.

Every document of lease which reserves a yearly rent or which states that the rent is payable in proportion to certain aliquot parts of the year does not necessarily create a tenancy from year to year. Where notwithstanding the mention of a term and also the fixation of rent by reference to a year, there was a provision in the lease that it would be lawful for the lessor to determine the lease and eject the lessee at any time at his option, the tenancy is only a tenancy at will. A tenancy at will is a personal relation between the original landlord and tenant, and is determined by the death of either of them. The reason for the rule is that as death determines the will the tenancy terminates by efflux of time and in such a case the successor of the tenant being at best a tenant by sufferance he may be ejected without notice. In the case of a tenancy at will no formal notice is required but a demand for possession is sufficient. (*Miller, C.J. and Mullick, J.*) RAMDHANI GOPE *v.* MISS C. V. SCOTT. 1924 F. H. C. 333 : 1925 F. 256.

—Thekadar—Power of creation of tenancy. MULLOO *v.* KUNDAN LAL. 7 N. L. J. 55.

—Trees—Land let for planting a grove—Right to trees.

Where a Zemindar has let land to a tenant for the special purpose of planting a grove thereon or where a grove planted by the tenant has been allowed to exist unchallenged by the zemindar, the tenant who planted the trees acquires a transferable interest in them and they become his property in the absence of a custom to the contrary. (*Kanhaiya Lal, J.*) MAN SINGH *v.* MADHO SINGH. 22 A. L. J. 70 : L. R. 5 A. 34 (Rev.) : 79 I. C. 599 : 1924 All 430.

—Trees—Rights of tenant—Grove holder.

If grove-holders cut down or allow to wither most of the trees in their grove and the land ceases to occupy the status of grove and the grove-holders are ejected as remaining in possession of land without any right, it is clear that they also lose the right they may have had in regard to the remaining trees. Such trees are then in exactly the same position as ordinary trees in a tenant's holding. (*Fremantle, S. M. and Burn, J. M.*) MT. NANNI KHATOON *v.* GIRDHARI LAL. L. R. 5 A. 148. (Rev.).

—Under proprietary rights—Claim of—Variation of lease.

In a suit to contest an ejectment plff. claimed that he held the land a *shankalap* under an old patil or at least under a special agreement. The Court found that, though the rent had remained approximately the same as it was in the patta, the area had changed considerably. *Held*, that the patta having been considerably varied, there was no reason for holding that the plaintiff had under-proprietary rights or even

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that he was holding under a special agreement. (*Fremantle, S. M. and Burn, J. M.*) BIBI KANIZ FATIMA v. NAGESHAR SINGH. L. R. 5 O. 44 : 10 O. & A. L. R. 300 : 11 O. L. J. 70.

— *Zamindar recorded in possession when ejectment took place—Suit for possession of holding—Onus of proof.*

The onus of proving that the tenant was in possession of the holding within the period of limitation lay on the tenant and not upon the Zamindar, in a suit by the latter. (*Fremantle S. M.*) MT. SIKTAJEE v. ISH NARAIN. L. R. 5 All. 282 (Rev) (1).

LAND REGISTRATION—Benami transactions—whether Revenue Courts can recognise—Gift—Validity.

D executed a deed of gift to R in 1919. In 1921 there was a quarrel between R and R's son and there was a case under S 145 Cr. P. Code. In 1921 D sided with the son and executed a cancellation deed of the gift. In 1922 R executed another deed of gift to Rk. Rk applied for registration which was refused on the ground that the transaction was benami but the Commissioner ordered the name of Rk to be registered. The petitioner then moved the Board on revision.

Held, Benami transactions were fraudulent and could not be recognised by a Revenue Court. The Registration Court had no business to question whether Rk's name had been rightly registered or not. *Held*, further, that S. 145 Cr. P. Code case had been decided in favour of D in 1921 which was brought during the life time of the late proprietor and the right to possession was declared in favour of D who was competent therefore to make a gift in favour of her daughter Rk. (*Foley*) RAJKUMAR GIRISHNANDAN SINGH v. BABU RAMKISHORI KUER. 2 Pat. L. R. 227 (Rev)

LAND TENURES—Ghatwali Jaghir—Unlawful possession—Absence of sanad denotes defect of title and not its completeness.

If a person enters into a Ghatwali Jaghir, not having obtained the appointment which is required to make him the lawful holder of it, his possession is without title at all, and until by prescription or otherwise he acquires a right which he is capable of alienating the lack of a sanad of appointment is really the proof of the defect of his title not of the completeness of it. (*Lord Sumner*.) KUMAR SATYA NARAIN SINGH v. RAJA SATYA NIRANJAN CHAKRAVARTHI. 34 M. L. T. (P. C.) 27 : 5 Pat. L. T. 171 : 28 C. W. N. 351 : 3 Pat. 183 : 51 I. A. 37 : 79 I. C. 825 : 1924 P. C. 5.

Ghatwali—Service tenure—Incidents—Alienability.

Where lands are granted, and the grantee has to provide police patrols and pay them but has nothing else to perform, the tenure is not Ghatwali tenure or any other service tenure. Ghatwali tenures are alienable by custom as in Kharugdhi. (*Das and Ross, JJ.*) TIKAIT THAKUR NARAYAN SINGH v. DILDAR ALI KHAN. 80 I. C. 544 : 3 Pat. 915.

Ghatwali tenure—Execution—Receiver for surplus after deducting the outgoings.

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In the case of lands held on Ghatwali tenure the rents and profits other than surplus being earmarked for the payment of chowkidars, sardars and Government dues, an order may be made that the surplus be placed at the disposal of the creditors for there can be no question that the creditors are entitled to that surplus in execution of their decree, and for the purpose a Receiver may be appointed. (*Jwala Prasad and Ross, JJ.*) DAMODAR NARAIN SINGH v. GANGA RAM MARWARI. 1924 P. 269.

Ghatwali tenures inalienable and indivisible—Actual appointment of next heir not necessary—Hundwa estates—Nature and incidents of.

A Ghatwali tenure is inalienable and indivisible and cannot be sold in execution of a decree against the person of the incumbent of the office of ghatwali for the time being. 9 C. 187 and 10 M. I. A. 16 Ref. Neither by the terms of the grant nor by the general law applying to such ghatwali tenures is an actual appointment of the next heir to be ghatwali in the room of his predecessor requisite, nor is actual performance of the stipulated ghatwali services from time to time necessary. Readiness and willingness to perform them when required may be inferred where there is no proof of refusal to perform and where performance within a reasonable time, if required, is not shown to have become impossible.

Hundwa tenure is a Government tenure. It is a perpetual and hereditary tenure, being a service tenure and ghatwali in nature.

To terminate the Ghatwali character of lands, it is necessary to find something done or omitted to be done on the part of the Government, as the grantors, which would have the legal effect of surrender and re-grant of the lands on new terms, or, at any rate, of a release of the right to appoint the ghatwali and call for the performance of the services.

Where a tenure is created as distinct from a personal employment the tenure holder has such an interest in the rendering of the services as entitles him to such benefit of the tenure as accrues from his readiness and willingness to perform his obligation. The service is no a mere burden on the land. It constitutes a personal right in so far as the land held on that condition is concerned, and a personal obligation in so far as concerns the grantor, which, being in the nature of a public obligation, cannot be waived by the grantor for his own advantage, nor being in the nature of a title to the lands, can be relegated to desuetude for the mere advantage of the Ghatwali. The truth is that, rights can once shown to have been established continue to be vested in living persons. Obsoliscence and desuetude are popular expressions rather than solid legal grounds for refusing a continuing recognition to the right as originally established. (*Lord Sumner*.) KUMAR SATYA NARAIN SINGH v. SATYA NIRANJAN CHAKRAVARTHI. 34 M. L. T. (P. C.) 27 : 5 Pat. L. T. 171 : 3 Pat. 183 : 51 I. A. 37 : 79 I. C. 825 : 28 C. W. N. 351 : 1924 P. C. 5 (P. C.)

34 M. L. T. (P. C.) 27 : 5 Pat. L. T. 171 : 3 Pat. 183 : 51 I. A. 37 : 79 I. C. 825 : 28 C. W. N. 351 : 1924 P. C. 5 (P. C.)

Ghatwali tenure—Occupancy rights.

Occupancy rights are inconsistent with Ghatwali tenure as the landlord is entitled to have the

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land given in lieu of performance of duties returned to him free of encumbrances. The incidents of such tenures differ widely in different parts of the country and if by custom occupancy rights are claimed such custom has to be proved (*Ross and Sen, JJ.*) *DAL SINGH BHUMJ v. KRISHNA KHUTYA.* 1924 P. H. C. C. 304.

———*Kumri lands—No relation exists between Kumri lands and ryotwari holdings.*

There is absolutely no relation or analogy between the nature of Kumri lands in South Canara and ryotwari holdings. *Mr. Anver Ali.* *KODOTH AMBU NAIR v. SECRETARY OF STATE.*

47 Mad 572 : 26 Bom L. R. 639 :

20 L. W. 49 : 80 I. C. 83 : 1924 P. C. 150
(1924) M. W. N. 572 : 35 M. L. T. (P. C.) 128 :
47 M. L. J. 35.

———*Mukarari holdings—Provision for rent for excess area.*

The mere fact that a certain rate is mentioned in respect of excess land to be found in the possession of tenants does not raise a presumption as to *Mukarari* nature of the holdings. (*Suhrawardy and Duval, JJ.*) *RAMJUDDIN v. RAI BADHA KANTA AICH BAHADUR.* 80 I. C. 937

———*Mukarari—Right to cut trees.*

Mukarari tenure holders have a right to cut trees from the land comprised in the tenure. (*Walmsley and Suhrawardy, JJ.*) *MIDNAPORE ZEMINDARY CO. v. JAGAT CHANDRA DEBEY.* 76 I. C. 990 : 1925 Cal 139.

———*Origin—Nature and incidents of Ghatwali—Birbhum Regn. XXIX of 1814—Dismissal of ghatwali on the ground of incompetency and misconduct—Whether entails forfeiture Civil Court's Jurisdiction.*

In a suit by the plf against the Government, on the ground of title by purchase of ghatwali tenures from certain tenants under regulation XXIX of 1814 and the Government opposed the claim, on the strength of (1) limitation under Art. 14 or 91 of the Limitation Act, (2) and that the Civil Court had no jurisdiction to try the suit, and (3) that the incidents of the ghatwali tenure, conferred on the Government an absolute power of appointment or dismissal over tenure holders and that dismissal entailed forfeiture of the lands in question. *Held*, dismissing the plaintiff's claim, (1) that Art. 14 or Art. 91 will not apply, as the suit is for a ghatwali office, is a suit for a recovery of lands and the period is unquestionably 12 years (2) and that a suit for the recovery of possession of land is incidental to the tenure and that a Civil Court has jurisdiction to decide whether plf's claim is sustainable, (3) that the ghatwali office performed the duties of dependent police officers and as remuneration for the services enjoyed the profits of land. The vacancy caused in the office by death, neglect of duty or misconduct is filled in by Government. The tenure may be considered hereditary in the sense, that Government when appointing a new person may consider the claims of members in the family of the last holder. If however, a ghatwali was dismissed for misconduct, he forfeits the tenure. The tenure can be held so long as the holder thereof performs the services. The right of appointment and dismissal is vested in the Government.

LEASE—CO-LESSEES.

(*Jwala Prasad and Ross, JJ.*) *H. MATHEWSON v. SECRETARY OF STATE FOR INDIA IN COUNCIL.*

3 Pat. 673 : 1924 P. 616.

———*Mokhasa—What is See.* 73 I. C. 287.

———*Samudayam and Karaiyedu—What is*

The *karaiyedu* tenure consists in a system of shifting severalty of ownership, the village lands being re-distributed among the mirasidars at intervals. When a suit is brought for the partition of the village lands for change to individual ownership, it cannot affect directly the sustainability of such a suit, whether the tenure of the village is ownership by the community, that is, ordinary *Samudayam* tenure, or whether it is the shifting severalty of the ownership of which the *Karaiyedu* tenure consists. (*Oldfield and Ramesam, JJ.*) *VENKATRAMA AIYAR v. SUBRAMANIYA SASTRY.* 20 L. W. 122 : 78 I. C. 37 : 1924 Mad. 741.

———*Sindh—Jagirdar and Zamindar—Rights of—Trees.*

In Sindh as between the Jagirdar and the Zamindar the right to cut and sell timber in *Zamindari* lands is vested in the latter. Trees are part of the land on which they stand and the right to cut and sell them is incident to the proprietorship of the land. (*Fawcett, A. J. C.*) *PIR MAKHDOM v. MAHIK BOOLA KHAN.* 79 I. C. 819.

———*Ubari tenure—Incidents of.*

The *ubari* tenure has nothing to do with proprietorship in the lands, but is merely the right to hold the village on payment of a quit rent to Government. In this respect the tenure resembles that of *Inamdars* in Bombay. The ordinary presumption is that the lands are partible and alienable. (*Baker, J. C.*) *ABDUL HUSAIN v. MEGHRAJ.* 7 N. L. J. 110 : 78 I. C. 760 : 1924 Nag. 133.

———*Ubari tenure—Partibility and alienability—Presumption.*

Ubari tenure has nothing to do with proprietorship in the lands, but is merely the right to hold the village on payment of a quit rent to the Government, that is on payment of less revenue than would ordinarily be payable. *Ubari* tenure is distinct from the proprietary rights in the village and as the ordinary presumption is that a village is partible and alienable, the burden is on those who set it up to prove that a particular village is an exception to the ordinary rule. (*Baker, J. C.*) *QUAZI ABDUL HUQ v. MEGHRAJ.* 7 N. L. J. 110 : 78 I. C. 780 : 1924 All. 133.

LEASE—CO-LESSEES—*Death of one of the*

In the case of joint lessors, the death of one without heirs does not entitle the lessor to re-enter on his land. Until both are dead, the landlord's rights do not arise. (*Jwala Prasad and Macpherson, JJ.*) *GOPAL OJHA v. RAMADEV SINGH.* 82 I. C. 204 : 1925 P. 228.

———*Construction—Fenayadi lease—Building purposes—Permanent tenancy.*

1924 P. 88.

———*Construction—Boundaries—Description of—Thuk map—Reference to.*

A lease of a Colliery described the demised land as "bounded on the south by the border of the limit of mouza Fatehpur as per thak". *Held*, that the words "as per thak" meant as per thak

LEASE—CO-LESSEES.

demarcation and not as per thak map. 41 C. 493
Ref. (*Das and Macpherson, JJ.*) SHASHI BHUSAN
BANERJI v. RAMJAS AGARWALA. 3 Pat. 85 :
1924 P. 402.

—Construction—Istimrari mokurari—
Life estate.

The expression "istimrari mokurari" occurring in a lease does not necessarily confer a permanent, heritable and transferable grant but means a lease for the life of the grantee. (*Das and Ross, JJ.*) HARI GIR v. KUMAR KAMAKHYA.
1924 P. H. C. C. 158 : 3 Pat. 534 : 78 I. C. 511 :
1924 P. 572.

—Construction—Mireshorotto Jaumaiva—
Meaning of.

—Construction—Permanent lease—Enhancement of rent—Provision against—Heritability of lease—Subsequent conduct.

Under the terms of a lease the lessee was given the right to hold the land at the rent stated therein without any reduction for natural calamities and without any liability to enhancement so long as he paid the rent. There were no words implying a perpetual lease and no mention of hereditary rights. On a question arising as to the construction of the lease.

Held, that the lease was heritable. It is only where there is an ambiguity in the terms of a document of old date that the Court can interpret them by subsequent action of the parties. The fact that the successors of the lessee were allowed to remain in possession of the land without change in the rent did not necessarily indicate that the terms of the lease applied to them. (*Fremantle, S. M. and Burn, J. M.*) MANOHAR LAL v. GIRJA BUX SINGH. L. R. 50. 39 :
L. R. 50. 49 10 O. & A. L. R. 461 : 10 O. L. J. 641.

—Construction—Rent—Maanhunda rent.

Maanhunda rent is a fixed amount not depending upon the total outturn of crops grown. (*Miller, C. J. and Mullick, J.*) RAGHUNANDAN SAHAY v. RAM SADAR. 3 Pat. L. R. 22 :
6 Pat. 4 : 1924 P. H. C. C. 335

—Construction—Rent—Paddy—Money value—Basis of calculation.

A lease of lands contained a clause "settling as rent thereof Rs. 87 in cash and 2 bishas and odd of paddy or its price = Rs. 45-80 total = Rs. 132-80". On a construction of the lease held that the tenant was entitled, if he chose, to pay the money value fixed in the lease in lieu of paddy. The value of the paddy need not be calculated according to the then prevailing market value thereof. (*Newbould and Ghose, JJ.*) OFFICIAL TRUSTEE OF BENGAL v. BENODE BEHARI GHOSE MAL. 51 Cal. 943 : 1925 Cal. 114.

—Construction—Trees, when pass to the lessee—Reclamation lease.

A lease of a mouzah was granted for the express purpose of clearing jungle land, bringing it under cultivation, and no reservation of the right in the trees was made in the lease. Held, that the lessee had the right to appropriate the trees when cut. The present case is a stronger one. The land was given for cultivation; it could not be cultivated until the trees were cut, and the landlord not only made no reservation of his rights in the trees, but expressly transferred

LEGAL PRACTITIONER.

the rights in the trees together with the land. (*Prideaux, A. J. C.*) GANPATI v. SONAI.
7 N. L. J. 59 : 83 I. C. 479 : 1924 Nag. 96.

—Determination at lessors will—Lessee whether can be ejected. 75 I. C. 603.

—Re-entry and sub-letting—Provisions against—Effect.

The existence of provisions against sub letting and for re-entry in case of non-payment of rent in a *kabuliyat* do not affect its validity. (*Burn, J. M.*) CHHATTAR v. CHHATTAR SINGH.
10 O. & A. L. R. 243 : L. R. 5 A. 42 (Rev).

LEGAL PRACTITIONER—Disbarment—Professional misconduct—If and when can be re admitted.

When a legal practitioner who for professional misconduct has been disbarred from practising his profession of law applies to be restored to his former position the court should see if his sentence of exclusion has had the effect of awakening him to a higher sense of professional honour and duty and if his conduct and behaviour after the sentence has been so irreproachable as to entitle the court to admit him again into the ranks of the profession. (*Kincaid, J. C., Kimp, De Souza and Raymond, A. J. C.*) *In re MIRZA JALALUDDIN.*
79 I. C. 564.

—Misconduct—In affidavit in support of appeal or revision petitioner must take scrupulous care not to conceal or distort facts—Charge of impropriety or inattention against Judge is not to be lightly made.

A legal practitioner who chooses to file an affidavit in support of a petition of appeal or revision must swear to the facts as they occur and take scrupulous care not to conceal or distort them or colour them with his own impressions hastily formed at the time. From the slip of notes found attached to the record of the appeal or the refusal of the Judge to wait for the records before proceeding with the hearing or from his own failure to make an impression on the Judge the practitioner has no right to assume that the Court had made up its mind or prejudged the case. The members of the legal profession are responsible for the fair and honest conduct of a case and they cannot be allowed to make personal attacks or reckless and unfounded charge of impropriety in or inattention against a tribunal when the real ground is that the advocate concerned has failed to make an impression by his arguments on the Court concerned and lost his case in spite of every effort. (*Walsh, Kanharia Lal and Ryves, JJ.*) *In the matter of W. S. DAY, VAKIL.*
L. R. 5 A. 389 : 25 Cr. L. J. 1113 : 81 I. C. 937 :
1924 A. 565.

—Pleader—Power to refer questions to arbitration. See ARBITRATION. 79 I. C. 48.

—Professional misconduct—Striking off rolls—Re-installment—When can be made.

Where a legal practitioner whose name has been struck off the rolls for professional misconduct satisfies the court after the lapse of 7 years that he has been leading an honest and straight life since his debarment it is the duty of the High Court to give him another chance. (*Miller C.J., Foster and Kulwant Sahay, JJ.*) MATHURA

LEGAL PRACTITIONERS ACT.

PRASAD SINGH v. EMPEROR. 25 Cr. L.J. 1274 :
82 I. C. 282 : 1925 P. 280.

—Witness—If should take up brief.

A legal practitioner who is a witness in a case or who is personally interested in the litigation should not take up a brief in the same (*Kennedy, J. C. and Raymond, A. J. C.*) GHADIALY v. EMPEROR. 25 Cr. L. J. 571 : 81 I. C. 59 : 1925 S. 99.

LEGAL PRACTITIONERS ACT (XVIII OF 1879)—*Pleader standing surety for accused—Detention of accused's property alleged to be stolen—Whether professional misconduct—Quasi criminal nature of—Principle of Autrefois acquit.*

M s o o d surety for accused who was arrested on a charge under S. 420, I. P. C., and took charge of certain valuable property at his request, which subsequently turned out to be stolen property. The accused was convicted, and the vakil on a subsequent trial under Ss. 420, 411 and 414 of the I. P. C. was acquitted and proceedings under S. 13 (1) was instituted for misconduct in having stood surety for the accused and detained his valuables. Held that in standing surety for a man under S 420 the pleader was not guilty of unprofessional conduct and did not act as his pleader and he was not guilty of criminal offence in taking charge of the accused's jewels, (2) and that his acquittal in a criminal court for inefficiency of evidence, is a bar to proceedings under the Legal Practitioners Act, as the proceedings therein are quasi criminal and the principle of "Autrefois acquit" and must apply. (*Per Sir Sydney Robinson, C. J. and other Judges in Chambers*) In the matter of MAUNG PO TOK, A PLEADER 2 Rang 491 : 1925 R. 110.

—Ss. 12 40—Criminal offence—Power to take action—Suspension—Notice.

If a complaint is made against a legal practitioner that he has committed an offence, it is a matter which should be tried before a criminal Court and not by proceedings under the Legal Practitioners Act. If he is convicted by the former, then disciplinary action can be taken.

Under S. 40 a pleader should not be suspended without an opportunity being afforded to defend himself. In the matter of MAUNG KIN SO.

76 I. C. 825 : 25 Cr. L. J. 265.

—S. 12—Temporary misappropriation of client's money—Suspension.

A legal practitioner was convicted of criminal breach of trust, but the court found it was only a temporary misappropriation and dealt with him leniently. Held the conviction did not imply a defect of character which would unfit him permanently to be a pleader and a sentence of suspension would be sufficient. (*Sanderson, C. J. and Richardson, J.*) EMPEROR v. BRAHMANANDA DATTA. 25 Cr. L. J. 1125 (2) : 81 I. C. 949 (2) : 1925 Cal. 238.

—S. 13—Misconduct—Boycott of courts—Disrespectful attitude to the Court—Throwing up brief—Liability of pleader.

The members of the local bar took a dislike to a Magistrate on the ground that he was in the habit of dismissing their cases because counsel did not appear immediately when the case was called on. They passed a resolution boycotting the Magistrate. In pursuance of that resolution a pleader threw up his brief before the Magistrate

LEGAL PRACTITIONERS ACT, S. 13.

to which course the client subsequently assented. Held that under the circumstances the pleader was not guilty of professional misconduct. If the pleader had thrown up his brief without the client's consent leaving him undefended the pleader would have been guilty of professional misconduct. Pleaders have duties and obligations to their clients in respect of the suits and matters and equally important duty cast on them, viz., to co-operate with the court in the orderly and pure administration of Justice. The boycott resolution was improper and if it had not been withdrawn, would have called for serious notice of the Court. (*Robinson, C. J. and May Young, J.*) A PLEADER In the matter of. 2 Rang. 265 : 82 I. C. 712 : 25 Cr. L. J. 1352 : 1924 R. 320.

—Ss. 13, 14—Pleader, employing himself as professor without consent of court—Expressing loss of faith in British India.

77 I. C. 986 : 25 Cr. L. J. 522.

—S. 13—Pleader paying client's money to a relation of the client—Want of authority—Professional misconduct.

A pleader who withdraws from court money belonging to his client and pays it over to a relative of the client without being authorised to do so, acts negligently, but is not guilty of professional misconduct within the meaning of S. 13 (*Sanderson, C. J. and Richardson, J.*) EMPEROR v. BABU BHUBANESWAR NAG. 77 I. C. 181 : 25 Cr. L. J. 325 : 1925 All. 146.

—S. 13—Pleader—Professional misconduct—Order under S. 107, Cr. P. Code—Non-compliance with—Committal to prison—Civil disobedience—Carrying on business without permission—Legality of.

Two pleaders against whom orders under S. 107 of the Criminal Procedure Code had been passed refused to furnish security and were thereupon committed to prison. Later on when the question of renewing their sanads was brought to the High Court they disclaimed and disavowed any intention of either disobeying the District Magistrate's orders or of paralysing the administration of Justice. Held, that the High Court could accept their expressions of regret as being genuine and order the sanad to be issued to these pleaders.

Per Coultts Trotter, J. :—While the Court will not interfere with or have regard to any man's political opinions or opinions on public questions it is impossible to allow a person who proclaims or practises what is called the doctrine of "Civil disobedience" to ask to be part of the machinery of the Courts which exist for the very purpose of the thwarting of Civil disobedience and the enforcement of Civil obedience. (*Schwabe, C. J. and Coultts Trotter, J.*) FIRST GRADE PLEADER in the matter of. (1924) M. W. N. 5:1924 Mad. 479.

—S. 13 (b)—Pleader—Professional misconduct—False representation to client—Apprehension of injury to professional reputation—Vindictive proceedings—Costs. 1924 Mad. 160 : (1924) M. W. N. 18.

—S. 13 (b)—Pleader—Purchase of litigation—Conduct of litigation in the name of another—Fees taxed as costs—Impropriety.

LEGAL PRACTITIONERS ACT, S. 14.

A pleader purchased certain property which was to be the subject of litigation in the name of a third person, instituted a suit for the property in the name of that person, appeared and conducted the case and succeeded in having his fee taxed in the costs against the defendant although the pleader was himself the real plaintiff. Held that the conduct of the pleader fell within S. 13 (f) of the Legal Practitioners Act, even though the Oudh Civil Digest might not apply to his case (*Neave and Kendall, A. J. C.*) SHEO NARAIN LAL v. A AND B PLEADERS.

10 O. & A. L. R. 427.

81 I. C. 975 : 25 Cr. L. J. 1151 :

1 O. W. N. 264.

—S. 14—Scope of enquiry—Asking Bench clerk for trend of judgment before it is delivered—Professional misconduct. 5 Pat. L. T. 350 : 1924 P. 131 : 75 I. C. 728 : 25 Cr. L. J. 140.

—S. 36—Declaration of a person as tout—Inquiry—Mode of—Discretion of District Judge. 1924 A. 69.

—S. 36—Jurisdiction—Order declaring tout 75 I. C. 722 : 25 Cr. L. J. 34.

—S. 36—Proceedings under—Recording of evidence—Delegation of functions.

It is only the Judges and officers specially mentioned in S. 36 of the Legal Pract. Act, who can frame and publish list of tous ; they cannot delegate the task of making the enquiry or taking evidence to a subordinate officer and the evidence must be adduced before the former. 15 I. C. 654, 59 I. C. 322 : 60 I. C. 321 Ref. (*Abdul Raoof, J.*) KISHOR CHAND v. EMPEROR. 5 Lab 443.

LESSOR AND LESSEE—Assignee of lease—Trespasser—Possession of—Pendency of lease—Title of lessor.

An occupancy tenant leased his holding in 1897 for 23 years to the zamindar and put him in possession. Pending the lease the defendant entered into possession and got the holding registered as Khudkasht in the revenue papers. The successor in interest of the occupancy tenant brought a suit for declaration of title. Held that the title of the plff. was not affected in any way and that he was entitled to a decree. (*Walsh, A. J. C.*) BIJADHAR BHAGAT v. JEAT CHAMAR.

22 A. L. J. 647 : L. R. 5 A. 404 : 80 I. C. 601 : 1924 A. 518.

LETTERS OF ADMINISTRATION—Grant of—Sale by administrator of immoveable property without sanction of court—Deceased subsequently found to be a Buddhist—Effect on antecedent transactions.

Letters of administration had been granted in respect of the estate of a deceased person. The administrator sold immoveable property of the deceased without the permission of the Court but in the course of administration. Subsequently it was found that the deceased was a Buddhist exempted from the operation of the Succession Act. Held that the sale by the administrator was not thereby rendered invalid. (*Heald and Lentaigne, JJ.*) LEE LIM MA HOOK v. SAW MAH HONE

2 Rang. 4 : 79 I. C. 729 : 1924 Rang. 221.

LETTERS PATENT, CL. 12.

LETTERS PATENT—Joint trial—Judicial Discretion—Defective summing up—Interference.

76 I. C. 966 (2) : 25 Cr. L. J. 294 (2).

—(BOM.) Cl. 12—High Court—Original side—Administration suit—Land outside Court's jurisdiction—Power to adjudicate on claim.

A suit for the administration of an estate is not a suit for land. Consequently the High Court can in the exercise of its original jurisdiction and in the course of an administration suit determine whether lands situate outside the limits of its ordinary jurisdiction belonged to the deceased at the time of his death. Leave under Cl. (12) of the Letters Patent is not necessary for the suit. 29 B. 249 Ref. : 33 Cal. 180 foll. (*Shah, A. C. J.* and *Crump, J.*) MAHOMEDALLY ADAMJI v. ABDUL HUSSEIN ADAMJI. 48 Bom. 331 : 26 Bom. L. R. 163 : 79 I. C. 780 : 1924 Bom. 313.

—Cl. 12—Mortgage suit—Property and persons outside jurisdiction—Jurisdiction of Original side.

The High Court in the exercise of its ordinary original Civil jurisdiction has power to entertain a suit by a mortgagee to enforce the mortgage security even though the properties are situate outside the limits of the ordinary original civil jurisdiction and against mortgagors who are living outside the jurisdiction. 14 B. 353 foll. (*Shah, J.*) JASRAJ FOOLJI v. AKUBAL. 26 Bom. L. R. 539 : 80 I. C. 1007 : 1924 Bom. 419.

—Cl. 12—Suit for land—Suit on mortgage—Property outside jurisdiction—Original side.

Suits by mortgagees to enforce their rights under their mortgages are not suits for land within the meaning of Cl. 12 of the Letters Patent, and such a suit is one to realise and dispose of his and his debtor's interests in the land. The object of the suit is not to obtain land or to obtain a declaration of title to land or to obtain damages for interference with land, but to obtain repayment of debt owing to the plaintiff and for that purpose to realise the security which has been vested in him. 14 B. 353 : 22 B. 701 foll. The personal jurisdiction of the Bombay High Court is exercised under Cl. 12 of the Letters Patent not only in cases where the defendants or some of them reside permanently within the jurisdiction but where, according to the provision of the Letters Patent, they have been lawfully caused to appear upon summons where the cause of action or part of it has arisen in Bombay. (*Scott, C. J.* and *Heaton, J.*) VENKATRAO SETHUPATHY v. KHMJI ASSUR. 80 I. C. 442 : 26 Bom. L. R. 535.

—Cl. 12—Suit by unpaid vendor for price—Declaration of lien—Lands outside jurisdiction.

A suit by an unpaid vendor of immoveable property to have a charge declared on such property for the balance of the purchase money as against a vendee residing or carrying on business in Bombay is maintainable on the original side of the High Court even though the property is situate outside the limits of the original jurisdiction. The High Court has jurisdiction *in personam* in regard to lands situate outside its ordinary

LETTERS PATENT, CL. 15.

original jurisdiction. (*Fawcett, J.*) SHRIMAN NEDAN RAJAH KOTAKAL *v.* THE MALABAR TIMBER CO., LTD. 26 Bom. L.R. 541 : 48 Bom. 625 : 80 I. C. 1049 : 1924 Bom. 412.

—Cl. 15—*Appeal—Whole case open.*

In a Letters Patent appeal, the whole case is open and not merely the points on which the Judges differed. (*Macleod, C.J., Kajiji and Kemp, JJ.*) VELJI BHIMSEY & CO. *v.* BACHOO BHODAS. 26 Bom. L. R. 349 : 48 Bom. 691 : 1925 Bom 118.

—Cl. 15—*Judgment—Order refusing to excuse delay—Application for leave to appeal to the Privy Council.*

An order refusing to excuse the delay in presenting an application for leave to appeal to His Majesty in Council is a "judgment" within the meaning of cl. 15 of the Letters Patent and appealable. (*Marten, Pratt and Fawcett, JJ.*) NAGINDAS MOTILAL *v.* NILAJI MOROBA NAIK. 26 Bom. L. R. 395 : 48 Bom. 442 : 80 I. C. 362 : 1924 Bom. 399.

—Cl. 36—*Appeal under Cl. 15 of the Letters Patent—Difference of opinion among members of Division Bench—Procedure.*

Where the two members of a Division Bench hearing a letters patent appeal from the decision of a single Judge in a second appeal differ in their opinion, the opinion of the senior Judge prevails under Cl. 36 of Letters Patent. (*Macleod, C. J., Kajiji and Crump, JJ.*) PANDU DAGADOO *v.* JAMNA DAS. 26 Bom. L.R. 470 : 1925 Bom. 113.

—(CALCUTTA). Cl. 15—*Judgment—Appealability—Order dismissing suit for want of prosecution—Rule 36 of Chapter 10 of the Calcutta High Court Rules.*

An order of a single judge on the Original Side of the Calcutta High Court dismissing a suit for want of prosecution under Rule 36 of Chapter 10 of the Original Side Rules of the Calcutta High Court, is a judgment and is appealable under Cl. 15 of the Letters Patent. (*Sanderson, C. J. and Walmsley, J.*) UDOY CHAND PANNA LAL *v.* KHESIDAS. 28 C. W. N. 916 : 51 Cal. 1025 : 81 I. C. 1048 : 1924 Cal. 1025.

—Cls 15 and 36—*Division Bench of High Court hearing appeal—Difference of opinion—Dismissal of appeal under S. 98, C. P. C.—Letters Patent Appeal.*

A Division Bench of two Judges of the High Court heard an appeal. The senior Judge was for dismissing the appeal while the junior Judge was for allowing it in part. The Judges eventually dismissed the appeal under S. 98, C. P. Code. An appeal under Cl. 15 of the Letters Patent was filed against the decision. Held that the proper provision applicable to the case was not S. 98, C.P.C. but Cl. 36 of the Letters Patent and therefore the opinion of the senior Judge which prevailed, could be made the subject of a letters patent appeal. (*Newbould, Ghose and Page, JJ.*) SURESH CHANDRA MUKERJI *v.* SHITI KANTA BANERJEE. 28 C. W. N. 637 : 78 I. C. 679 : 51 Cal. 669 : 1924 Cal. 855.

LETTERS PATENT, CL. 41.

—Cl. 26—*Certificate of Advocate General—Statement of trial judge as to fact happening at the trial court—Conclusiveness of—Procedure for granting certificates.* 25 Cr. L. J. 817 : 81 I. C. 353 : 1924 Cal. 257.

—Cl. 28—*Jurisdiction of the High Court—Goondas Act (1 of 1923)—Warrant issued by Secretary to Government—Legality—Revision—Cr. P. Code, Ss. 435 and 439.*

An order of the Secretary to the Bengal Government declaring a person to be a Goonda and directing him to leave Bengal on a specified date passed under Bengal Act I of 1923 is not open to revision by the High Court either under Cl. 28 of the Letters Patent or under Ss. 435 and 439 of the Cr. P. Code. The Secretary is not "an inferior criminal court" within S. 435, Cr. P. Code. (*Greaves and Panton, JJ.*) BHIMRAJ BANIA *v.* EMPEROR. 51 C. 460 : 83 I. C. 500 : 1924 Cal. 698.

—Cl. 36—*Applicability of—Reference under S. 66 of the Income Tax Act—Difference of opinion among members of Division Bench—Opinion of senior Judge prevails—See INCOME TAX ACT, S. 2.* 51 C. 504.

—S. 41—*Appeal to Privy Council.*

Whether appeal lies to Privy Council from order on certificate by the Advocate General was not decided as the Privy Council dismissed the appeal on merits 25 Mad. 61. Expl. (*Lord Sumner.*) BARENDRA KUMAR GHOSE *v.* EMPEROR. 1 O. W. N. 935 : 1925 P. C. 1.

—Cl. 41 — *Criminal case—Leave to appeal to His Majesty in Council—Grounds for—Stay of execution of sentence.*

As His Majesty the King is supreme over all persons and courts within his dominions, a right of appeal in all cases, civil and criminal, to the King in Council exists, from the highest Court of each separate colony, province, state or possession, whether it be a court of error or not, except so far as the prerogative in this behalf has been expressly surrendered. *Cushing v. Dupuy* (1880, 2 A. C. 409 *Re Wi Mahia's will* (1908) A. C. 448 Ref. Criminal proceedings, however are, in practice, reviewed only if it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done. The judicial committee do not, as a rule, advise His Majesty to grant appeals in criminal cases, except where questions of great and general importance, likely to occur often, are raised, and where the due and orderly administration of the law is shown to be interrupted or diverted into a new course, which might create a precedent for the future, and where there are no other means of preventing these consequences. Such appeals lie either by the right of grant, in pursuance of leave obtained by the appellant from the Court appealed from, or by reason of special leave granted by the judicial committee. The latter appeals arise, either where the court below does not possess power to grant leave to appeal or where the leave to appeal was granted on some special point and the appellant wishes to raise points not included in the leave to appeal. But

LETTERS PATENT (Lahore), CL. 10.

whether leave is granted by the Court appealed from or by the judicial committee, it is plain that the answer to the question, whether the case is a fit one for appeal, must depend on the same considerations; the grant of the leave to appeal is a step ancillary to the determination of the appeal and the principles which regulate the ultimate decision of the appeal cannot obviously be ignored when an application for leave is examined. (1914) A. C. 599 Ref.

The rule has been repeatedly laid down and has been invariably followed that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done. 12 A. C. 459 Kef.

Where the question of the legality of the conviction of the accused of a capital offence depended on a correct construction of S. 34 of the Indian Penal Code and there was a deep-seated divergence of judicial opinion in every superior court in India as to the true interpretation of the section, it is a fit case for granting leave to appeal to the Privy Council under Cl. 41 of the Letters Patent.

The High Court further directed that as a certificate under Cl. 41 of the Letters Patent had been ordered, the execution of the sentence under appeal should be stayed subject to such orders as may be passed by their Lordships of the Judicial Committee. (*Mookerjee and Chatterjee, JJ.*) BARENDRA KUMAR GHOSH v. EMPEROR 39 C. L. J. 1 : 28 C. W. N. 377 : 83 I. C. 560 : 1924 Cal. 546.

— (LAHORE), CL. 10 — Appeal under—
New plea as to limitation.

Where it was urged for the first time in Letters Patent Appeal that a suit was barred by Art. 44, but its decision involved a finding of fact, viz., whether the appellant's possession was adverse to the knowledge of the respondents, it cannot be heard at that stage. (*Shadi Lal, C. J. and Le Rossignol, J.*) WAZIR CHAND v. NATHU RAM. 6 L. L. J. 151 : 80 I. C. 321 : 1924 Lah. 468.

— CL. 12—Carrying on business—Meaning
of—Defendant—If includes foreigners.

1924 Mad. 158.

— (MADRAS), CIs. 13 and 15—Appeal—Order
for transfer of a suit—'Judgment'

47 Mad. 136 : 1924 Mad. 90.

— CL. 15—Judgment—Meaning—Execution
of decree—Stay of—Order of single Judge
refusing—Appeal against.

An appeal lies under Cl. (15) of the Letters Patent against the order of a single Judge of the High Court refusing to stay the execution of a decree.

Meaning of the word "Judgment" in cl. (15).

The fact that part of a decree is declaratory is no bar to a stay of the execution thereof being granted pending an appeal therefrom. (*Krishnan and Waller, JJ.*) SONACHALAM PILLAI v. KUMARA VELU CHETTIAR 47 Mad. 316 :

(1924) M. W. N. 167 : 19 L. W. 427 :
34 M. L. T. (H. C.) 32 : 79 I. C. 109 :
1924 Mad. 597 : 46 M. L. J. 138.

LETTERS PATENT (Rangoon), CL. 7.

— CL. 15—Order allowing plaintiff to sue as
a pauper—If a judgment—Appeal—Opportunity
to defendant to disprove—Effect of Government
admitting pauperism.

An order of a Judge on the Original Side of the High Court giving leave to the plaintiff to sue *in forma pauperis* is a judgment within cl. 15 of the Letters Patent and is appealable.

At the hearing of such an application, even if the Government admits the pauperism of the plaintiff, the defendant should be given opportunities to prove he was not a pauper. (*Spencer, O. C. J. and Srinivasa Iyengar, J.*) BABA SAH v. PURUSHOTAMA SAH.

20 L. W. 845 : 35 M. L. T. (H. C.) 136 :
1925 Mad. 167 : 47 M. L. J. 932.

— CL. 36—Small Cause Revision case—
Difference of opinion among judges of division
Bench—Procedure.

Where a High Court acts in revision under S. 25 of the Provincial Small Cause Courts Act and the Judges constituting the Bench differ in opinion, S. 98 C. P. Code does not apply but under Cl. 36 of the Letters Patent, the opinion of the senior Judge would prevail case law reviewed. (*Krishnan and Odgers, JJ.*) NAGAPPA PILLAI v. ARUNECALAM CHETTY.

1925 Mad. 281 : 47 M. L. J. 876.

— (RANGOON), CL. 7—Advocates of upper
Burma—Right to be enrolled—Status.

1924 Rang. 1.

— CL. 8—Allegations against practitioner in
his role as printer—Acts punishable under Criminal
Law—Disciplinary action. In the matter of
MAUNG BA KYIN. 76 I. C. 827 : 25 Cr. L. J. 267 :
1924 Rang. 113.

— S. 11—Application to remove a suit to
High Court. 76 I. C. 479.

— CL. 13—Appeal—Limitation for—Delay.
MAUNG HMAN v. MA SHIN. 1924 Rang. 45.

— CL. 13—Order of a single Judge regard-
ing procedure to be followed by commissioner in
taking accounts whether a 'judgment'—Com-
petency of appeal.

Where in a partnership suit, on the Commissioner's application for directions in taking accounts, the Judge in the original side passed an order, which was appealed against under cl. 13 of the Letters Patent *Held*, that an order which authorizes proceedings to be taken for the determination of the question between the parties, cannot be considered a judgment within the meaning of cl. 13 of the Letter Patent. It is merely an order facilitating the examination of accounts and regulates only the procedure without determining the right between the parties. *Held* further, a decision which affects the merits of the question between the parties by determining some right or liability may be held to be a judgment, and an order, which paves the way for such determination cannot be considered a 'judgment' and is not appealable. *The Justice of the Peace for Calcutta v. Oriental Gas Coy.* 8 B L. R. 433; *Ramendra Nath Roy v. Brajendra Nath Das* 45 Cal. 111; *Tulja Ram Rao v. Alagappa Chettiar* 35 Mad. 1. followed. (*Robinson, C. J. and Brown J.*) YEO ENG BYAN v. BENG SENG & Co. 2 Rang. 469 : 1925 Rang. 43.

LICENSOR AND LICENSEE.

LICENSOR AND LICENSEE—Denial of title—Forfeiture—Revocation of.

A licensee, unlike a lessee, does not forfeit his license by merely denying the title of his licensor. Nor can a license be revoked where, relying on the license the licensee has executed a work of a permanent character. 39 A. 621 Foll : 28 A 74, Foll. (*Kanhaiya Lal, J.*) *AMJAD KHAN v. SHAFI- UDDIN KHAN.* 78 I.C. 215.

LIMITATION—Appeal—Calculation of time.

In calculating the period of limitation for filing an appeal, time must be calculated from the date of judgment and not of the decree. (*Fremantle, S. M.*) *MUMTAZ ALI v JAGARNATH PANDEY.*

10 O. & A. L. R. 262 : L. R. 5 A. 45 (Rev).

—*Deduction of time—Putni sold for arrears—Sale set aside and possession restored—Appeal by purchaser—Time between restoration of possession and decision of appeal cannot be deducted.*

A putni taluk was sold under Regulation VIII of 1819 for arrears of rent for the year 1321 and purchased by one B. The defendants sued to set aside that sale. The suit was decreed on the 4th October 1917 by the trial Court. The sale was set aside and the defendants were held entitled to possession and they actually got possession in October 1917. There was an appeal by the purchaser but the decree of the trial Court was confirmed by the High Court on the 12th August, 1919. Plaintiff instituted a suit for rent on the 20th March, 1920. It was originally for rent of 1323 and for the kists upto 1326. Subsequently on the 4th March, 1921, there was an application for the amendment of the plaint and the arrears of rent for the year 1322 were included in the claim. The defendants were restored to possession of the putni in October 1917, which was more than 3 years before the 4th March, 1921, and there was nothing to prevent the plaintiff from suing them for rent of 1322 and accordingly the claim for the year 1322 was barred by limitation. The period between the date when defendants got possession and the date of decision in appeal cannot be deducted. 12 M. I. A. 244 Foll. 43 Cal. 660. *Dist. (N. R. Chatterjee and Chotzner JJ.) BIJOY CHAND MOHATAB v. KHOKA SINHA.* 40 C. L. J. 97 : 1924 Cal 1059.

—*Nature of plea.*

A plea of limitation is not a mere technical plea. A party who can invoke the law of limitation in his favour is certainly justified in doing so and he ought not to be deprived of the advantages thereby gained by the alleged technicality of the plea raised. (*Kennedy, J. C. and Raymond, A. J. C.*) *MANGHUMAL JETHANAND v. ARATMAL SATRAMDAS.* 1924 Sindh 47 :

—*Plaint—Amendment of—Suit in personal Capacity—Change into claim as administrator—Suit barred to the date of amendment—Effect.*

The plaintiff sued within the period of limitation for money due, but after the expiry of the period wanted the plaint to be amended so as to be permitted to sue as administrator also. *Held* the change in the capacity of the plaintiff to maintain the suit has not the effect of introducing a new

LIMITATION ACT (IX OF 1908), S. 4.

plaintiff and no question of limitation arises. (*Suhrawardy and Chotzner, JJ.*) *NABA KUMAR CHOUDHURY v. HIGHEAZAMY.* 79 I. C. 403 : 1925 Cal. 419.

—*Starting point—Suspension of—Revival.*

Ordinarily limitation runs from the earliest time at which an action can be brought and after time has commenced to run there may be a revival of a right to sue when a previous satisfaction of the claim is nullified with the result that the right to sue which had been suspended is reanimated. 7 M. I. A. 323 ; 33 C. 1033 ; 43 C. 660 Ref. Whenever proceedings are being conducted between the parties *bona fide* in order to have their mutual rights and obligations in respect of at matter finally settled, the cause of action for an application or for a suit, the relief claimable wherein follows naturally on the result of such proceedings, should be held to arise only on the date when those proceedings finally settle such rights and liabilities. (*Mookerjee and Suhrawardy, JJ.*) *DWIJENDRA NARAYAN ROY v JAGES CHANDRA.* 39 C. L. J. 40 : 79 I. C. 520 : 1924 Cal. 600.

—*Suspension of—Sale for arrears of patni rent—Sale set aside at the instance of patnidars—Suit for rent—Limitation.*

A patni was sold in 1915 for arrears of rent under Beng Regn. VIII of 1819 and purchased by a stranger. The patnidars sued to set aside the sale and the suit was decreed in 1917 and confirmed in 1919 on appeal. The patnidars actually got possession in 1917. On 20-3-1920, plaintiff instituted the present suit for rent for the years 1323 B. S. and for the kists due up to 1326 B. S. together with cesses. Subsequently on 4-3-1921 there was an application for amendment of the plaint and for arrears of rent for the year 1322 being included. The amendment was allowed. *Held*, that the claim for the year 1322 was barred, the suit not having been brought within three years of the date when the patnidars got possession. The plaintiff was not entitled to wait simply on the off chance of the decree of the trial Court being set aside by the appellate Court when the defendants had actually got possession of the patni. (*Chatterjee and Chotzner, JJ.*) *MAHARAJA DHIRAJ SIR BIJOY CHAND MOHATAB v. KHOKA SINHA.* 40 C. L. J. 97 : 1924 Cal 1059.

LIMITATION ACT, S. 3—Second appeal—Limitation—Mixed question of fact and law—If can be gone into.

In second appeal the High Court cannot of its own accord go into a question of limitation, involving a mixed question of fact and law under S 3, Lim. Act. (*Kinkhede, A. J. C.*) *BHUWAN LAL v. MANHORI.* 78 I. C. 960.

—*S. 4—Prescribed—Meaning of.*

The word "prescribed" in S. 4 of the Lim. Act means prescribed in the Lim. Act and not merely in the first schedule. (*Wazir Hasan and Kendall, A. J. C.*) *BANS RAHADUR SINGH v MT. SUKHRAJ KUAR.* 10 O. & A. L. R. 250 : 81 I. C. 484 :

11 O. L. J. 297 : 1924 Oudh 385.

—*S. 5—Applicability to O. 41. Rr 17 and 19.*

47 Mad. 171 : 76 I. C. 886 : 1924 Mad. 114.

LIMITATION ACT (IX OF 1908), S. 5.

———S. 5—*Bona fide impression of a court which entertained the appeal though wrongly filed in his Court justifies extension.*

Where a responsible officer like the Commissioner never thought that the appeals were not entertainable by him, under the circumstances, if the appellants thought that, they had a right of appeal to the Commissioner, the mistake must be taken to be *bona fide* mistake until the contrary is shown. (*Mukerji, J.*) *CHOB SINGH v. DARYAI SINGH.*
82 I. C. 594 :
L. R. 5 A. 163 (Rev.) : 1924 A. 915.

———S. 5—*Change of rule—Ignorance of—If ground for excusing delay.*

The fact that a person was not aware of a change of rule which had been given ample publicity is no ground for excusing delay. (*Kotwal, A. J. C.*) *GOPAL GANESH v. WALLABHDAS SANTUKIRAM.*
75 I. C. 878.

———S. 5—*Delay in filing appeal—Copies of original judgment not filed in time—Recent notification—Ignorance of.* 1924 Lah. 41.

———S. 5—*Delay in filing appeal—Mistake of counsel.*

The mere fact that the counsel entrusted with the task of filing an appeal forgot all about it till after the expiry of limitation, is not a sufficient ground for extending time under S 5 of the Lim. Act. (*Dalal, J. C.*) *MT. DILAN v. RAM BHARASEY.*
1 O. W. N. 880 : 10 O. & A. L. R. 1276.

———S. 5—*Delay in getting copies—Money paid to clerk—Appellant taking no steps—Negligence.* *MT. MAHTAB KUER v. MT. BIRHMO.*
1924 All. 176.

———S. 5—*Excusing delay ex-parte—Order not objected to at the hearing of appeal—Revision.*

Where a Judge excused the delay in the filing of an appeal without notice to the respondent and when the appeal came on for hearing the latter did not object to the order, the final decision in the appeal cannot be attacked on the ground of the delay in filing the appeal. (*Kendall, A. J. C.*) *BHARAT v. BASANT.* 80 I. C. 617 : 1925 Oudh 148.

———S. 5—*Ex parte decree—Application to set aside—Excusing delay.*

The High Court has power to frame a rule making the provisions of S. 5 of the Lim. Act, applicable to applications to set aside *ex parte* decrees. (*Coutts Trotter, C. J. Ramesan and Wallace, JJ.*) *KRISHNAMACHARIAR v. SRI RANGAMMAL.*
47 Mad. 824 :
35 M. L. T. (H. C.) 43 : (1924) M. W. N. 682 :
20 L. W. 382 : 80 I. C. 877 :
1925 Mad. 14 : 47 M. L. J. 409.

———S. 5—*Extension of time—Review—No reasonable ground—If time can be deducted.*

The mere presentation of a petition for review of judgment unless it is shown there was reasonable ground for the same, does not entitle the applicant, for an extension of time under S. 5, when he prefers an appeal against the judgment. (*Sanderson C. J. and Walmsley, J.*) *KAILASH CHANDRA NAG v. BEJOY CHANDRA NAG.*
80 I. C. 786 : 1925 Cal. 253.

LIMITATION ACT (IX OF 1908), S. 5.

———S. 5—*Leave to appeal to the Privy Council—Time taken in application for review—Deduction of.*

The time taken in applying for a review of judgment may be deducted in calculating the period of limitation for an application for leave to appeal to the Privy Council. (*Shah, A. C. J. and Kincaid, J.*) *NARIMAN RUSTOMJI v. HASHAM ISMAYAL.*
26 Bom. L. R. 1261 : 1925 Bom. 137.

———S. 5—*Mistake of vakil's clerk—If sufficient cause.*

The mistake of a clerk in filing the appeal out of time is no ground for excusing delay. (*Dalal, J. C.*) *GANESH DAT v. HIRDE BIHARI.*
82 I. C. 484 : 1925 Oudh 189 (1).

———S. 5—*Period for leave to appeal cut down—Mistaken advice of counsel—If sufficient cause.*

Act XXVI of 1920 which cut down the time for leave to appeal to the Privy Council from six months to three months came into force on 1st January 1921. In respect of a judgment delivered a few days later the party on the advice of his local pleaders applied for leave within the six months' period but after the three months' period had expired. There was a delay of 14 days and it was sought to be excused as due to the erroneous advice of local pleader. *Held*, it was a fit case for excusing the delay. (*Marten, Pratt and Fawcett, JJ.*) *NAGINDAS MOTILAL v. NILAJI MOROBA NAIK.*
48 Bom 442 :
26 Bom. L. R. 395 : 80 I. C. 862 : 1924 Bom 399.

———S. 5—*Sufficient cause.*

Where the filing of the cross objection raised a question of proprietary title and thus made the appeal to the Commissioner incompetent, *held*, the delay in filing it in the Court of District Judge should be excused as appellant could not take this event into consideration when he filed the appeal. (*Stuart, J.*) *LALA BHAGWAN DAS v. MOHABHAT SHAH.*
1923 All. 170.

———S. 5—*Sufficient cause—Review—Discovery of new evidence.*

The sufficient cause mentioned in S. 5 Lim. Act can include the late discovery of new evidence on which an application for review is granted. Where there are good grounds for granting review on the discovery of new evidence, that may in certain cases be a ground for extending time. (*Batten, A. J. C.*) *INDRAAJBHAN v. SITARAM.*
78 I. C. 527.

———S. 5—*Sufficient cause—Illness in the family.*

Where an appeal is filed out of time, notice should be issued to the respondent to show cause why the delay should not be excused, and the question decided before the appeal is admitted. The matter of excusing delay is one in the discretion of the court depending on the circumstances of each case and where due diligence, good faith and absence of neglect are shown the delay will be excused. Illness in the family is not sufficient cause (*Suhrawardy and Chotzner, JJ.*) *ELAHIREWAZ KHAN v. BISWAR BAISSA.*
79 I. C. 924 : 1925 Cal. 175.

LIMITATION ACT (IX OF 1908), S. 5.

———S. 5—*Sufficient cause—Interpretation of.*

The words "sufficient cause" in S. 5 must receive a liberal interpretation but it must not be over-looked that when once the time for appeal has passed a valuable right is secured to the successful litigant of which he must not be deprived unless the court is satisfied that justice requires that an extension of time should be granted. It must also be shown that there has been no inaction or negligence on the part of the petitioner. (*Kennedy, J. C. and Raymond, A. J. C.*) *NUR MAHOMED v. HAS-SOMAL.* 78 I. C. 953 : 1925 Sindh 60.

———S. 5—*Sufficient cause—Time spent in review—Deduction of.*

A plaintiff can deduct in his favour the time spent in prosecuting with due diligence a prior application for review, even though the plaintiff has made a mistake of law in taking those proceedings. 45 C. 94 Ref. (*Daniels, J.*) *PARBHU DAYAL v. MURLIDHAR.* 22 A. L. J. 365; L. R. 5 A. 298 : 10 O. & A. L. R. 528 : 78 I. C. 677 : 1924 All. 867.

———S. 5-A.—*Delay due to wrong legal advice—If ground for excusing.*

The period of limitation for applying for leave to appeal to the King in Council having been cut down by Act XXVI of 1920, certain parties sought to get delay in filing such a petition excused on the ground their local pleader advised them the old period of 6 months was still in force. The name of the pleader was not disclosed in the affidavit nor any reasons given why their High Court's counsel was not consulted. *Held*, there was not sufficient cause to excuse the delay. (*Prideaux and Kinkhede, A. J. C.*) *PADAMRAJ PHULCHAND v. MITSUIE BHUSHAN KESHA.* 1924 Nag. 279.

———S. 6—*Minor—Promissory note in the name of guardian—Suit on—Limitation.*

Where a guardian takes a promote, he is the person entitled to sue on it and the suit would be barred if not brought within the ordinary period of limitation. S. 6 of the Lim. Act has no application to the case. 28 M. 205 Foll. (*Macleod, C. J. and Shah, J.*) *VISHNU NARAYAN v. KESHAV GAJANAN.* 26 Bom. L. R. 426.

80 I. C. 474 : 1924 Bom. 468.

———S. 6—*Right to sue—Joint Hindu family—Members not in existence at the time of alienation.*

A right to sue is not co-parcenary property in which a son acquires a right by birth. If the plaintiff is a minor on the date when limitation commences, the period of limitation will be extended by virtue of S. 6 of the Lim. Act but S. 6 cannot be pleaded by a plaintiff who was not in existence when the alienation took possession. (*Daniels, J.*) *DHANRAJ RAI v. RAM NARESH.*

L. R. 5 A. 325 : 79 I. C. 1019 : 1924 All. 912.

———Ss. 6, 7, and 8—*Scope of.*

The period of limitation prescribed for a suit of the nature to which the provisions of Ss. 6, 7 and 8 apply must be taken to be the period reckoned on the basis on the time provided by the schedule and also of provisions of S. 8. (*Wazir Hasan and Kendall, A. J. C.*) *BANS BAHADUR SINGH v. MT. SUKRAJ KUAR.*

10 O. & A. L. R. 250.

81 I. C. 484 : 11 O. L. J. 297 : 1924 Oudh 385.

LIMITATION ACT (IX OF 1908), S. 10.

———S. 7—*Decree holders—Major and minor—If former can grant valid discharge.*

Where of two joint decree holders one is major and the other a minor, the former cannot give a valid discharge binding on the latter without S. 7, Lim. Act. (*Moti Sagar, J.*) *COURT OF WARDS v. ABRAR ALI.* 1924 Lah. 681.

———S. 7—*Joint decree-holder—Hindu father and minor sons—Father next friend and guardian in the suit—Capacity to give discharge—Civil Procedure Code, O. 32, R. 6—Execution application—Limitation—When commences.*

A decree was obtained in a suit in which the plaintiffs were Hindu father and his minor sons, the latter being described on the face of the proceedings as suing through their next friend and guardian the father. The father died soon after the decree, and the eldest of the minors filed an execution application within three years of attaining majority, but more than three years after decree. *Held*, as the father was the next friend of his minor sons, he was not in a position to give a good and legal discharge without the consent of the court whose permission was necessary under O. 32, R. 6, Civil Procedure Code, and hence under S. 7, Limitation Act, time did not run from the date of the decree but only after the disability, i.e., minority ceased. The application for execution was therefore within time. 36 Mad. 295 : 25 M. L. J. 150 applied (*Coutts Trotter, C. J. and Ramesam, J.*) *AL. VR. CT. LAKSHMANAN CHETTI v. SUBBIAH CHETTI.*

20 L. W. 342 : 47 Mad. 920 :

35 M. L. T. (H. C.) 92 : 82 I. C. 785 :

1924 M. W. N. 773 : 1925 Mad. 78 :

47 M. L. J. 389.

———S. 7—*Joint decree-holders—Succession certificate taken by all—Minors—Limitation for execution.*

Pending a suit for contribution the plaintiff died and his adult son, widow, and three minor sons represented by their brother as guardian obtained a succession certificate in their names and got themselves substituted in the place of the deceased plaintiff. Subsequently in proceedings in execution of the decree the question arose whether it was competent to the adult decree-holders to give a valid discharge to the judgment-debtor within the meaning of S. 7 of the Limitation Act. *Held* by *Walmsley, J.* (*Suhrawardy, J.* dissenting) that in the circumstances of the case it was open to the adult decree holders to give a valid discharge in respect of the decree without the concurrence of the minor decreeholders, even though the succession certificate had been given to all of them. (*Walmsley and Suhrawardy, JJ.*) *BILWAR BIBI v. MAHOMED HABIBAR RAHAMAN.* 51 Cal. 566 : 1924 Cal. 710.

———S. 9, Art. 155—*Suit for possession by mortgagee—Limitation—Suspension of.*

1924 Lah. 40.

———S. 10—*Applicability to constructive trusts.*

Per Dawson Miller, C. J.—Where a person directs another to acquire property for him (the person directing) and furnishes some money for the purpose, but after sometime he withdraws

LIMITATION ACT (IX OF 1908), S. 10.

from the venture completely but the person directed continues his exertions and entirely as their result, acquires the property, there is only a constructive trust and S. 10 does not apply.

Per Mullick, J.—There is no trust at all in such a case and limitation begins to run from the date of the withdrawal of the principal. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) *HARIHAR PRASAD SINGH v. MAHARAJA KESHO PRASAD.* 5 Pat L. T. Supp. 1 : 1925 P. 63.

—S. 10—*Applicability—Principal and agent—Suit against agent.*

To a suit by a principal against his agent, S. 10 cannot apply. (*Baker, J. C. and Pridcaux A. J. C.*) *BHANJAL v. BEHARILAL,* 81 I. C. 505.

—S. 10—*Applies to trust of land to be acquired in the future—The absence of any property at the date of creation of the trust does not affect the applicability of S. 10.*

It is open to a person to create a trust empowering another to go to a certain place for the purpose of acquiring land for him and the land so acquired would become vested in the trustee from the moment of its acquisition and the trust would fasten to that land exactly as if it had been vested in the trustee at the moment of the creation of the trust. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) *HARIHAR PRASAD v. KESHO PRASAD.* 5 Pat. L. T. Supp. 1 : 1925 P. 63.

—S. 10—*Express trust can be proved by inferences from conduct of parties and without express declaration—Trusts Act, S. 5.*

Per Mullick, J.—It is not necessary that an express declaration should be proved. Inference can be drawn from the conduct of the parties sufficient to establish an express trust. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) *HARIHAR PRASAD v. KESHO PRASAD.*

5 Pat. L. T. Supp. 1 : 1925 Pat. 63.

—S. 10—*Express trust—Provision for payment of money to a minor on attaining majority—Partition deed—Suit for recovery of money—Limitation.*

A partition deed entered into between two Mahomedan brothers recited that their deceased elder brother had entrusted a sum of money to them and one of the two brothers undertook to pay the amount to the son of the deceased brother on his attaining majority together with interest at 9 per cent. per annum. In a suit by the minor more than three years after attaining majority held, that there was an express trust created in favour of the plaintiff and that the suit was not barred by limitation. (*Devadoss, J.*) *MAHOMED-MATHAR ROWTHER v. KARA ROWTHER.* 20 L. W. 546 : (1924) M. W. N. 876 : 1924 Mad. 920.

—S. 10 and Art. 120—*Trustee de son tort—Suit for accounts—Limitation.*

S. 10 of the Limitation Act applies only to cases of express trustees. A suit for accounts against a trustee *de son tort* is governed by Art. 120 of the Lim. Act and he is liable to render accounts of the properties received by him for a period of six years preceding suit 45 M. 415 foll. (*Mukerji and Dalal, JJ.*) *BEHARI LAL v. SHIVA NARAIN.* 22 A. L. J. 866 : L. R. 5 A. 697 : 1924 All. 884.

LIMITATION ACT (IX OF 1903), S. 14.

—S. 12—*Computation of time—Date of judgment—If excluded*

The date on which judgment is pronounced has to be excluded and then the time requisite for obtaining copies. (*Campbell, J.*) *ATA MUHAMMAD v. PIR KHAN.* 1924 Lah. 599.

—S. 12—*Computation of time—Time for obtaining copies.*

Where the time for obtaining copies of judgment, of decree and judgment are two distinct periods and not overlapping, both periods can be deducted under S. 12, Lim. Act. (*MacLeod, C. J. and Shah, J.*) *TIMAPPA GANPAT v. MANJAYA SUBRAYA HEBBAR.* 48 Bom. 433 : 26 Bom. L. R. 362 : 1924 Bom. 425.

—S. 12—*Scope of—Exclusion of time for obtaining copies.* 48 Bom. 292 : 1924 Mad. 185.

—S. 12—*Time for obtaining decree or order.* 1924 All. 162.

—S. 12—*Time for obtaining copies—Decree signed long after judgment.*

An appellant is entitled to deduct the time between the delivery of judgment and the signing of the decree in computing the period of limitation for filing an appeal. If the latter date is no after the appealable time, the appellant gets the benefit of the interval, provided he has applied for copy of the decree before it was signed. (*Jwala Prasad and Ross, JJ.*) *MAHOMED MOIN-UD-DIN ASHRAF v. MOHAMMAD ISHAQ ASHRAF* 75 I. C. 265.

—S. 12—*Time spent in obtaining copy of judgment—If a deduction in applying for leave to appeal to His Majesty in Council.*

In applying for leave to appeal to His Majesty in Council it is only the time requisite for obtaining a copy of the decree but not of the judgment that can be deducted in computing limitation. (*Kennedy, J. C. and Raymond, A. J. C.*) *NUR MAHOMED v. HASSOMAL.* 78 I. C. 953 : 1925 Sindh 60.

—S. 12 (2) and (3)—*Copies of judgment and decree—Application for, on different dates—Time occupied in obtaining copy of decree—Deduction of.* 1924 P. 113.

—S. 14—*Execution before Collector—Proceeding under O. 21, R. 100—Time occupied by—If can be deducted.*

A Collector in Central Provinces cannot enquire into objections in execution under O. 21, R. 100 and time spent in such infructuous proceedings cannot be deducted under S. 14 as the Collector is not a court within the meaning of the section. (*Baker, J. C.*) *BANDAPPA v. SHANKER RAO.* 1924 Nag. 309.

—S. 14—*“Or other cause of a like nature”—Prior application for execution—Dismissal—Non-conformity of relief with decree—Time if can be deducted.*

Where a prior execution application is dismissed on the ground that relief asked for was not in conformity with the decree sought to be executed, it falls within “other cause of a like nature” and the time spent in the prior proceedings can

LIMITATION ACT (IX OF 1908), S. 14.

be deducted for purposes of limitation. (*Mullick and Bucknill, JJ.*) KISHORE MAL v. JAGDISH NARAYAN SINGH. 3 Pat. 42 : 75 I. C. 312 : 1924 Pat. 471.

—S. 14—Parties and cause of action different—Applicability. 1924 Rang. 123.

—S. 14—Plaint returned for presentation to proper court—Deduction of time.

Where a court returns a plaint for want of jurisdiction the time occupied in that court counts towards limitation and saves it under S. 14, Lim. Act from being barred. (*Kinkhede, A. J. C.*) VENKAT BHAT v. MT. YAMUNA. 80 I. C. 286.

—S. 14—Redemption disallowed by Collector—Suit in Civil Court—Limitation.

Where an application to the Collector under the Punjab Redemption of Mortgages Act is disallowed as barred by time, a suit in the Civil Court for the same relief is in effect one to set aside the Collector's order and falls within Art. 14 of the Lim. Act. (*Moti Sagar, J.*) RAM CHAND v. KAURA. 1924 Lah. 690.

—S. 14 and Art. 62—Patni sale—Purchase by defaulter—Recovery of surplus sale proceeds—Suit—Limitation—Pendency of proceedings to set aside the sale—Limitation—Exclusion of time.

On 15-5-1916 a patni tenure was sold for arrears of revenue. On 29-5-1916 some of the patnidars sued to set aside the sale. Pending the suit further arrears of rent accrued and the patni was again sold on 16-11-1916; plaintiff applied to set aside that sale also and the Court passed a decree on 21-2-1918 setting aside both the sales. On appeal the High Court confirmed the sale on 23-2-1920. Meanwhile one of the patnidars had sued on 14-5-1917 alleging that he had furnished half of the purchase money to the ostensible purchaser and that the sale of 16-11-1916 should be set aside. On 24-1-1917 the ostensible purchaser had withdrawn the surplus sale proceeds from Court. On 31-5-1920 plaintiff applied to amend his plaint by claiming one half of the claim for surplus sale proceeds. Held that the claim for surplus sale proceeds was governed by art. 62 of the Limitation Act and plaintiff had to sue within 3 years from the time when the money was received by the defendant. On the date the application for amendment was made, a suit for recovery of the amount would be barred and therefore the amendment should not be allowed.

The period between the date on which the sale was set aside by the lower court in the first suit and the date when the High Court confirmed the sale on appeal, could not be deducted inasmuch as the case did not come under S. 14 of the Limitation Act. The plaintiff in second suit was not prosecuting the first suit and was not associated with the plaintiffs of the first suit. Nor did it fall under any other section of the Act. (*Chatterjee and Cuming, JJ.*) NIRANKA CHANDRA BASU v. ATUL KRISHNA GHOSE. 28 C. W. N. 1009 : 1925 Cal. 67.

—S. 14—Scope of—Proceedings not allowed by law—Ignorance of law—If time can be excluded.

LIMITATION ACT (IX OF 1908), S. 15.

Proceedings coming under S. 14, Lim. Act must be such as are recognized by law as legal in their initiation though a party has carried the proceedings to a wrong court. A party who proceeds in ignorance of law cannot be said to proceed with due diligence or in good faith. (*Poster, J.*) SHEO DHARI RAM v. GUPTHESWAR PATHAK. 1924 Pat 716.

—S. 14 (2)—Application for execution—Filed in proper Court but prosecuted in wrong Court—Exclusion of time.

The question in the case was whether an execution application on 7-6-1916 was in time. The application before that was dated 10-4-1912 and it was properly filed in the Vadgaon Court but thereafter as that Court had to sit for a certain number of days in a month at the Haveli Court a notice was issued that the Judge would be sitting in the Haveli Court to hear the application. Execution was also ordered on the notified date. The defendant objected to the order on the ground that the Court had no jurisdiction to pass that order sitting in the Haveli Court and appealed to the District Court which on 26-2-1913 set aside that order. An appeal to the High Court by plaintiff proved unsuccessful. The application was finally brought on board in the Vadgaon Court on 30-6-1915 when it was struck off owing to the absence of the plaintiff. Held that the plaintiff was entitled to deduct the time from 15-4-1912 till the decision of the District Court on 26-2-1913 under S. 14 (2) of the Lim. Act. The proceedings in the Haveli Court should be treated as a separate proceeding. (*MacLeod, C. J., Kajiji and Crump, JJ.*) PANDU DAGADU v. JAMNA DAS. 26 Bom. L. R. 470 : 1925 Bom. 113.

—S. 15—Applicability of—Decree—Attachment of, in another execution—Execution proceedings under first decree not stayed—Suspension of limitation.

S. 15 of the Limitation Act only applies to an absolute stay, and not to a limited stay as would be ordered by the notice under O. 21, R. 53 (1) B. The stay does not prevent either the holder of the decree sought to be executed or his judgment-debtor from seeking to execute the original decrees, and that being the case, time must be taken as running against them. (*MacLeod, C. J. and Shah, J.*) CHANBASAPPA NAGAPPA v. HOLIBASAPPA BASAPPA. 48 Bom. 485 : 26 Bom. L. R. 317 : 80 I. C. 239 : 1924 Bom. 383.

—S. 15—Applicability—Execution proceedings—Injunction—Period of.

S. 15; Lim Act, applies to execution proceedings and where proceedings are stayed by an injunction order, the period of its duration should be excluded for purposes of limitation. (*Das and Ross, JJ.*) BABU LAL v. RAMSARAN LAL CHOWDHRY. 78 I. C. 478.

—S. 15—Attachment before judgment of decree—Injunction—Period if can be excluded.

An attachment before judgment of a decree and a consequent order issued by the court attaching the decree by absolutely prohibiting the execution of the decree by anybody amounts to an injunction and the period of its pendency can be

LIMITATION ACT (IX OF 1908), S. 15.

excluded under S. 15 of the Limitation Act in executing the decree. (*Phillips and Odgers, JJ.*) KALEPALLI RAJITAGIRIPATHY v. KALEPALLI BHAWANI SANKARAN. 19 L. W. 650. 47 Mad 641 : (1924) M. W. N. 527 : 80 I. C. 103 : 1924 Mad. 673 : 47 M. L. J. 4.

—S. 15 (2)—Period of notice—Deduction—Notice of Government wards—Ceasing to be wards at the time of hearing—Effect.

Where under Bombay Court of Wards Act, two months' notice had to be given before instituting a suit against the wards, that period can be deducted under S. 15 (2) of the Lim. Act, even though at the time of hearing, the wards had ceased to be under the Government. (*Macleod, C. J. and Shah, J.*) KHANDERAO SHIDRAMAPPA v. CHANMALLAPPA SHIDDAPPA. 26 Bom. L. R. 364 : 81 I. C. 750 : 1924 Bom. 364.

—S. 18—Fraud—Execution sale—Fraudulent concealment of knowledge of sale—Saving of limitation.

The decree-holders once guilty of fraud in bringing about the sale and keeping the judgment debtors ignorant of it must show that the opportunity was offered to the judgment-debtor to discover the fraud and that the fraud in fact dispelled subsequent to the sale or else the fraud once committed would continue. (*Jwala Prasad, J.*) THAKUR MAHTON v. JHAMAN MAHTON. 5 Pat. L. T. 200 : 80 I. C. 761 (1) : 1924 Pat. 496.

—S. 18—Fraudulent—Suppression of facts—Evidence of—Execution sale—Conduct of decree holder.

In the case of a sale alleged to have been brought about by the fraud of a decree holder, it is open to the Court to find from the suppression of one or more notices relating to the sale or to the decree itself that the whole was part and parcel of one original scheme and that the various incidents were merely indications of the fraudulent intention of the decree-holder from the outset. It is not sufficient to make a general allegation that because there was no service of sale processes or because there was irregularity in the service, the decree holder must necessarily have been responsible. Where a finding as to fraud is arrived at without any evidence to support it, it is liable to be questioned in second appeal. (*Mullick and Foster, JJ.*) KISHUNDEO NARAYAN MAHTA v. RAMREJAN SINGH. 5 Pat. L. T. 61. 1924 Pat. 67.

—S. 18 and Art. 62—Suit for money had and received—Limitation—Fraud—Proof of—Onus

When a suit is on the facts of it barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect. A person who in such circumstances desires to invoke the aid of S. 18 must establish that there has been fraud, and that by means of such fraud, he has been kept from the knowledge of his right to sue. Once it is established, the burden is shifted on the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite

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of the facts constituting the particular fraud, (*Prideaux, A. J. C.*) RAMCHANDRA v. HARDEO. 20 N. L. R. 23 : 80 I. C. 590 : 1924 Nag. 94.

—S. 19—Acknowledgment. 76 I. C. 751.

—S. 19—Acknowledgment—Essentials of. An acknowledgment under S. 19, Lim. Act must be a conscious admission of the existing liability in respect of the property or right which is claimed in the suit and must show an existing jurat relationship between the parties at the time when the admission was made. If an acknowledgment is not express, it may be by implication but the implication must be a necessary implication so that the acknowledgment is clear and unequivocal. (*Kennedy and Bilaram, A. J. C.*) RALLIRAM SHEWARAM v. BUDHURAM PARMANAND. 79 I. C. 914.

—S. 19—Acknowledgment of liability—Proof—Statement in prior case. 1924 All. 70.

—S. 19—Acknowledgment of liability—Promise to pay, if necessary.

Under section 19, Limitation Act, it is not necessary that there should be a promise to pay the amount due to constitute an acknowledgment. All that is necessary is an acknowledgment of the liability before the claim is barred. (*Devadoss and Jackson, JJ.*) PERI RAMASWAMI v. CHANDRA KOTAYYA. 47 M. L. J. 840.

—S. 19—Acknowledgment of liabilities—Statement by debtor.

In a deposition by the debtor in a court he stated "The debt due to the creditor, K was a mortgage debt. It ripened into a decree. It was in O. S. No. 80 of 1910 on the file of the Ellore sub-court. He gave me a letter that he would proceed against the mortgaged property only and would not proceed against my person. These debts are due by me along with others but they were paid by me alone. I therefore owe no debts to any of my creditors". Held, that there was a clear admission by the debtor that he was in debt to the plaintiff and that the statement amounted to an acknowledgment of liability within the meaning of S. 19 of the Limitation Act. (*Jackson, J.*) TALLAPRAGADA SATYANARAYANA MURTHY v. MADDU RAMIREDDY. 20 L. W. 562 : 1924 M. W. N. 877 : 82 I. C. 933 : 1924 Mad. 856.

—S. 19—Acknowledgment of liability—Principal and agent—Authority—Sufficiency of acknowledgment.

The mere fact that an agent used to write letters on behalf of his principal is not sufficient in law to enable court to infer that he was an authorised agent for the purpose of making an acknowledgment of liability. The name of a firm in the heading of a letter written in the course of business is a sufficient acknowledgment. 1 A. 683 ; 6 C. 340 Foll. (*Daniels and Neave, JJ.*) UMA SHANKAR v. GOBIND NARAYAN. 22 A. L. J. 807 : L. R. 5 A. 638 : 80 I. C. 6 : 1924 All. 855.

—Ss. 19 and 20—Acknowledgment—Essentials of—Signature necessary—Period of redemption if enlarged by S. 20 of the Lim. Act.

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An acknowledgment to be operative must be signed by the party against whom any particular right is claimed. In a suit for redemption it is for the plaintiffs to prove that they had a subsisting right of redemption at the date of suit and they are not relieved of the burden by showing that the fact of the mortgage was admitted by the predecessors-in-title of the present defendant when more than 80 years after the mortgage was effected had expired. S. 20 of the Lim. Act applies only to cases where the suit is for the recovery of a debt or legacy and does not operate to enlarge the period allowed by law to the mortgagor to redeem his property. (*Moti Sagar, J.*) **PIROZE KHAN v. KANHIYA RAM.** 6 Lah. L. J. 194; 78 I. C. 617 : 1924 Lah. 484.

—S. 19—*Acknowledgment of liability—Suit on a mortgage—Admission of the execution of the mortgage—Non-denial in the written statement by the legal representative of the mortgagor of the subsistence of the debt, whether amounts to an acknowledgment of liability—Civil Procedure Code, O. 8, R. 5.*

Where in a suit on a mortgage the plaintiff alleges the execution of the mortgage and alleged further that there was due in respect of the mortgage at that date a sum which was the principal amount and arrears of interest, and in the written statement the legal representative of the mortgagor, in that capacity, admitted the mortgage in terms and dealt with the plaintiff, paragraph by paragraph, but did not deny the subsistence of the debt at the date of the written statement there would be an acknowledgment of liability under the mortgage in the written statement within the meaning of S. 19 of the Limitation Act.

A mere statement that a debt existed at one time without anything further would not be sufficient as an acknowledgment of liability but if from the circumstances it could be inferred that the intention of the person making the statement was to convey the impression that the debt was still subsisting, the Court would be justified in holding that it was an acknowledgment of a subsisting liability within the meaning of S. 19 of the Limitation Act. (*Schwabe, C.J. and Krishnan, J.*) **THE OFFICIAL ASSIGNEE OF MADRAS v. SUBRAMANIA IYER.** (1924) M. W. N. 19 :

33 M. L. T. (H. C.) 235 : 1924 Mad. 286 : 19 L. W. 331 : 77 I. C. 740 : 46 M. L. J. 1.

—S. 19—*Acknowledgment—Suit for a definite sum claimed as balance of account—Admission by a defendant that account must be taken and settled—Valid acknowledgment to save limitation.*

In a suit brought for a definite sum claimed as due under accounts, an admission by the defendant that accounts must be taken and settled is an acknowledgment of liability and would save limitation. (*Wallace, J.*) **BHOGE REDDI KUMARASWAMI v. MADDEKARA NARAYANA RAO.**

(1924) M. W. N. 355 (2) : 1924 Mad. 619 (1) : 34 M. L. T. (H. C.) 200 : 19 L. W. 683 : 80 I. C. 355 (1) : 46 M. L. J. 468.

—S. 19—*Admission of liability—Arrangement for satisfaction—Effect of.*

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An unqualified admission of liability coupled with a declaration as regards the arrangement proposed for its satisfaction is an acknowledgment within S. 19, Lim. Act. (*Kinkhede, A. J., C.*) **DAJI MAHAR v. MAHADEO KUNHI.**

1924 Nag. 147.

—S. 19—*Applicability—Execution proceedings.*

The provisions of S. 19, Lim. Act, apply to execution proceedings. (*Das and Ross, J.J.*) **MT. RESHMA KUARI v. RAMESHWAR OJHA.**

79 I. C. 897 : 1925 P. 197.

—S. 19—*Authority to bind another—Agency—Proof—Enforceability of claim.*

Where as the result of acknowledgment by one person, others are brought to be made liable, the onus is on the person who seeks to make such persons liable to prove some sort of agency or authority to make an acknowledgment binding on the others.

It does not matter whether at the time of making the acknowledgment the claim could have been enforced. (*Jackson, J.*) **MALLADI KRISHNAYYA v. VENKATAPAYYA.** 80 I. C. 940.

—S. 19—*Mallakhandi—If an acknowledgment.*

Mallakhandi is a good acknowledgment under S. 19, Lim. Act, and will preserve any debt due which was not at that time barred by limitation. (*Rankin and Mukherjee, J.J.*) **KSHITISH CHANDRA DAS v. UMED MANDAL.**

78 I. C. 139 : 1925 Cal. 338.

—S. 19—*Mortgage—Suit for redemption—Sub-mortgagees impleaded after 60 years—Acknowledgment by manager—Effect.*

In a suit to redeem filed within 60 years of the mortgage, certain persons who were sub-mortgagees were impleaded, when they pleaded limitation as at the time they were joined it was more than 60 years. The mortgagor claimed the benefit of a statement made by the sub-mortgagees in a sale proclamation relating to those properties wherein they had stated the sub-mortgage was subject to the original mortgage. Held, it was an acknowledgment within S. 19 and would save limitation. Where the acknowledgment is by the manager of a joint Hindu family acting on behalf of the family, it binds all the members. (*Mukerji and Dalal, J.J.*) **SANVAL DAS v. SAIYID ALI MAHDI.**

22 A. L. J. 1018 : L. R. 5 A. 718 : 1925 A. 174.

—S. 19—*New consideration or actual promise to pay—If required.* 28 C. W. N. 322 : 79 I. C. 489 (2) : 1924 Cal. 388.

—S. 19—*Oral agreement to pay does not extend time.* 75 I. C. 440.

—S. 19—*Pleading—Statement that there was a mortgage—Sale effected to pay off—If an acknowledgment.*

An acknowledgment that a debt was due without more will be held to imply a promise to pay : but the statement that there was a debt but it has been discharged is not sufficient. 33 C. 1047 ; 42 M. 637 Ref.

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Where in a written statement there is a statement that a mortgage was executed and in order to pay it off a sale was effected, the inference from the latter portion will negative the implication of a promise to pay. (*Das and Ross, JJ.*) CHHATERDHARI MAHTO v. NASIB SINGH.

5 Pat. L. J. 551 : 78 I. C. 919 : 1924 P. 806

—S. 19—Prescribed—Meaning of—Acknowledgment—When to be made.

The word "prescribed" in S. 19 means prescribed by any law for the time being in force and not merely by the Limitation Act. First Schedule. It thus includes the operation of S. 31, Lim. Act.

Under S. 19 the acknowledgment should have been made before the expiration of the period prescribed for the suit. (*Daniels and Boys, JJ.*) HARISH CHANDRA v. MT. KUSTOLA KUNWAR.

80 I. C. 743 : L. R. 5 A. 657 : 1925 All. 68.

—S. 19—Promissory note by father—Acknowledgment by son—Effect on joint family.

1924 Mad. 96.

—S. 19—Redemption—Suit by one mortgagor—Pleadings—Acknowledgment of rights of other mortgagors.

The transferee of a portion of the equity of redemption brought a suit to redeem the mortgage and in the course of his claim made an admission that the mortgagor had a subsisting right to redeem the property. Held that this was a sufficient acknowledgment of the liability of the transferee himself to be redeemed in the event of his succeeding in his suit and there was a fresh period of limitation for a suit for redemption available from the date of that acknowledgment. (*Neave, J.*) KRISHNA MISIR v. DWARKA PANDE.

L. R. 5 A. 530 : 1924 A. 876.

—S. 19—Signature—What is.

Where the evidence shows that the mode of sending letters by a guru to his *chelas* is not by signing at the bottom but to begin the communication with the words "Sri Sri Hani sarman" an acknowledgment of liability written in this form in the guru's handwriting will be deemed to have been signed for the purposes of S. 19, Lim. Act. (*Lindsay and Sulaiman, JJ.*) GOPAL DAS v. BANWARI LAL.

75 I. C. 1004 : 1925 A. 8

—S. 20—Decree—Part-payment—Not certified—Saving of limitation.

Where a part-payment towards a decree satisfies the conditions laid down in S. 20 of the Limitation Act, it can be admitted so as to save limitation for execution even though it has not been certified under O. 21, R. 2, C.P. Code. (*Jackson, J.*) NARAYANA NAIR v. KUNHI RAMAN NAIR.

20 L. W. 190 : (1924) M. W. N. 674 : 82 I. C. 743 : 1925 Mad. 131.

—S. 20—Negotiable instrument—Promissory note—Suit by endorsee against maker and endorser—Liability of—Presentation for payment—Notice of dishonour—Cause of action—Limitation—Payment of portion of amount by maker—Effect.

The liability of the endorser of a promissory note arises out of the endorsement and not on the note. A payment of money by the endorsee on

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the note and signed by him saves limitation only against the person liable on the note and has nothing to do with persons liable on the endorsement. In order to make the endorser liable, it must be presented for payment within a reasonable time after the endorsement and it is not in the option of the endorsee by waiting for an unreasonable length of time to postpone the cause of action. Notice of dishonour should be also given within a reasonable time after dishonour. (*Ramesam, J.*) JAGANNADHA REDDIAR v. LAKSHMANA REDDIAR. 35 M. L. T. (H.C.) 120 : 1925 Mad. 132 : 80 I. C. 932 : 47 M. L. J. 475.

—S. 20—Part payment of decree out of Court—If saves limitation.

If the part payment of the decree amount is entered in an execution petition presented within 3 years from the date of such alleged payment, if the fact of payment is proved, it amounts to a certificate of payment under O. 21, R. 2, and will operate to save limitation under S. 20, Lim. Act. (*Moti Sagar, J.*) FATTU v. NANAK CHAND.

1924 Lah. 676.

—S. 20—Payment of interest—Limitation against surety—Saving of.

Payment of interest by a debtor under S. 20 does not give a fresh starting point of limitation against the surety 28 B. 248 : 25 C. L. J. 238, Foll. (*Prideaux, A. J. C.*) SETH ABDE ALI v. ASKARAN.

20 N. L. J. 140 : 1924 Nag. 411.

—S. 20—Payment of interest—Possession of land and receipt of rents—Saving of limitation.

1924 Pat. 169.

—S. 20—Payment not having been made towards interest.

In a suit by a plff. on two promotes executed by one of the defendants, on behalf of a partnership business, and it was opposed on the ground, that part payments were not made towards interest as such and the suit was barred. Held, that there were circumstances to indicate that payments were made towards interest and that even if they had been made towards principal there was writing sufficient to comply with S. 20 of Lim. Act. (*Duckworth and Godfrey, JJ.*) RALA SINGH v. BABU BHAGWAN SINGH & SONS.

2 Rang. 367 : 1925 Rang. 30.

—S. 22—Applicability—Party added by Court under O. 1, R. 10.

S. 22, Lim. Act, applies even to cases where a person is added as a party at the instance of the Court under O. 1, R. 10. (*Kennedy and Bilaram, A. J. Cs.*) RALLIRAM SHEWARAM v. BUDHURAM PARMANAND.

79 I. C. 914.

—S. 22—Joinder after limitation of a party not necessary.

75 I. C. 781.

—S. 22—New plaintiffs sought to be substituted—Expiry of limitation—Effect.

Where a suit was improperly constituted when filed, it cannot after the period of limitation has expired be made good by the substitution of a proper plaintiff by way of amendment. The amendment in such a case cannot be taken to date back to the time when the suit was originally

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instituted, but only to the time when the application was made. (*Kennedy, J. C. and Raymond, A. J. C.*) MANGUMAL JETHANAND v. ARATMAL SATRAMDAS. 1924 Sind. 47.

—S. 22—Suit for pre-emption—Impleading one of the vendees after limitation—Effect NIAZ ALI KHAN v. MD. AFZAL KHAN. 1924 Lah. 230.

—S. 23—Continuing wrong—Cases under Oudh Rent Act.

S. 23 of the Lim. Act is not among the provisions which are applicable to suits under a special or local law unless expressly exempted. Consequently the principle of a continuing wrong cannot be implied in cases under the Oudh Rent Act. (*Fremantle, S. M. and Burn, J. M.*) BHAGWAN DIN v. THE SPECIAL MANAGER, COURT OF WARDS. L. R. 50, 97.

—S. 25—Calculation of time—Gregorian calendar—Document fixing months according to Hindi calendar—Effect.

If the starting point of limitation is to be calculated as so many months or years from a certain date, the calculation is according to the Gregorian calendar. But if the document on which the rights of parties are founded fixes the rights to accrue under the Hindi calendar, S. 25 will not apply. (*Mukerji and Dalal, J. J.*) ROSHAN LAL v. CHAUDHRI BASHIR AHMAD 22 A. L. J. 902 : L. R. 5 A. 636 : 82 I. C. 330 (2) : 100 & A. L. R. 1302 : 1925 A. 138.

—S. 26 Expln.—Scope of—Easement—Acquisition of—Period necessary to acquire—Denial of right.

A mere denial of a right affords a cause of action and there is no reason to doubt that any person whose property is threatened with a servitude may bring a suit for a declaration that an easement is enjoyed on sufferance and not as of right.

The explanation to S. 26, Lim. Act, confers an increaseable right of easement on any person after an enjoyment of anything over 19 years provided he waits less than one year before challenging an interruption and the beginning of his enjoyment arose 20 years before suit. (*Le Rossignol, J.*) CHIRAGH DIN v. GHULAM MUHAMMAD.

1924 Lah. 628.

—S. 28—Extinguishment of right—Subsequent delivery of possession—Effect.

For more than 12 years after the confirmation of an auction sale, the judgment-debtor remained in possession. Thereafter the purchaser obtained a sale certificate and obtained formal delivery. In a suit for possession and declaration of title by the judgment debtor, held the auction purchaser's title had become extinguished under S. 28, Lim. Act, and the subsequent obtaining of formal delivery of possession was of no avail, as his right commenced from the date of confirmation of sale and not from the date of obtaining sale certificate. (*Wazir Hasan, J. C. and Neave, A. J. C.*) MT. MAHMUDINISSA v. SYED ZAHID RAZA.

11 O. L. J. 466 : 1 O. W. N. 139 : 1925 Oudh 20.

—S. 28—Lapse of time—Effect on possession already got.

19 L. W. 283 : 39 C. L. J. 295 : 28 C. W. N. 840.

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—S. 25—Right to maintenance—Extinction. 1924 Cal. 364.

—Art. 10—Covenant in sale deed—Option to purchase to vendor in case of sale—Suit for enforcement—If a suit for pre-emption. See LIM. ACT, ART. 113. 90 I. C. 962.

—Art. 10—Possession with tenants—Pre-emption. 5 Lah. L. J. 539 : 1924 Lah. 302.

—Art. 11—Applicability of—Claim in execution proceedings—Disallowance of—Suit to establish title—Limitation.

A claim preferred to the attachment of property was dismissed for default. Nevertheless as the decree-holder took no further steps to bring the property to sale, the execution proceedings were dismissed very soon afterwards for default whereupon the attachment ceased under O. 21, R. 57, C. P. Code. Held, that it was not thereafter incumbent on the decreeholder to institute a suit under Art. 11 of the Lim. Act within a year after the date of the adverse order rejecting the claim. (*Rankin and Page, J. J.*) NAJIMUNNESSA BIBI v. NACHARADDIN SARDAR. 51 Cal. 548 : 39 C. L. J. 418 : 1924 Cal. 744.

—Art. 11—Applicability of—Application by auction purchaser for delivery of possession—Sons of judgment-debtor impleaded—No obstruction or resistance on behalf of judgment-debtor—Sons asserting title on their own account—C. P. Code, O. 21, Rr. 99 and 103.

On an application by the purchaser at an execution sale under O. 21, R. 95, C. P. Code, for delivery of possession of property sold impleading the sons of the judgment-debtor as parties, the Court can remove the sons out of possession only if it is satisfied that they hold the property on behalf of the judgment-debtor or claiming title under him. Where the Court finds the sons were in possession in their own right and dismissed the application of the purchaser, a subsequent suit by him for possession is not governed by the shorter period of limitation under Art. 11-A of the Lim. Act. Nor is the order one passed under O. 21, R. 99, C. P. Code. So held by the majority (*Mukerji, J. dissenting*). (*Sulaiman and Kanhaiya Lal, J. J.*) BOHRA SOBHA RAM v. TUPSI RAM. 22 A. L. J. 626 : L. R. 5 A. 488 : 46 A. 693 : 1924 A. 495.

—Arts. 11 and 120—Attachment before judgment—Claim—Decree and execution sale—Claim petition—Rejection—Suit—Limitation.

An attachment before judgment was made. After decree sale was applied for and ordered. Held, a suit to contest an order made upon a claim filed against such attachment is governed not by Art. 120 but by Art. 11. A suit brought more than a year after application and order for execution sale is barred. 34 M. 902. (*Krishnan and Ramesam, J. J.*) VELLAYAN ASARI v. SIVAGNANAM ASARI. 34 M. L. T. 193 (H. C.) : 79 I. C. 917 : 1925 Mad. 49.

—Art. 11—Claim petition—Order against minor—Suit challenging.

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A suit in respect of an adverse order under O. 21, R. 63, against a minor must be filed within one year after attaining majority. If the guardian files the suit within one year of the order, and that suit is dismissed, it cannot extend the period of limitation for a suit by the minor. (*Phillips and Venkatasubba Rao, JJ.*) SUBBIAH PANDARAM v. ARUNACHELA PANDARAM, 80 I. C. 992.

—Art. 11 (a)—Applicability of—C. P. Code, O. 21, R. 100—Application under—Dismissal of for want of cause of action. PAHAL GHORAI v. HAJI MUNSHI FAZLUDDIN MAHOMED, 1924 Cal. 97.

—Art. 12—Sale null and void—Application to set aside. See B. T. ACT, S. 49 K. 28 C. W. N. 556.

—Art. 12 (b)—Revenue sale under Madras Estates Land Act—Suit to set aside. 1924 Mad. 278.

—Art. 12 (b)—Sale under the Madras Estates Land Act—Suit to set aside—Limitation.

A suit to set aside a sale held under the provisions of the Madras Estates Land Act is governed by Art. 12 (b) of the Limitation Act. There is no provision in the Madras Estates Land Act similar to the one in O. 21, R. 92, C. P. Code, for confirmation of sale and for the sale thereupon becoming absolute. Consequently the second clause of Art. 12 (b) of the Lim. Act must be applied. 6 M. 148; 13 C. L. J. 339 Kel. (*Phillips and Venkatasubba Rao, JJ.*) KAMALAMMAL v. CHOCKALINGA ASARI. (1924) M. W. N. 37; 76 I. C. 840; 19 L. W. 81.

—Art. 14—Applicability of—Orders without jurisdiction—Limitation for setting aside.

Art. 14 of the Lim. Act applies to acts or orders done in exercise of powers legally exercisable by the executive; in other words, the article applies to acts or orders which need not be set aside. The article has no application where jurisdiction has been usurped, and the order is *ultra vires*. An order made without jurisdiction is a nullity and need not be set aside; to an order of this description Art. 14 has no application. 24 C. 149; 32 C. 716; 32 C. 1107; 33 C. 693; 36 C. 726; 15 C. W. N. 300 Ref. (*Mookerjee and Rankin, JJ.*) PEARY LAL RAY CHAUDHRI v. SECRETARY OF STATE. 39 C. L. J. 454; 83 I. C. 446; 1924 Cal. 913.

—Art. 14—Scope of—Order one to be set aside—Order in mutation case.

Art. 14 applies to acts or orders done in exercise of powers legally exercisable by the Executive and before it can be applied the order must be one which needs to be set aside. If there is no provision of law for setting it aside, Art. 14 cannot apply. An order in a mutation case cannot be directly impugned in a Civil suit; yet another can show in a Civil suit he is the real owner and as the basis of such a decree ask the Revenue authorities to make the mutation in his name. Art. 14 does not apply to such a case. (*Hallifax, A. J. C.*) MT. MUNNA v. SUKLAL. 1924 Nag. 142.

—Art. 29—Amount collected by distraint—Suit for refund—Limitation.

LIMITATION ACT (IX OF 1908), Art. 36.

Arrears of rent decreed were collected by distraint under the Agra Tenancy Act and subsequently on the decree being reversed, a suit was brought for recovery of the amount levied. Held, it was a suit for compensation of wrongful seizure of movable property under legal process and Art. 29, Lim. Act, applied. (*Piggott, J.*) MAN SINGH v. RAM NATH 1924 A. 828.

—Art. 29—Applicability—Attachment before judgment—Dismissal of suit.

Art. 29 applies to suits for compensation for wrongful seizure of moveables under a legal process. Where property is attached before judgment and the suit is finally dismissed, the attachment cannot be said to be illegal if it was the property of the defendant. The detention becomes wrongful only when the suit is dismissed. (*Kanhaiya Lal, J.*) MANGA v. CHANGA MAL. 22 A. L. J. 977; L. R. 5 A. 732; 81 I. C. 1038; 1925 A. 131.

—Arts. 29 and 62—Money paid into Court drawn out by persons not entitled—Suit for recovery—Limitation.

Where money paid into court lawfully belonged to the plaintiff but it was drawn out by the defendants without justification, held that a suit to recover the money was not governed by Art. 26 of the Lim. Act. (*Baker, O. J. C.*) RAJA RAM v. MULCHAND. 7 N. L. J. 140; 1924 Nag. 248.

—Art. 31—Railway—Loss of goods consigned by Railway—Suit for damages. See RAILWAYS ACT, SS. 77 AND 140. 46 M. L. J. 802.

—Art. 32—Placing heavier beams on plff.'s wall—Perversion of purpose—Suit for removal. MOHAN v. BISHAMBHAR SAHAI, 46 A. 68; 78 I. C. 193; 1924 A. 450.

—Arts. 32, 120, and 144—Landlord and tenant—Building by tenant—Suit for demolition and injunction.

Where an occupancy tenant puts up buildings on the land without the permission of the landlord, a suit by the latter for demolition of the building and for injunction is governed by arts. 32 or 120 of the Lim. Act and not by Art. 144. (*Sulaiman, J.*) PIYARE LAL v. BED RAM. 1924 A. 814.

—Art. 36 and 49—Attachment before judgment—Dismissal of suit—Compensation for wrongful detention and loss of profits.

Where certain moveables were attached before judgment, in a suit on a pronote by the defendant in respect of a pronote executed by the plff. and the suit was dismissed on appeal, and the latter sued for compensation for loss of profits and reputation, the lower court dismissed the same as being time barred under Art. 29 of Lim. Act. Held, on appeal that the view taken by the courts below was unsustainable in that Art. 29 applies to a suit for compensation for wrongful seizure of moveables under a legal process. There was no wrongful seizure in the case on the day on which the attachment was made, though the subsequent dismissal of the suit had the

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effect of making the detention of the attached property wrongful and the suit for compensation was within time either under Art. 49 or Art. 36 read with S. 23, 29 All. 615, 31 M. 431, 19 M. 80, 38 M. L. J. 324, 42 Cal. 85, 39 All. 322, 6 Bom. L. R. 704, 64 I. C. 513 referred to and explained (*Kanhaiya Lal, J.*) *MANGA v. CHANGA MAL.* L. R. 5 A. 732 : 81 I. C. 1938 : 1925 A. 131 : 22 A. L. J. 977.

— — — — — Arts. 36 and 90—Company—Director—Suit against director for losses arising through negligence—Limitation, *See*. LIM. ACT. ARTS. 90 AND 36. 5 Lah. 27.

— — — — — Arts. 36, 37 and 39—Obstruction of water source—Suit for compensation.

A suit for damages for injury to crops committed by obstructing a water course is not governed by Art. 36 as there are specific articles which apply. If there was a trespass on immoveable property accompanied by obstruction of water course, Art. 39 would apply. In respect of a continuing obstruction by itself, Art. 37 read along with S. 23 will apply and a suit brought within 3 years of the last day to which the wrong continued would be in time. (*Hallifax, A.J.C.*) *SONA PATIL v. LAXMAN.* 82 I. C. 482 : 1925 Nag. 189.

— — — — — Arts. 39 and 49—Suit for compensation for cutting gum trees—Limitation.

Plaintiff alleged that the defendant first trespassed on his land in 1917 and in the course of that trespass, in 1918 he cut plaintiff's valuable lac producing trees on the land and removed the same, and thus caused damage to him. Plaintiff measured his damage by the value of the lac produce which he might have gathered but for the defendant's interference. *Held*, (1) that in determining the nature of the claim or finding out the article by which it is governed, it is the nature of the cause of action rather than its form which has to be looked to and which determines the applicability of the particular article of the Limitation Act, (2) that the present suit was not merely for the value of the wood cut and carried but for damages arising from trespass, (3) that the suit was one for compensation for trespass upon immoveable property within the meaning of Article 39 and for wrongfully taking specific moveable property within the meaning of Article 49 of Sca. 1 of the Limitation Act. (*Kinkhede, A. J.C.*) *NARBADAPRASAD v. AKBAR KHAN.* 20 N. L. R. 80 : 80 I. C. 769 : 1924 Nag. 125.

— — — — — Art. 44—Applicability—Alienation by unofficial guardian.

Art. 44, Lim. Act, applies to alienations by unofficial guardians. (*Macleod, C.J. and Crump, J.*) *IRANGAUDA FAKIRGAUDA PATIL v. NINGAPPA.* 1924 Bom. 517.

— — — — — Art. 44—Compromise decree against minors—Sanction of Court—Suit to recover property—Limitation.

Where a compromise decree is passed against a minor and the same had been scrutinized by the court and found beneficial to him, a suit for the recovery of possession of properties alienated under the decree must be filed within 3 years of attaining majority. (*Le Rossignol, J.*) *THI RAJ v. KHEAUSI.* 1924 Lah. 427.

LIMITATION ACT (IX OF 1908), Art. 52.

— — — — — Arts. 44, 91 and 144—Malabar Tarwad—Alienation by Karnavan on behalf of himself and minor members—Suit by junior members to set aside—Limitation Act, Art. 144, application, *See* LIM. ACT. ARTS. 91 AND 144. 46 M. L. J. 340.

— — — — — Art. 44—Sale by unauthorised person—Suit for recovery of possession—Limitation

A suit to set aside a sale by an unauthorised person and for recovery of possession does not fall within Art. 44 of the Lim. Act. The plaintiff sued for a declaration that a conveyance executed by his mother in collusion with his brother did not affect his interest and for an injunction restraining defendant from disturbing plaintiff's possession and in the alternative for cancellation of the document. *Held*, that the suit was one substantially for setting aside the sale in spite of the omission of a specific prayer to that effect. (*Walmsley and Mukerjee, J.J.*) *UMA CHARAN CHAKRA VARTHI v. GUIRAM BEG.* 39 C. L. J. 394 : 1924 Cal. 1008.

— — — — — Art. 47—Onus—Nature of inquiry.

Held (*Per Pullan, A.J.C.*) Where the plaintiff sets up his claim within the 12 years period of limitation allowed for such suits and it is no part of his case that there was any decision by a criminal or other Court which could in any way affect his claim and such a case is set up by the defendants in their written statement, it is primarily for the defendants to show that there was a decision of the criminal Court which brought plaintiff's claim under any other rule of limitation than that on which plaintiff relied.

(*Per Kendall, A.J.C.*) The ordinary period for one who is bound by an order under S. 145, Cr. P. C., is three years and until the plaintiff could prove that he was not bound by that order his claim must be held to be barred by limitation. *Held*, that in civil suits dealing with the application of Art. 47, Sch. I, of the Limitation Act, it is not every error which makes the result invalid and that before want of jurisdiction can be established in such a case a vice must be clearly established which infects the whole proceedings. 22 C. W. N. 342 foll. (*Pullan, and Kendall, A. J. Cs.*) *RANI ABADI BEGAM v. AHMAD MIRZA BEG.* 1 O. W. N. 433 : 11 O. L. J. 757 : 82 I. C. 691 : 1925 Oudh 190.

— — — — — Art. 49—Jewellery—Possession originally permissive—When becomes unlawful—Demand and refusal.

Where the possession of jewel by the defendant had been originally permissive, her bare assertion subsequently that she is the owner of the property does not change the character of her possession into an unlawful one. Her possession becomes unlawful only when there is a formal demand for return of the jewel and a refusal to comply with it. Under Art. 49 of the Lim. Act time would begin to run only from the date of her refusal to comply with the demand. (*Robinson, C.J. and Brown, J.*) *MA MARY v. MA HLA WIN.* 2 Rang. 555 : 1925 Rang. 146.

— — — — — Art. 52—Suit for price of goods supplied from time to time—Limitation. *NAJAN AHMAD-HAJI ALI v. SALE MAHOMED.* 77 I. C. 943.

LIMITATION ACT (IX OF 1908), Art. 53.

—Art. 53—*Bill of sale—Thavanai—Meaning of—Credit period—Words—Interpretation—Technical meaning—Evidence of—Evidence Act, Ss. 92 (5) and 98—Limitation for suit for money due.*

A vendor sent to his vendee a bill for some piece goods purchased and at the top of the bill appeared the words "Debit interest at $\frac{3}{4}$ per cent. per mensem after 60 days thavanai." In a suit for the money due, the plea of limitation was set up and the question arose whether it was a credit sale or a cash transaction. *Held*, the word thavanai meant credit period and the suit was governed by Art. 53 of the Limitation Act.

Per *Venkatasubba Rao, J.*—The word thavanai has acquired various meanings in various lines of business. Under S. 98, Evidence Act evidence can be given to show the meaning it bears in the particular mercantile transaction in which it was used. In such cases the duty of the Judge is to inform his mind not only by reference to dictionaries of good reputation but also by evidence of the meaning ordinarily given to it amongst those who use it (1904) 1 Ch. 170, 16 Ch. D. 718 referred to. Even if the meaning of the word is fixed period, oral evidence can be given under proviso 5 to S. 92 Evidence Act, that by the usage of particular trade an incident not expressly mentioned in a contract is a term of that contract.

Per *Jackson, J.*—Thavanai is a colourless expression meaning only "period". Any particular sense in which the word may have been used must be proved aliunde. (*Venkatasubba Rao and Jackson, JJ.*) *K. M. P. R. N. M. FIRM v. M. SOMASUNDARAN CHETTI & Co.*

20 L. W. 981 : 1925 Mad. 161 : 47 M. L. J. 844.

—Arts. 59 and 60—Loan—Deposit—Suit for recovery—Limitation. 1924 Bom. 28.

—Art. 61—*Applicability—Money paid to save from sale property of another—Suit for recovery.*

If a person pays off a decree to save from sale the property of a stranger judgment-debtor, suit to recover the amount falls under art. 61, Lim. Act. (*Kendall, A. J. C.*) *COLLECTOR SINGH v. MADARI LAL.* 78 I. C. 738 : 1925 Oudh 132 (2)

—Art. 62—*Joint family—Separation—Suit by separated member for share of debt collected—Limitation.*

Art. 62 applies to a suit by a separated member of a joint Hindu family for his share of a debt which had been kept joint at the time of partition but had afterwards been collected by the other members of the family (*Kanhaiya Lal, J.*) *BHAGWAN DAS v. SUKHDEO KORIE.* 1924 A. 812.

—Art. 62—*Suit for recovery of surplus sale-proceeds realised in patni sale—Limitation—Art. 62 applicable—Starting point—Date of withdrawal of money by defendant.*

See 22 C. W. N. 1009.

—Arts. 62, 89, 90, 115 and 120—*Suit against heirs of agent—Damages arising out of negligence of agent—Limitation—Pleader allowing decrees to become barred—Liability of.*

Plaintiff sued the legal representatives of his deceased agent and pleader for recovery of

LIMITATION ACT (IX OF 1908), Art. 66.

moneys representing damages caused by the alleged neglect, misconduct and breach of duty of the deceased agent and amounts alleged to have been misappropriated by him. *Held*, that the representatives of a deceased agent are not liable to render an account in the sense in which the agent, had he lived might have been called to do so. The liability to render accounts is a personal one attaching to the agent and cannot be enforced against his heirs. This does not mean however that the heirs must necessarily escape liability for the defalcation or breach of duty of the agent if the principal can prove that he has suffered loss thereby. The suit may be so framed as to include a claim for sums received by the agent to the use of the plaintiff and for the loss occasioned to the principal by reason of the defalcation and breach of duty of the agent, and to the extent of the assets of the deceased in the hands of his heirs. To such a suit Art. 62 or Art. 115 of the Lim. Act would apply and not Arts. 89 and 90 which relate to suits by a principal against his agent and not to suits against the legal representatives of an agent. In the case of continuous and comprehensive agency as in the case of a Raj pleader with a general retainer and a monthly salary, the limitation for a suit for account runs not from the date of the Vakalatnamas in particular cases, but from the date when the defendant refuses to render account's. (*Miller, C. J. and Foster, J.*) *MAHARAJADHIRAJA SIR RAMESWAR SINGH v. NARENDRA NATH DAS.* 5 Pat. L.T. 355 : 2 Pat. L. R. 205.

—Arts. 62 and 141—*Suit to recover interest of a mortgagee—Limitation.*

The interest of a mortgagee in the property mortgaged is immoveable property and a suit to recover such interest is governed by Art. 141 and not Art. 62 of the Limitation Act. (*Wazir Hasan and Neave, A. J. Cs.*) *THAKUR JAI INDAR BAHADUR SINGH v. THAKUR SHEO INDAR BAHADUR SINGH.* 10 O. L. J. 481 : 78 I. C. 393 : 1924 Oudh 218.

—Art. 62—*Void contract—Suit for refund of consideration.*

A suit for refund of consideration in respect of a transaction which is void falls under Art. 62 Lim. Act and must be brought within 3 years of the same. (*Baker, J. C.*) *OMRAO v. RAMDHAR.* 81 I. C. 873 : 1925 Nag. 130.

—Art. 66, 75, 80—*Bond payable within a specified period—Stipulation to pay interest month by month—Option of creditor to sue on default in payment of interest—When time begins to run—Limitation—Instalment bond—Right of waiver, whether open on other bonds.*

Where a bond provided for repayment within six months but the interest was to be paid month by month and in the event of failure to pay in any month, the creditor was to have the right to file the suit at once without waiting for the stipulated period of six months.

Held (1) that the limitation begins to run from the date of the first default in payment of interest, (2) that the bond having become payable on the occurrence of the first default in payment of interest, the suit brought after 3 years from that

LIMITATION ACT (IX OF 1908), Art. 66.

date was barred under Art. 80 Sch. I of the Limitation Act 8 O. C. 77, 14 O. C. 129, 45 A. 27 and 37 All. 400 Foll. 16 O. C. 45, 20 O. C. 132, 5 O. L. J. 739; O. L. J. 416, and 39 Mad 981 not followed. 6 O. L. J. 248 and 8 O. L. J. 418 distinguished.

Art. 75 of the Limitation Act, which applies to instalment bonds, is the only one which recognises the right of the payee to waive his right to sue on the expiration of the first term of payment. The omission of such a provision from the other Article relating to suits on bonds clearly indicates the intention of the Legislature to deny any right of waiver in other cases. (*Wazir Hasan and Neave, J. Cs.*) *PHERAI v. PYDAI RAM*, 10 W. N. 647 : 10 O. & A. L. R. 1087.

—Art. 66—Suit on bond—Principal and surety.

The liability of a surety being co-extensive with that of his principal, a suit on a bond against principal and surety, in which a day had been fixed for payment, falls under Art. 66, Lim. Act as regards both. (*Campbell and Zafar Ali, JJ.*) *NIHAL CHAND v. KHUDA BAKHS*. 1924 Lah. 534.

—Art. 67—Punjab Act I of 1904—Bond—Acknowledgment—Interest payable at Sahu-kara rate—Suit—Limitation.

The plffs. advanced grain and money to the defendants and they sued for the amount due to them. The defendants raised a plea of limitation in answer to the claim in respect of the grain advances, and its decision depended on whether the book entries of the balances struck by the defendants, which were attested by witnesses, were bonds or mere acknowledgments. If they were bonds the suit was governed by Art. 67 of the Lim. Act, while if they were mere acknowledgments the suit in respect of grain advances was barred by time. Held that although the entries in question did not contain express promises to pay the principal they made mention of interest being payable at the *sahukara* rate, and this implied a promise to pay the principal. Consequently as the entries which were attested by witnesses contained promises to pay the amount, they were bonds and the whole suit was in time. (*Martineau and Moti Sagar, JJ.*) *NARAIN DAS v. MIRAN BAKHS*. 5 Lah. 406 : 1925 Lah. 75.

—Art. 68—Administration bond—Breach of condition—Suit on. 76 I. C. 802: 1924 Rang. 68.

—Arts. 73 and 80—Promissory note—Payable at sight—Suit on—Limitation.

A promissory note that is payable at sight is payable on demand and a suit on the note is governed by Art. 73 of the Lim. Act. Time runs from the date of the execution of the interest. (*Suhrawardy and Duval, JJ.*) *DURGA PRASAD SEN v. KALI CHARAN AICH RAI*, 40 G. I. J. 84 : 1924 Cal. 1065.

—Art. 75—Inaction is not waiver.

If a creditor simply sleeps on his rights and does nothing for three years it cannot be said that he had agreed to waive the right which accrued to him when the default occurred. (*Macleod, C. J. and Crump, J.*) *GANPAT BALAJI KALE v. NARAYAN SAWALIRAM*. 1924 Bom. 301.

—Art. 75—Instalment bond—Failure to pay instalment—Cause of action.

LIMITATION ACT (IX OF 1908), Art. 89.

Where a bond provides for payment of money in instalments and default is made in the payment of any instalments, the cause of action for a suit on the bond arises on the date of default and not the date of execution of the bond. The case falls under Art. 75 of the Lim. Act. If some instalments have been paid, oral evidence can be let in about the same and it is not a case of acknowledgment within S. 20 of the Act. (*Das and Macpherson, JJ.*) *MUNDO SINGH v. MAHANTH KRISHNA DAYAL GIR*. 1924 P. H. C. 67 : 75 I. C. 98 : 1924 P. 439.

—Arts. 75 and 80—Instalment bond—Default—Option to sue for whole amount—Limitation—Starting point.

Under a simple bond defendant agreed to pay the plaintiff the principal sum and interest in twelve monthly instalments. The instalments included payment of principal as well as interest and in case of default in payment of any one of the instalments the plaintiff could sue for the whole amount or he could sue after the expiry of one year fixed for repayment of the entire debt. There was default in payment of the first instalment and there was no proof of waiver on the part of the plaintiff. In a suit on the bond, held that the entire unpaid amount became due on the date of the first default and that art. 75 of the Lim. Act applied to the case. (*Neave and Kendall, A.J.Cs.*) *MOHANYA v. PANNA LAL*, 10 O. & A. L. R. 534 : 79 I. C. 848 : 11 O. L. J. 513.

—Arts. 75 and 116—Instalment bond—Provision for recovery of full amount on default—Rights of obligee—Suit for money due under the bond—Limitation.

An instalment bond, duly registered, contained a provision enabling the payee to recover the whole of the amount due under the bond in case there was default made in the payment of an instalment more than once.

The bond was executed in favour of the Secretary of a company which was unregistered consisting as it did of only nine members. The bond was subsequently assigned by the secretary after the company was registered. In a suit by the assignee of the bond more than six years after the date of the first default held, (1) that the bond merely gave an option to the obligee to take advantage of the default and to recover the whole of the amount due under the bond if he so chose; but it did not compel him to do so and in the absence of a demand the right to sue for the amount will not accrue; and (2) that the fact that the company was subsequently registered will not invalidate its previous dealings and that the assignment by the secretary was quite legal. 29 M. 477 followed. (*Krishnan, J.*) *MOHIDEEN KARIYA PULAVAR v. PERIYANAYAKAM PILLAI*, 20 L. W. 430 : 1924 M. W. N. 828.

—Art. 85—Mutual open, and current account—Test of. 1924 P. 107.

—Art. 89—Co-sharers—suit for recovery of allowance realised by one co-sharer on behalf of all—Limitation.

A suit by one co-sharer for recovery of his share of certain allowances collected by another co-sharer is governed by article 89 of the Limitation Act, when the latter had collected it in

LIMITATION ACT (IX OF 1908), Art. 89.

pursuance of an arrangement entered into between all the co-sharers. (*Shah, A.C.J. and Fawcett, J.*) *GIRJABAI SHIVDEORAO v. NARAYAN RAO*. 26 Bom. L. R. 1165.

—Art. 89—Suit for accounts—Agency.
75 I. C. 1022.

—Art. 89—Suit for account—Principal and agent—Plea of limitation to be specifically raised—Demand and refusal.

Where in a suit for accounts against an agent the plaintiff alleged that the defendant always promised to account but put off rendering the accounts from time to time and the written statement merely alleged that the suit was barred on the face of it and that accounts had been rendered. *Held*, that it was not part of the defendant's case that there had been a demand and refusal at any particular time and therefore the suit was barred. It is not open to the defendant to raise a substantive plea of limitation without stating the necessary facts in his written statement. The plaintiff in the case alleged an admission on the part of the defendant of his liability to account and that the account will be rendered rather than a refusal to account. 43 I. C. 571; 44 C. 1 Rel. 30 C. L. J. 90 Dist. (*Das and Ross, JJ.*) *SYED HASSAN IMAM v. DEBI PRASAD SINGH*. 3 Pat 546; 1924 P. H. C. G. 189; 5 Pat. L. T. 303; 80 I. C. 956; 1924 P. 664.

—Arts. 89 and 90—Suit by principal against legal representatives of deceased agent—Limitation—Arts. 89 and 90 not applicable but Art. 62 or 115. See LIM. ACT, ART. 62. 5 Pat. L. T. 355.

—Arts. 89 and 120—Principal and agent—Suit against heirs of deceased agent for accounts and recovery of money—Limitation.

Where a cause of action for accounts and recovery of money due from an agent has accrued before the death of an agent, the mere fact of his subsequent death would not give a fresh starting point of limitation against his legal representative. A suit for accounts against the legal representative would be governed by Art. 89 and not by Art. 120. (*Phillips, J.*) *MAHBOOB SIR FRAIVANTU SREE RAJA PARTHASARADI APPA RAO v. SUBBA RAO*. 35 M. L. T. (H. C.) 84; (1924) M. W. N. 517; 1924 Mad. 840; 47 M. L. J. 483.

—Arts. 90 and 36—Director of limited company—Suit against for losses suffered by his negligence—Limitation—Position of director.

In each case it is a question of fact as to whether a director of a company whose acts are brought into question is in the position of a trustee, a partner, or an agent to the company or to the body of share-holders. *Held* that on the facts of the case, the defendant in acting as the Chairman of the local board of directors was in respect of the suit transactions, acting as the agent of the banking company and a suit against him for losses incurred by his negligent conduct of the business was governed by Art. 90 of the Limitation Act and not by Art. 36. (*Abdul Raoof and Fford, JJ.*) *DAULAT RAM v. BHARAT NATIONAL BANK, LTD., DELHI*. 5 Lah. 27; 79 I. C. 740; 1924 Lah. 435.

LIMITATION ACT (IX OF 1908), Art. 97.

—Art. 90—Suit by Municipality for recovery of moneys embezzled by municipal servants through the negligence of the manager—Limitation.

A suit by a Municipal Board against its secretary and Executive Officer for the recovery of moneys embezzled by Municipal servants owing to the negligence of the defendant, is governed by Art. 90 of the Limitation Act. (*Mears, C. J. and Piggott, JJ.*) *MUKERJI v. THE MUNICIPAL BOARD, BENARES* 46 A. 175; L. R. 5 A. 113; 22 A. L. J. 26; 80 I. C. 241; 1924 A. 467.

—Act. 91—Applicability of—Instruments void and not voidable—Avoidance of—Declaration. *MT. BIBI KANIZ ZAINAB v. SYED MOBARAK HUSSAIN*. 1924 P. 284.

—Arts. 91 and 144—Hindu widow—Mortgage—Subsequent sale of the equity of redemption—Adoption—Right of adopted son to set aside alienation—Limitation.

In May 1900 a Hindu widow in possession of her husband's estate mortgaged it and subsequently in November 1900 she sold the equity of redemption directing the vendee to pay off the mortgage. In November 1907 the widow adopted the plaintiff and died the next month. The vendee paid off the mortgage and obtained possession of the land in March 1908. The plaintiff sued to recover possession of the land in December 1919. The defence was that the suit was barred by limitation. [*Held*, that the plaintiff as adopted son of the widow was not bound to set aside the sale in favour of the defendant and Art. 91 of the Limitation Act had no application to the case. Prior to March 1908 the possession of the properties was with the mortgagee and the adverse possession of the vendee commenced only in March 1908 when he paid off the mortgage and took possession of the property. The plaintiff's suit for recovery of possession was within time under Art. 144 of the Limitation Act and he was entitled to recover possession of the lands on payment to the defendant of the amount which he had paid to discharge the mortgage. It was not necessary for the plaintiff to have to sue to set aside the alienation by the widow; he could like a reversioner sue to enforce his right within the period of limitation after the death of the widow. 19 Bom. 809; 35 Bom. 88 Foll. (*Shah, A. C. J. and Fawcett, J.*) *HANAM GOWDA v. IRGOWDA*. 26 Bom. L. R. 829; 48 Bom. 654; 1925 Bom. 9.

—Arts. 91 and 144—Malabar Law—Alienation by karnavan—Suit to set aside—Limitation.

A suit by the junior members of a Malabar tarwad to recover possession of immoveable property improperly alienated by the Karnavathi is governed by Art. 144, and not by Art. 91 of the Limitation Act. The fact that the Karnavathi purported to execute the document not only as Karnavathi, but also as guardian of the minor plaintiffs, will not make either Art. 91 or Art. 44 applicable to the suit. (*Phillips and Venkatasubba Rao, JJ.*) *KANNA PANIKKAR v. NANCHAN*. 19 L. W. 395; 1924 Mad. 607; 34 M. L. T. (H. C.) 89; 78 I. C. 564; 46 M. L. J. 340.

LIMITATION ACT (IX OF 1908), Art. 97.

—Art. 97—*Failure of consideration—Partial failure—Eviction from a portion of property purchased—Rights of purchaser.*

Where transferees of several items of properties for consideration are still in possession of some of the items of property conveyed, they cannot recover the whole of the consideration for the transfer. The fact that they are in possession of some portion of the property transferred to them by the defendant under the transfer goes to the root of their title to recover the purchase money on the ground of failure of the existing consideration. (*Syed Nair Hasan, J.*) KARIM BUX v. ABDUL WAHID KHAN. 11 O. L. J. 323.

1 O. W. N. 416; 10 O. & A. L. R. 976; 80 I. C. 81; 1924 Oudh 377.

—Art. 97—Registered lease—Dispossession prior to expiry of lease—Suit for damages—Limitation. See LIM. ACT, ART. 116. 78 I. C. 248.

—Arts. 97 and 116—Registered lease—Dispossession—Suit for damages—Limitation.

Where a lessee under registered lease is dispossessed before the expiry of his term, limitation for a suit for damages runs from the date of dispossession and is governed by art. 116 and not 97. (*Baker, J. C.*) SETH LAXMICHAND v. BAJIRAO. 1924 Nag. 220 (2).

—Art. 99—Mortgage—Money left with mortgagee for payment of prior mortgage—Default—Suit—Decree—Limitation for recovery of amount.

A mortgagee was directed to pay off a prior mortgage out of the consideration for his own mortgage. Default having been made in payment the prior mortgagee sued both the mortgagor and the subsequent mortgagee and obtained a joint decree. The mortgagor who had to pay up the decree sued for recovery of the amount from the subsequent mortgagee. The defendant raised a plea of limitation. *Held*, that Art. 99 of the Limitation Act applied to the case and time began to run from the date of discharge of the decree. (*Daniels and Neave, JJ.*) LAKHI v. MURAT TEWARI. 22 A. L. J. 737; L.R. 5 A. 534; 1924 A. 843.

—Art. 103—Suit for prompt dower—Limitation when commences.

In a suit for prompt dower by a Mahomedan lady, limitation runs only when demand having been made the same is refused (*Wazir Hassan, A. J. C.*) MT. ZOHRA BIBI v. GANESH PRASAD. 78 I. C. 106.

—Art. 106—Partnership—Dissolution—Death of partner—Suit for accounts.

Where by the death of a partner, partnership is dissolved, limitation for a suit for accounts runs under Art. 106 from the date of death. (*Baker, J. C.*) SETH RAMBHAN v. PRAYAGDAS. 20 N. L. R. 49; 78 I. C. 198; 7 N. L. J. 195; 1924 Nag. 263.

—Art. 106—Partnership—Dissolution of old partnership and formation of new one—Accounts of old partnership—Right to take on dissolution of new one—Condition—Limitation.

The plaintiff, the 2nd, 3rd and 4th defendants, and the 1st defendant's father had a partnership in bamboo trade from 1912 to 1913. 1st defendant's father died in that year. Nevertheless the

LIMITATION ACT (IX OF 1908), Art. 116.

same bamboo trade was carried on by the surviving members along with the 1st defendant, and apparently the father's share was treated as the 1st defendant's share in the new partnership which continued till 1917. In 1918 plaintiff instituted a suit for dissolution of partnership, for the taking of accounts and for recovery of the share of the profits, the accounts which the plaintiff wanted to be taken being not only of the trade from 1913 to 1917 but also of the trade in 1912—1913.

Held, that the claim to take accounts of 1912—1913 partnership was not barred by limitation.

No doubt, when a partner dies, the partnership comes to an end under the Contract Act. But nevertheless if the remaining partners continue the business, for the purposes of ascertaining what shares those remaining partners brought into the new partnership, an account may have to be taken of the old partnership and there will be no question of limitation at all in such a case as that, for, the account of the old partnership is taken not for the purpose of enforcing the claim to the money due as profits in that partnership but for the purpose of ascertaining what the capital supplied by the continuing partners was to the new partnership. (*Krishnan, J.*) ABDUL JAFFAR SAHIB v. VENUGOPAL CHETTIAR. 80 I. C. 378; 1924 Mad. 708; 46 M. L. J. 503.

—Art. 109—Auction-purchaser—under subsequent mortgage receiving rent—Suit by purchaser under a prior mortgage for rent—Starting point of limitation.

Where an auction-purchaser in execution of a mortgage decree purchased certain lands, and accepted some portion of the rent from the lessees, another purchaser of the same land, sold in execution of a prior mortgage, filed a suit for the recovery of rent paid wrongfully to the purchaser under the subsequent mortgage, and it was contended by the debt, that time must run from the date of payment of rent to the appellant.

Held, "The only article which appears to apply is Art. 109 i.e. "for the profits of immoveable property belonging to the plaintiff which has been wrongfully received by the defendant". Under this article, the period of limitation (3 years) begins to run, when the profits are received. The suit is barred by time. (*Neave, J.*) MD. ABBAS ALI KHAN v. GOKUL CHAND AND ANOTHER. L. R. 5 All. 688 Civil; 1925 A. 52.

—Arts. 113 and 10—Sale-deed—Covenant to give first—Refusal to purchase—If a right of pre-emption.

The vendee of a house covenanted to give the vendor and his heirs the first option to purchase the house at a certain price, if he were to sell the house at any time. In a suit to enforce this covenant, *held* it was not a suit to enforce a right of pre-emption, but one for specific performance falling under Art. 113 Lim. Act, (*Kincaid, J. C. and Kennedy, A. J. C.*) KHEMCHAND RAMDAS v. MOHSON SHAH. 80 I. C. 962.

—Art. 116—Breach of Covenant—Limitation. 1924 Cal. 148.

—Art. 116—Company—Suit for dividends—Auction-purchaser of shares—Refusal by Company to register the purchaser—Position of purchaser—Company if a trustee—Limitation.

LIMITATION ACT (IX OF 1908), Art. 118.

The purchaser at a court auction sale of some shares in a company belonging to a judgment debtor applied to the company to register his purchase, but it was refused. He then brought a suit for recovering dividends which had fallen due more than three but less than six years before the date of suit. *Held*, the suit was barred. He was not a shareholder and therefore would not take his stand on the registered contractual relation which is the foundation for any claim to call in aid of Art. 116 of the Limitation Act.

42 Mad. 33; 35 M. L. J. 256 distinguished; 5 Mad. 537; 42 M. L. J. 449 referred to

A Company does not hold the dividends as a trustee for the shareholders. (*Hallace, J.*)
ADDEPALLI VENKATA GURUNADHA RAMA SESHAYYA v. SRI TRIPURASUNDARI COTTON PRESS BEZWADA. 19 L. W. 623; 1924; Mad. 721; 79 I. C. 94; 46 M. L. J. 563.

—Arts. 118 and 144—Adoption—Hindu widow—Suit for possession by reversioner—Limitation—Starting point.

In suits for possession by a Hindu reversioner impeaching the validity of an adoption by the widow, the period of limitation is 12 years under Art. 144 and not under Art. 118 of the Limitation Act.

13 I. A. 84; 20 I. A. 30; 33 I. A. 156; 30 M. 309; 39 I. A. 19 referred to. (*Lord Phillimore*)
KALYANDAPPA BIN AYAPPA DESAI v. CHANBASAPPA BIN DODAPPA DESAI,

28 C. W. N. 666; 22 A. L. J. 508;
26 Bom. L. R. 509; L. R. 5 P. C. 97;
1924 P. C. 137; (1924) M. W. N. 414;
48 Bom. 411; 1 O. W. N. 553; 10 O. & A. L. R. 1114;
11 O. L. J. 181; 79 I. C. 971.
34 M. L. T. (P. C.) 111; 20 L. W. 109 (P. C.).
46 M. L. J. 598.

—Art. 118—Applicability—Suit by adopted son for possession.

Art. 118 has no application to a suit by an adopted son for possession of property, where the validity or factum of adoption is incidentally in issue. (*Kotval and Prideaux, A.J.Cs.*)
MT. ANNA PURNABAI v. RUPRAO. 1924 Nag. 319.

—Arts. 118 and 119—Applicability—Suit for possession—Defendant in possession under an adoption.

Arts. 118 and 119 apply only to a suit for declaratory relief pure and simple and not to a suit for possession even though the defendant is in possession under an adoption or the plaintiff's title is based upon an adoption. (*Hillifax, A. J. C.*)
MT. MUNNA v. SUKLAL. 1924 Nag. 142.

—Art. 118—Punjab Act (I of 1920), Art. 3—Registered adoption deed—Suit to declare adoption invalid—Within what time to be brought—Registration, if will amount to constructive notice.

A suit brought to declare that a person appointed heir by a registered adoption deed is not so entitled, is not barred even if brought after 6 years from the date of the registered adoption deed; because the deed of adoption is not in itself tantamount to notice of adoption. 48 Cal. Page 1 (P. C.) followed.

LIMITATION ACT (IX OF 1908), Art. 120.

The onus of proving knowledge is on those who plead limitation. (*Scott-Smith and Ffordes, J.J.*)
GULAM MAHOMED v. MIRZA.

5 Lah. 368; 1925 Lah. 25.

—Art. 120—Applicability. MT. KOKLA KUMAR v. KALIAN MAL. 76 I. C. 585.

—Arts. 120 and 125—Applicability of—Hindu female having limited interest in property—Minor—Certificated guardian—Sale by guardian without permission of Court—Suit by next reversioners to declare alienation void—Cause of action when arises—Limitation Act, Art. 120 applies and not Art. 125. See GUARDIAN AND WARDS ACT, Ss. 18 and 30. 51 C. 101.

—Art. 120—Applicability—Suit to set aside order of Government.

In 1903 the Government officials marked off the lands in suit and issued to the plaintiff a rough patta, showing the lands to which Government admitted his right to obtain a grant subject to certain conditions. Plaintiff preferred objections to the exclusion from the rough patta of the land in suit. His objections were definitely rejected in 1905. Thereupon plaintiff brought a suit to set aside that order and to obtain a declaration of his right in 1913.

Held that Art. 120 applied and the suit was barred. (*Mr. Ameer Ali*)
KADATH AMBUNAIR v. SECY. OF STATE. 26 Bom. L. R. 639; 20 L. W. 49;
35 M. L. T. (P. C.) 128; 1924 P. C. 150;
47 Mad. 572; 80 I. C. 835; 1924 M. W. N. 512;
47 M. L. J. 35.

—Art. 120—Attachment before judgment—Claim—Decree and execution sale—Claim petition—Rejection—Suit—Limitation, See LIM. ACT, ARTS. 11 and 120. 34 M. L. T. 193 (H. C.).

—Art. 120—Buddhist Law—Partition—Ownership of joint estate—Successive marriages—Limitation. MAUNG LU GALE v. MAUNG LU PO. 77 I. C. 53.

—Art. 120—Claim for mesne profits—Accrual after death of testator. MAUNG PO KIN v. MAUNG SHWE BVA. 1924 Rang. 155.

—Art. 120—Compromise decree—Minor—Leave of Court not obtained—Suit to set aside decree—Limitation—Art. 120 applicable. See C. P. CODE, O. 32, R. 7. 22 A. L. J. 521.

—Arts. 120 and 126—Sale by Hind father—Suit to set aside—Limitation. 77 I. C. 174.

—Arts. 120 and 144—Suit for declaration of title—Prayer in the alternative for possession—Limitation.

Plaintiff sued for a declaration of title to certain property of which he alleged he had been in continuous possession but as an alternative relief he also prayed for possession in case he be found to have been dispossessed. His title was proved. The defendant alleged that the plaintiff never obtained possession and did not set up a case of dispossession. The finding on this point was that the plaintiff's predecessors had actually entered into possession and had continued in uninterrupted possession and enjoyment ever since. *Held*, that in the absence of any allegation on the defendant's

LIMITATION ACT (IX OF 1908), Art. 120.

side that the plaintiff's predecessors had been dispossessed, it was fair to presume that the possession continued. (*Neave, A. C. J.*) SUBDHUN PANDE v. MAHESH PRASAD. 10 O. & A. L. R. 310; 81 I. C. 588 : 1925 Oudh 170.

—Art. 120—Suit by remote reversioner—Suit to set aside alienation by widow.

The only article of the Limitation Act applicable to a suit by a remote reversioner to set aside an alienation by a Hindu widow and for a declaration of its invalidity is 120 and the suit would be time-barred if brought after the expiry of six years from the date of the alienation. (*Neave, A. J. C.*) ANANDI DIN v. RAM SAHAI.

10 O. & A. L. R. 305 : 11 O. L. J. 236; 27 O. C. 173 : 1 O. W. N. 24 : 1924 Oudh 381.

—Art. 120—Trustee—Compromise by, and decree on footing of—Validity as against trust—Conditions—Hindu Law—Joint family—Father—Will bequeathing properties to charity—Son's suit to set aside will on ground that properties bequeathed were joint family properties taken by son—Validity—Suit by executor-trustee to set aside decree—Limitation—Applicability—Son brought in as trustee by compromise though testator expressly excluded him—Validity of compromise to that extent.

A Hindu bequeathed some properties by will in favour of a charity. The executors under the will applied for probate thereof, whereupon the sons of the deceased testator entered a caveat contending that the will was brought about by undue influence and was invalid. They (the sons) also filed a suit for a declaration that the properties were joint family properties and that the deceased had no right to dispose of them by will. Both the application for probate and the suit were compromised, a razinamah was entered into between the executors and the sons by which two of the items were left for charity and the other items were taken by the sons, and a decree was passed in terms of the razinamah. More than six years after the date of the said razinamah decree, the plaintiff, one of the executors, instituted a suit, *inter alia* for a declaration that the razinamah decree was void and of no effect and that all the properties belonged to the charity, and for recovery of the said properties from the sons. The plaint did not allege that the compromise was brought about by fraud and that the plaintiff discovered the fraud only shortly before suit. The plaint alleged that the compromise was brought about by collusion, but there was no proof of any collusion. It was found that the contention of the sons that the properties bequeathed were joint family properties was one fairly open to them and that it was *bona fide* believed in by the parties and their vakils.

Held, that the razinamah was a fair settlement of the dispute between the parties and was valid and binding on the charity; and that Art. 120 of the Limitation Act was applicable to the case, and the suit was barred. By his will the deceased appointed the executors trustees and expressly excluded one of the sons from management of the trust property. Under the razinamah, that son was allowed to come in. It was contended that the compromise was invalid at least to that extent, because the executors, who were trus-

LIMITATION ACT (IX OF 1908), Art. 126.

tees had no right to get behind the terms of the will which had excluded the son.

Held, that the compromise was not invalid on the ground alleged, because neither of the executors had relinquished his right in favour of the said son. Assuming that the testator's wish that a person should be excluded from trusteeship was binding upon the trust it does not take away the jurisdiction of the Court, in framing a scheme to appoint such men, as it thinks fit to be trustees. (*Devadoss, J.*) CHITTAMBALA MUDALIAR v. PAR-THASARATHI MUDALIAR. 1925 Mad. 194 : 20 L. W. 659; 47 M. L. J. 801.

—Art. 123—Co-beirs—Suit for share of inheritance, MAUNG PO KIN v. MAUNG SHWE BYA. 1924 Rang. 155.

—Art. 123—Suit by legatee against co-legatee—Applicability of article.

Where a co-legatee is in possession of the estate of the deceased, a suit by a legatee for his share of the estate will be governed by Art. 123, Lim. Act. (*Harrison and Zafar Ali, J.J.*) GURBAKSH SINGH v. BHAGWAN SINGH. 1924 Lah. 561.

—Art. 125—Adverse possession—Female heir—Purchase from—Suit for possession—Limitation. 76 I. C. 915 : 1922 O. C. 784.

—Art. 125—Execution sale—Hindu widow—Sham hypothecation and collusive sale—Suit to set aside.

A Hindu widow in possession of her husband's estate executed a sham hypothecation of the same. A suit was brought on the mortgage and a decree collusively obtained against the widow. In execution of the decree the properties were sold. Subsequently a reversioner sued for a declaration that the sale was invalid and not binding on the estate. *Held*, that the suit was not barred by limitation. The proceedings suffered by the widow amounted to an alienation of the estate. 33 A. 356, Rel. (*Spencer, O. C. J.*) POOCHAMMAL v. SUNDARAMMAL.

(1924) M. W. N. 322 : 19 L. W. 564; 80 I. C. 554 : 1924 Mad. 617 (2).

—Art. 126—Joint Hindu family—Alienation by father—Suit by son to set aside—Limitation.

Art. 126 of the Lim. Act is specially applicable to a suit by a Hindu son to set aside his father's alienation of ancestral property. The period within which such a suit must be brought is 12 years from the date on which the alienee takes possession of the property. The subsequent birth of the plaintiff does not give a fresh start to limitation. 64 I. C. 757 : 8 A. L. J. 733 : 14 A. L. J. 25, Ref. (*Mukherji, J.*) SANKET NARAYAN PANDE v. RAM BHAROS. L. R. 5 A. 423 : 79 I. C. 1010; 1924 A. 677.

—Art. 126—Suit under—Cause of action—Limitation—Starting point.

The cause of action under Article 126 of the Limitation Act only arises when possession of property is taken by the transferee. The fact which starts limitation running is the ouster of father and sons from the actual enjoyment of the property. (*Daniels, A. J. C.*) OUDH BEHARI LAL v. DAL SINGH. 10 O. L. J. 504;

79 I. C. 666 : 1924 Oudh 420.

LIMITATION ACT (IX OF 1908), Art. 127.

—Art. 127—Applicability. 77 I. C. 697: 1922 O. C. 785.

—Art. 127—Applicability—Joint family property—Suit for share.

Art. 127 presupposes the continuation of a joint family and of the joint family property till the date of suit and an exclusion from the enjoyment of such property of one party by the other. (*Kanhaiya Lal, J.*) BHAGWAN DAS v. SUKHDEO KOERI, 1924 A. 812.

—Art. 127—Applicability—Mahomedans—Joint family—What is.

Art. 127 does not apply to the undivided property of a family governed by Mahomedan Law and not proved to have accepted as a custom the Hindu law of joint family. The words "joint family" in Art. 127 qualify the word "property" and a joint family is a peculiar concept of the Hindu Law and does not apply to Mahomedans who hold their shares in severalty. (*Kincaid, J. C. and Raymond, A. J. C.*) MT. BHAGBHARI v. MT. KHATUN, 80 I. C. 118.

—Art. 130—Jagir—Suit for resumption—Limitation. 1924 P. 298.

—Art. 132—Lien for unpurchased money—Enforcement of—Limitation.

A suit to enforce the vendor's lien given by S. 55 of the Transfer of Property Act must be brought within 12 years of the date of sale when the purchase money is payable. The parties cannot extend the time given by the law for the enforcement of such charge by simply putting off the date of payment. (*Devadoss, J.*) AUTHINARAYANA AIYAR v. KRISHNASWAMI AIYAR, 20 L. W. 484: (1924) M. W. N. 755: 82 I. C. 481: 1924 Mad. 854.

—Art. 132—Loan—Promissory note and security bond—Remedy on pro-note barred—Suit on security bond.

A sum of money was borrowed on a pro-note and subsequently a security bond was executed by means of which immoveable property was hypothecated for the debt. A suit was brought to recover the money due on the pro-note by enforcing the security bond. *Held*, the suit would be governed by Art. 132, Lim. Act, and the fact that the pro-note was barred does not affect the question. (*Wazir Hasan, J. C.*) BEHARI LAL v. LALA BENI MADHO, 10 O. & A. L. R. 371: 1 O. W. N. 103: 79 I. C. 942: 1925 Oudh 92.

—Art. 132—Mortgage—Instalment payments—Default—Cause of action—Limitation.

Where a mortgage deed provided for payment by instalments and also that default in such payment should constitute a separate cause of action, a suit for the recovery of instalments in respect of which default has been made is governed by Art. 132, Lim. Act, and limitation runs from the date of default. If the mortgagee does not take advantage of the clause, it will not prevent limitation running, unless the payee waived the benefit of the provision for prompt payment in case of default. Mere forbearance to one is not enough to prove waiver. (*Moti Sagar and Martineau, JJ.*) NANAK CHAND v. MAHAMMAD KHAN, 1924 Lah. 702.

LIMITATION ACT (IX OF 1908), Art. 134.

—Art. 132—Sale of mortgaged properties in execution of mortgage decree—Surplus sale proceeds deposited in court—Wrongful withdrawal from Court—Suit to recover money so withdrawn.

A suit to recover surplus sale proceeds realised out of the sale of mortgaged properties in execution of a mortgage decree which are deposited in Court but are wrongfully withdrawn is a suit to enforce payment of money charged upon immoveable property and the period of limitation for such a suit is 12 years under Art. 132, Schedule II, Limitation Act. 41 C. 654: 41 I. A. 452: 21 I. C. 961 (P. C.) followed. MT. CHANDRA KUNWAR v. SHEO DAYAL, 1 O. W. N. 372: 11 O. L. J. 707.

—Art. 132—Suit for recovery of money charged on an oil-well—Limitation.

Where money is charged on an oil-well either by act of parties or by operation of law, the period of limitation applicable for a suit to enforce the charge is that prescribed by Art. 132 of the Limitation Act, 36 C. 193: 31 M. 439 Ref. (*Pratt, and Macgregor, JJ.*) MA LON v. MA NYO, 1 Rang. 714: 79 I. C. 766: 1924 R. 204.

—Arts. 132 and 148—Suit by puisne mortgagee—Prior mortgage—Decree on without impleading puisne mortgagee—Subsequent suit by puisne mortgagee—Limitation.

The right of a puisne mortgagee to redeem is only ancillary to his right to work out his remedy against the mortgaged estate. He is only permitted to redeem for the purpose of working out his own security. The right of the puisne mortgagee to redeem the prior mortgage in a case where he had not been joined in a suit on the first mortgage is the right to redeem the first mortgage with a view of enforcing his own mortgage. (1911) 1 M. W. N. 165: 24 M. 171: 26 M. 537 Ref. Consequently a suit for that purpose is governed by Art. 132 and not by Art. 148 of the Lim. Act. (*Madhavan Nair, J.*) LAKSHMANAN CHETTIAR v. SELLA MUTHU NAICKER, (1924) M. W. N. 508: 1925 Mad. 76: 47 M. L. J. 602.

—Art. 134—Applicability of.

Art. 134 applies to property purchased from the mortgagee and not to the right, title and interest of the mortgagor purchased through Court at the instance of a decree holder against the mortgagee. 11 C. 121, 131: 25 M. 99, 11 M. L. J. 323 (F. B.) 9 A. 97 Ref. (*Raymond and Madgowlkar A. J. C.*) MAHOMED MOOSA v. KAZI FATEHULLAH, 79 I. C. 466: 1925 Sind 167.

—Art. 134—Applicability of—Transferee from mortgagee—Limitation.

Only a transferee with a *bona fide* belief at the time of the conveyance can claim the protection of Article 134 and in other cases the suit to redeem against him is governed by Article 148. (*Shadi Lal, C. J. and Le Rossignol, J.*) WAZIR CHAND v. NATHU RAM, 6 L. L. J. 151: 80 I. C. 321: 1924 Lah. 468.

—Arts. 134 and 91.

Malabar Tarwad—Alienation by Karnavan—Suit by junior members to set aside—Limitation—Art. 144 applicable. See LIM. ACT, ARTS. 91 AND 144. 46 M. L. J. 340.

LIMITATION ACT (IX OF 1908), Art. 134.

— — — Art. 134 — *Mortgage of property by brothers—Sale of equity of redemption by one—Suit to dispute sale—Limitation.*

Where two brothers mortgage their property and one of them sells the equity of redemption to the mortgagee, a suit by the other to challenge the validity of the sale would be barred twelve years after he gets knowledge of the sale. Nor would absence of knowledge be presumed after a lapse of fifty years. (*Macleod, C. J. and Shah, J.*) KRISHNAJI SONJI v. SADANAND.

26 Bom. L. R. 341; 80 I. C. 763; 1924 Bom. 417.

— — — Arts. 134 and 148 — *Mortgage—Sub-mortgage—Suit for redemption—Limitation.*

A suit for redemption by the mortgagors of a sub-mortgagee as such is governed by Art 148 and not by Art. 134 of the Lim. Act. (*Duckworth and Godfrey, JJ.*) MA MYAT GYI v. MA MA NYAN.

2 Rang. 561; 1925 Rang. 140 (2).

— — — Art. 134 — *Transfers from mortgagees and trustees—Difference—Notice.* 1924 Oudh 44.

— — — Art. 135 — *Applicability—Suit against puisne mortgagee.*

Art. 135, Lim. Act is not limited to suits against the mortgagor, but applies to suits against a person deriving title from the mortgagor under a prior mortgage. (*Daniels, J. C.*) GOKUL PRASAD v. SUKRU. 10 O. & A. L. R. 129; 11 O. L. J. 269; 81 I. C. 581; 1924 Oudh 374.

— — — Arts. 137, 138 — *Auction—purchaser—Mortgage pending attachment—Suit for possession.*

Pending an attachment the owner mortgaged it to another. The purchaser in execution filed a suit for redemption and for possession more than 12 years after the sale. Held the mortgage though void, the suit was barred. (*Madhavan Nair, J.*) SRINIVASA AYYANGAR v. VELLAYAN AMBALAM. 47 M. L. J. 913.

— — — Art. 139 — *Ejectment — Tenant holding over—Limitation.*

• Art. 139 of the Limitation Act is inapplicable to a case where a tenant is holding over under S. 116 of the T.P. Act. It only applies where the tenancy has been determined. (*Mullick and Jwala Prasad, JJ.*) TEKAIT HARNARAYAN SINGH v. DARSAN DEO. 3 Pat. 403; 1924 P. 560

— — — Art. 139 — *Landlord and tenant—Life estate—Heirs of grantee in possession for over 12 years—Ejectment—Limitation.*

Where there was a grant of a lease for life in favour of two individuals and on the death of the survivor of them, his heirs were in uninterrupted possession of the leasehold property for over 12 years without paying rent, Held that a suit to eject them after that period was barred by limitation. 18 B 256 not foll. 24 B 504 Ref. (*Das and Ross, JJ.*) HARI GIR v. KUMAR KAMAKHYA. 3 Pat. 534; (1924) P. H. C. C. 158; 78 I. C. 511; 1924 P. 572.

— — — Arts. 140 and 141 — *Possessory title.*

A plaintiff who relies solely on his possessory title and cannot prove his title to succeed to the last holder of the estate cannot invoke the aid of Art. 140 or 141. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) HARIHAR PRASAD v. KESHEO PRASAD. 5 Pat. L. T. Supp. 1; 1925 Pat. 68.

LIMITATION ACT (IX OF 1908), Art. 142.

— — — Arts. 140 and 141 — *Scope of—Remainderman — Reversioner — Will appointing Hindu female as executrix and giving life estate—Cause of action accruing on death of her husband—Prob. and Adms. Act, Ss. 4, 88 and 90.*

A Hindu testator died in 1894 leaving a will appointing his widow as executrix and giving her a life estate in the properties and the remainder to any son that might be adopted by the widow. The widow died in 1907 and an adoption made by her was declared to be invalid. The plaintiff whose cause of action arose in 1896 during the life time of the widow brought a suit in 1919 for recovery of possession of the properties against the defendants who set up a claim to them, Held, that the widow as executrix fully represented the estate; that the cause of action began to run from 1896 that when the executrix was barred the beneficiaries like plaintiffs were also barred, the executor representing the testator and not the legatees, that limitation for recovery of the lands ran during the period of executorship as against the estate of the testator, and that the suit was barred in 1908.

The plaintiff was neither a reversioner nor a remainder man under Art. 140 of the Lim. Act as the widow was holding a life estate under the will and as the remainder had been given away to the adopted son.

The provisions in Ss. 4, 88, 90, 100 and 147 of the Prob. and Admn. Act controlled the provisions laid down in Art. 140 and 141 of the Lim. Act. (*Das and Ross, JJ.*) MAHARAJA BAHADUR KESHO PRASAD SINGH v. MADHO PRASAD.

5 Pat. L. T. 513; 3 Pat. 880; 1924 P. 721.

— — — Art. 141 — *Suit for possession—Daughter—Transfer inter vivos by widow—Effect of.*

Limitation for a suit for possession by a Hindu daughter for her father's estate after the death of the widow, is 12 years running from the death of her mother. Any dealings with the property by the widow or her transferee during her life time would not affect the daughter's title which comes into existence only on the death of the widow. (*Wazir Hasan and Neave, A. J. Cs.*) MT. RAJ DULARI v. MT. CHANDESHUR DEL. 78 I. C. 65; 1925 Oudh 164.

— — — Art. 141 — *Suit for recovery of possession after death of Hindu widow—Date of death of widow—Proof of—Entries in books of purohit—Admissibility of. See EVIDENCE ACT, S. 32 (2).*

46 M. L. J. 541.

— — — Arts. 142 and 144 — *Applicability of—Plea of adverse possession—Relevancy of—Tenancy alleged by plaintiff denied by deft—Limitation—Starting point.*

Plaintiffs sued to eject the defendants from a house-site alleging that the latter were holding as tenants of the plaintiffs' predecessor-in-title and that they had latterly denied the title of the plaintiffs and set up a title in themselves. Held, that Art. 142 of the Limitation Act applied to the suit and the plaintiffs must prove their possession within twelve years next preceding the institution of the suit and in such cases an enquiry into the question of adverse possession is irrelevant. 16

LIMITATION ACT (IX OF 1903), Art. 142.

C. 473; 17 C. 137, Ref. (*Wazir Hasan and Neave, A. J. Cs.*) GURSAHAI KANDU v. CHEDI.

10 O. & A. L. R. 67 : 11 O. L. J. 251 :
79 I. C. 964 : 1 O. W. N. 38 : 27 O. C. 130

-----Art. 142—Burden of proof.

77 I. C. 506.

-----Arts. 142 and 144—*Co-sharer—Suit for possession of share—Dispossession—Proof—Exclusive possession of defendant.*

Where in a suit for possession of a share in an occupancy holding it was found that the defendants had been in exclusive possession for over 31 years, and that the plaintiff's case of ouster 3 years before suit was not true. *Held*, that the plaintiff's suit was barred by limitation. It is an abuse of the doctrine of constructive possession to apply it to the circumstances of the present case. (*Daniels, J.*) BASU v. MT. NANHI. L. R. 5. A. 376 : 79 I. C. 951 : 1924 A. 920.

-----Art. 142—*Dispossession—Subsequent regaining of possession followed by dispossession—Limitation.*

Where the plaintiff, a rightful owner, is kept out of possession for less than 12 years and then succeeds in regaining possession and then after a time is dispossessed, he can base a suit for recovery of possession on the subsequent dispossession, for a wrongdoer has no constructive possession when he is not actually in possession and that of a true owner, however it is obtained, is rightful possession in law. (*Mukerjee, J.*) GIRISH CHANDRA PAL v. BAIKUNTHA NATH SINGHA. 81 I. C. 279 : 1925 Cal. 270.

-----Arts. 142 and 144—*Dispossession—Terminus a quo—Possession of mortgagee.*

Mere paper dispossession does not amount to dispossession and whether under Art. 142 or 144 the *terminus a quo* is the actual physical dispossession.

Where a mortgagee is not entitled to possession but in pursuance of a paramount title which he sets up he gets possession, his possession is adverse to the mortgagor. (*Shadi Lal, and Le Rossignol, JJ.*) MUNNA LAL v. HAMID ALI.

79 I. C. 39 : 1925 Lah. 53.

-----Art. 142—*Partition—Possession by co-sharer who is not allotted property—Title.*

Where after a partition, property which is allotted to one co-sharer is allowed to remain in the hands of another co-sharer for more than 12 years, a suit by the former for possession thereafter is barred. The fact that after completing a title by prescription he abandons the land, will not enure in favour of the other co-sharer. (*Broadway and Zafar Ali, JJ.*) DAULAT RAM v. NANAK CHAND. 76 I. C. 742.

-----Arts. 142 and 144—*Purchaser from trespasser entitled to take his possession to that of the trespasser.* (*Lentaigne, J.*) MA MI v. HADJI MAHOMED. 75 I. C. 31.

-----Arts. 142 and 144—*Re-formation after submersion—Suit for possession—Burden of proof—Adverse possession.*

In a suit by the owner for recovery of possession of lands diluviated and re-formed *in situ*,

LIMITATION ACT (IX OF 1908), Art. 144.

more than 10 years after the alleged re-formation, on the allegation that the plaintiff had been dispossessed therefrom after reformation *in situ*, the burden of proving possession within 12 years of suit is on the plaintiff. He might rely on his possession in the eye of law by showing that the land was under water and therefore incapable of actual occupation within 12 years of suit, Art. 142 and not Art. 144 of the Lim. Act was applicable to the case.

Page, J.—It was not incumbent on the plaintiff to prove that the lands were incapable of use so that his constructive possession continued on account of diluvion within 12 years of suit. Acts of possession after subsidence of the water are not required to prove possession by the true owner which is presumed. His cause of action accrues only when another person takes possession of land. 9 C. 744 ; 44 C. 858 ; 29 C. 518 ; 44 M. 883, Ref. (*Newbould, Ghose and Page, JJ.*) SURESH CHANDRA v. SHITI KANTA BANERJEE. 28 C. W. N. 637 : 78 I. C. 679 : 51 C. 669 : 1924 Cal. 855.

-----Art. 142 — *Suit on possessory title—Limitation.*

Where a person has been forcibly dispossessed of immoveable property by a person having no title he can sue for possession simply on the strength of the possession which he had before he was dispossessed provided he comes within the 12 years' period under Art. 142. (*Abdul Raoof, J.*) KARIM BAKHSH v. GAUHAH ALI. 75 I. C. 837 : 1925 Lah. 47.

-----Arts. 142 and 144—*Suit for possession—Cause of action—Relinquishment by tenant—Sale of grove land—Suit by Zemindar.*

Where a tenant of a grove land sold it to a third person and subsequently relinquished it to a Zemindar who brought a suit for possession against the purchaser basing his cause of action on the relinquishment. *Held*, that Art. 144 of the Lim. Act applied to the case and that the cause of action arose on the date of the relinquishment and not on the date of the sale. (*Wazir Hasan, A. J. C.*) MAHABIR PRASAD v. RAM KUMAR. 10 O. & A. L. R. 890 : L. R. 5 O. 177 (Rev.).

-----Arts. 142 and 144—*Suit for possession—Title derived by purchase—Burden of proof.*

In a suit for possession as upon dispossession or discontinuance of possession, the onus is no doubt on the plaintiff to show that he or his vendor was in possession at some time within 12 years prior to suit. 16 C. 473 ; 6 B. 343 ; 28 A. 479. But where the possession within such period is proved in fact or in law, the burden shifts to the contesting defendants to prove therein title, and they can only do this by establishing that the title relied on by the other side has become extinguished by adverse possession for over 12 years. (*Chandrasekhara Aiyar, C. J. and Plumer, J.*) RAMJEE RAO v. ANANDAPPA. 2 Mys.L.J. 92.

-----Art. 144—*Adverse possession against office-holder—Effect on title of successors.*

77 I. C. 568 : 1924 M. W. N. 53.

LIMITATION ACT (IX OF 1908), Art. 144.

—Art. 144—Auction purchaser—Judgment-debtor in possession for more than 12 years after confirmation of sale—Subsequent obtaining of sale certificate and formal delivery of possession—Effect. See LIM. ACT, S. 28. 11 O. L. J. 466.

—Art. 144—Co-heirs—Suit for possession of joint property. 77 I. C. 257 : 1922 O. C. 797.

—Art. 144—Cosharee—Acquisition of properties—Exclusive possession—Ouster.

The plaintiff and defendant were brothers and Mahomedans. They inherited some properties from their father which they kept in common. The plaintiff was a trader in Rangoon and both before his father's death and after, he made periodical visits to his native place and stayed with defendant. The defendant had made acquisitions from out of the income of the common property. In a suit for partition and recovery of his share of his father's properties and the subsequent acquisitions, more than 12 years after the father's death. Held, that the possession of the defendant was not adverse to the plaintiff to his knowledge and that the suit was not barred. (*Devadoss, J.*) DADA SAHIB v. AZI MOHIDEEN SAHIB. 20 L. W. 670 : 1925 Mad. 287.

—Art. 144—Co-sharer—Common way—Obstruction by one—Suit by the other—Limitation. 76 I. C. 328.

—Art. 144—Delivery of symbolical possession—Adverse possession—Onus. 77 I. C. 564.

—Art. 144—Hindu Law—Reversioner—Possession adverse to nearest reversioner—Effect on remote reversioner. 77 I. C. 222 : 1922 O. C. 798.

—Art. 144—Lease by trustee of endowed property—Suit by successor for recovery of property—Limitation. See LEASE, CONSTRUCTION. 47 M. L. J. 256

—Art. 144—Planting of trees on another person's land—Active trespass—Adverse possession. 46 A. 52.

—Arts. 144 and 139—Suit against tenant—Adverse possession.

Neither art. 139 nor 144 contemplates that a lessee or a tenant at will or sufferance should give up possession before limitation can run in their favour. In such a case where the original tenant sets up title by adverse possession, Art. 144 and not Art. 139 applies. (*Rupchand Bilaram, A. J. C.*) MAHOMED FARUG v. STOIK. 79 I. C. 59 : 1925 Sindh 36.

—Arts. 144 and 148—Suit by heirs of mortgagee—Possession—Stranger.

When a stranger has redeemed a mortgage, a suit by the heirs of the mortgagee falls under Art. 144 and not art. 148. (*Mukerji, J.*) BHAJ BHADUR v. PARAMESHRI RAM. 1924 All. 834.

—Arts. 144 and 118—Suit for possession—Hindu widow—Adoption by her—Suit by reversioner for possession after death of widow—Limitation—Art. 144 applies and not Art. 118. See LIM. ACT, Arts. 118 and 144. 46 M. L. J. 598 (P.C.).

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LIMITATION ACT (IX OF 1908), Art. 148.

—Art. 144—Suit for possession of waste land—Unlawful planting of trees by defendant—Limitation.

A suit for possession of waste land belonging to plaintiff, but in which defendant planted trees without the consent of the former within 12 years of suit is governed by Art. 144 of the Lim. Act and is within time. (*Banerjee and Piggott, JJ.*) MUHAMMAD SAAFI v. BINDESHKI SARAN SINGH. 1924 All. 443

—Art. 144—Suit under—Proof of title—Onus on defendant to prove adverse possession. 77 I. C. 564.

—Arts. 145, 48—Suit for recovery of jewels deposited applicability of Art. 145 and not Art. 48—For recovery of articles left in the house of the deceased son of the defendant—Limitation.

In a suit for recovery of certain jewels deposited for safe custody, and certain other articles alleged to be in possession of the defendant, and the trial court dismissed on the ground that the suit was barred, under art. 48, not having been filed within three years from the date of deposit. Held, on appeal that the suit is not barred.

That art. 145 must be applied to a case of deposit of jewels and that the legal representative who succeeds on the death of the bailee, or depository is bound by any contract to which the deceased was a party, and that as regards claim of articles, since it is made within 3 years, and time began to run only from the date of refusal by the defendants. (*Devadoss, J.*) KRISHNASWAMY AYYANGAR v. GOPALACHARIAR. 20 L. W. 758 : 1925 Mad. 185.

—Art. 144—Transferee from co-sharer—Suit for possession—Limitation.

A transferee from a co-sharer of his portion of the land must sue for possession within 12 years of the transfer, as the principle of a co-sharer's possession being normally on behalf of all will not apply in his favour. (*Moti Sagar, J.*) UDI v. MARU MAL. 1924 Lah. 682.

—Art. 145—Order of Court directing return of attached property—Supratdar becomes depository for objector.

When the Court orders a supratdar to deliver the property attached to the objector holding that it belonged to the objector, supratdar becomes depository for the objector on the date of the order and article 145 governs the suit by the objector. (*Halliday, A. J. C.*) LAXMICHAND v. DULICHAND. 1924 Nag. 12.

—Arts. 147 and 148—English mortgage—Suit for sale or foreclosure—Art. 147 applicable, See T. P. ACT, Ss. 58 AND 76 20 L. W. 153.

—Art. 148—Redemption—Suit against auction purchaser from mortgagee—Limitation.

A suit for redemption is not a suit for possession pure and simple and where the property is in the hands of an auction purchaser from the mortgagee the suit would still fall under Art. 148 and not art. 144. (*Rymond and Madgavkar, A. J. C.*) MAHOMED MOOSA v. KAZI FATEHULLAH. 79 I. C. 466 : 1925 Sindh 167.

LIMITATION ACT (IX OF 1908), Art. 152.

— — — Art. 152—*Appeal—Limitation—Failure of court to draw decree.*

The limitation for appealing from a decree runs from the date of the decree. If the court omits to draw a decree, the suit must be deemed still pending and limitation does not run. It is open to a party to apply for drawing up the decree and in case it is refused to get the order revised. (*Kinkhedo, A. J. C.*) *PANDU v. RAJESHWAR.*

20 N. L. R. 131 : 78 I. C. 996 : 1924 Nag. 271.

— — — Art. 164—*Applicability.*

Art. 164 is not necessarily restricted to applications to set aside a decree passed in a suit. It applies to applications made under O. 9, R. 13 read with S. 141 in proceedings other than suits, such as proceedings arising out of a petition to file an award. (*Bilaram, A. J. C.*) *MESSRS. FLEMING SHAW & CO. v. MANGALCHAND DWARKADAS.* 1924 Sind 56

— — — Art. 164—*Suit against firm—Ex parte decree—Setting aside—Application for—Limitation.* See C. P. CODE, O. 9, R. 13.

26 Bom. L. R. 388.

— — — Art. 164—*Time if can be extended—"When the summons was not duly served"—Meaning of—Notice of adjourned hearing.*

A Court has no discretion to enlarge the 30 days provided by Art. 164 to set aside an *ex parte* decree. Where there is due service of the summons for the first hearing of a suit the mere fact that a defendant has not received notice of an adjourned hearing will not cause limitation to run from the date on which defendant became aware of the decree. (*Moti Sagar, J.*) *SURJIT SINGH v. TORRIE.* 1924 Lah. 666.

— — — Art. 166—*Execution sale—Absence of attachment—Application to set aside the sale—LIMITATION.* *MA PWA v. MAHOMED TAMBI.*

1924 Rang. 124.

— — — Art. 166—*Execution sale—Setting aside—Fraud.*

Where an execution sale is sought to be set aside on the ground of fraud the application is governed by Art. 166 of the Lim. Act. (*Jackson, J.*) *ALLIAR ROWTHER v. NARAYANA KUDUMBAN.* 20 L. W. 242 : 81 I. C. 844 (1) : 1924 Mad. 817.

— — — Arts. 166 and 181—*Execution sale—Setting aside—Limitation.*

Where a sale in execution is void as against a party, an application to set it aside under S. 47 of the C. P. Code is governed by art. 181 of the Lim. Act and not by art. 166. (*Schwabe, C. J. and Wallace, J.*) *RAJAGOPALA Aiyar v. RAMANUJA CHARIAR.* 47 Mad. 288 :

19 L. W. 179 : (1924) M. W. N. 182 :

80 I. C. 92 : 1924 Mad. 431 . 34 M.L.T. (H.C.) 37 : 46 M. L. J. 104.

— — — Art. 166—*Sale a nullity—Application to set aside.* See B. T. ACT, S. 49.

28 C. W. N. 556.

— — — Art. 166—*Scope of.*

Art. 166 is wide and general and includes within its scope all applications to have execution sale set aside. (*Pearson and Graham, J.J.*) *HARIPADA HALDAR v. BARADAPROSAD ROY CHOWDHURY.*

51 Cal. 1014 : 82 I. C. 322 : 1925 Cal. 351.

LIMITATION ACT (IX OF 1908), Art. 181.

— — — Art. 177—*Amending Act 26 of 1920, S. 2—Death of defendant or respondent—Time for bringing on record the legal representatives.*

1924 Lah. 65.

— — — Art. 177—*Death of defendant—Period for impleading legal representative—If cut down by Act XXVI of 1920.*

Art. 177 which relates to the case of a defendant has been left entirely untouched by Act XXVI 1920 and the period for bringing on record his legal representative is still six months. (*Moti Sagar, J.*) *ARJAN DAS v. NANAK CHAND.*

78 I. C. 771 : 1925 Lah. 98.

— — — Art. 177—*Limitation under—Amending Act. 26 of 1920.*

77 I. C. 474

— — — Art. 177—*Period of limitation for bringing on record legal representative—Amending Act of 1920.*

The Amending Act 26 of 1920 did not touch Art. 177 of the Lim. Act and therefore after the amending Act was passed, the period in the column, according to law, opposite to Art. 177 was still six months. (*Walsh, A. C. J. and Ryves, J.*) *ALICE GEORGINA SKINNER v. KUNWAR MUKARRAM ALI KHAN.* L. R. 5 A. 607 :

1925 A. 77.

— — — Art. 180—*Auction purchaser—Application for possession.*

An application for possession of property by a decree holder auction-purchaser made more than 3 years after the confirmation of the sale is barred. (*Pullan, A. J. C.*) *MAHOMED HASSAIN v. THE NATIONAL BANK OF UPPER INDIA.*

79 I. C. 691 : 1925 Oudh 106.

— — — Art. 181—*Applicability or Application for continuation of proceeding—Limitation.*

There is no provision of law which requires a decree holder to apply to the Court to continue a pending execution proceeding and consequently such an application is not governed by art. 181 of the Lim. Act. Art. 181 of the Lim. Act applies only where the application is required to be made by the C. P. Code. 27 A. 334; 37 A. 518; 31 M. 71, 42 A. 564 Rel. (*Dalal, J. C. and Wazer Hasan, A. J. C.*) *IQBAL NARAIN v. MR. JAG RANI.*

10 O. & A. L. R. 1285 : 1 O. W. N. 847.

— — — Arts. 181 and 182—*Applicability of—Application for restitution—Limitation.*

Held by the majority (*Ross, J. dissenting*) that Art. 181 and not Art. 182 of the Limitation Act applies to an application for restitution under S. 144, C. P. Code. 28 C. 113; 11 C. L. J. 541; 24 C. L. J. 467; 1 Pat. L. J. 232; 43 B. 235 followed

Per Ross, J. :—An application for restitution is really an application for execution and there is no reason why Art. 182 of the Lim. Act should not be applied to the case. 20 M. 448; 19 A. L. J. 549; 40 M. 780; 33 M. L. J. 413; 41 B. 625; 45 B. 1137; 37 A. 567 Referred to. (*Das, Ross and Kulwant Sahay, J.J.*) *BALMAKUND MARWARI v. BASANTA KUMARI DAS.* 3 Pat. 371 :

5 Pat. L. T. 145 : 78 I. C. 200 : 1924 P. H. C. C. 33; 1925 P. 1.

— — — Art. 181—*Applicability—Mortgagor—Right to redeem—Application not necessary.*

LIMITATION ACT (IX OF 1908), Art. 181.

Art. 181, applies only where an application is required by law to be made. A mortgagor is not required by any rule of procedure to make an application and obtain an order thereon before he can pay the amount fixed for redemption. (*Wazir Hasan, A. J. C.*) MAHOMED BAQAR KHAN v. JAGAT NARAIN LAL. 1 O. W. N. 500 : 80 I. C. 706 : 10 O. & A. L. R. 1149.

—Art. 181—*Applicability—Setting aside of fraudulent transfer*

Art. 181 does not apply to proceedings to set aside a fraudulent transfer under S. 53 Prov. Ins. Act. (*Moti Sagar, J.*) DARYAI SINGH v. KUNJ LAL. 1924 Lah. 553.

—Arts. 181 and 182—Attachment before Judgment—Decree—Claim petition allowed suit to set aside—Application to execute—Limitation.

MANYAM SURAYYA v. S. VENKATARATNAM. 47 Mad. 176 : 79 I. C. 779 : 19 L. W. 20.

—Art. 181—Decree of Privy Council—Addition of legal representatives of deceased parties—Limitation—Interest.

Where pending an appeal to the Privy Council, some of the parties died and their legal representatives were not brought on record, the decree of the Privy Council is nevertheless binding on the estate of the deceased. An application to add the representatives as parties to the decree is governed by art. 181 of the Limitation Act and the starting point is the date of the decree. (*Phillips and Odgers, J.J.*) KALYANI PILLAI v. THIRUVENGADASWAMI AYENGAR. 20 L. W. 99 : (1924) M. W. N. 439 : 1924 Mad. 695 : 35 M. L. T. (H. C.) 50 : 47 Mad. 618 : 47 M. L. J. 154.

—Art. 181—Dismissal of prior application for default—Continuation of—Properties different—Effect

A subsequent application for execution can be regarded as a continuation of a former one only when the former application has been dismissed without any fault or laches on the part of the decree-holder in the process of execution. It is also necessary that the properties against which relief is sought should be the same in both the applications. (*Das and Ross, J.J.*) MT. RESHMA KUARI v. RAMESHWAR OJHA. 79 I. C. 897 : 1925 P. 197.

—Art. 181—Insolvency—Alienation—Application by Official Receiver to set aside—Limitation.

Art. 181 does not apply to an application by an Official Receiver to set aside an alienation by the insolvent. (*Oldfield and Devadoss, J.J.*) PITTA RAMASWAMAH v. SUBRAMANIA AIYAR. 79 I. C. 443.

—Arts. 181 and 182—Mesne profits—Application for ascertainment of—Limitation.

An application for ascertainment of mesne profits is an application in a pending suit and not an application in execution. Consequently limitation for the application is that prescribed by art. 181 and not by art. 182 of the Lim. Act. (*Jwala Prasad, A. J. C. and Kulwant Sahay, J.*) HARAKHPAN MISSIR v. JAGDEO MISSIR. 1924 P. H. C. C. 265 : 5 Pat. L. T. 626 : 3 Pat. L. R. 32 : 1924 P. 781.

LIMITATION ACT (IX OF 1908), Art. 181.

—Art. 181—Mortgage decree—Appeal from preliminary decree—Application for final decree. 1924 A. 99.

—Art. 181—Mortgage—Preliminary decree—Final decree—Application by mortgagee—Limitation.

An application by the mortgagee in a suit for sale for a final decree is governed by art. 181 of the Lim. Act and the period of limitation runs from the expiry of the time fixed by the preliminary decree. The period of limitation cannot be extended by reason of the pendency of proceedings as regards the title of the mortgagor. 7 L. W. 438; 16 L. W. 198; 40 A. 235 followed. It is not competent to the Court to add a new ground for extension of the limitation prescribed for an application or to invent any ground of equity for suspending the running of limitation 46 C. 694 (P. C.) Ref. (*Devadoss and Jackson, J.J.*) AMMA-THAYEE AMMAL v. SIVARAMA PILLAI. 20 L. W. 987 : 48 M. L. J. 74.

—Art. 181—Restitution by party who was exonerated from decree but whose property was nevertheless sold—Application for—Limitation—S. 18 of the Limitation Act—Case under—Allegations necessary for raising.

Where, though a party was exonerated from the decree, his property was nevertheless sold. Held, he was entitled to restitution and his application therefor was governed by Art. 181 of the Limitation Act the starting point being the date of the sale.

The application for restitution was made after the expiration of the three years allowed for the purpose but the applicant alleged in his petition that the decree holder fraudulently proceeded against applicant's share also without serving notice on him, and that as notice was thus fraudulently suppressed the applicant only came to know of the sale in 1921 when the application was made. Held that those allegations raised a case under S. 18 of the Limitation Act, that there was a continuing fraud up to the date of the application and that it was therefore not barred. (*Jackson, J.*) KALLEPALLI PALLAYYA v. BHIMARAJU. 20 L. W. 606 : 1924 Mad. 859 : 1924 M. W. N. 759 : 35 M. L. T. (H. C.) 96 : 47 M. L. J. 535.

—Art. 181—Application for final decree—Mortgage suit—Preliminary decree affirmed on appeal—Limitation.

Where the preliminary decree passed in a mortgage suit is affirmed on appeal, the former decree merges in the decree on appeal and limitation for the passing of a final decree runs from the date of the appellate decree. 39 A. 641, 36 A. 350 Ref. (*Broadway and Campbell, J.J.*) FITZ-HOLMES v. BANK OF UPPER INDIA, LTD. 5 Lah. 257 : 81 I. C. 649 : 1924 Lah. 582.

—Art. 182—Application in accordance with law—Partial execution—No objection taken—Application to execute remainder.

Where without any objection being taken by the judgment-debtor, an execution application was put in and carried into effect regarding a portion of the decree only, it is an application in accordance with law and a subsequent applica-

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tion to execute the other portion of the decree can be maintained. (*Macleod, C. J. and Crump, J.*) BABAGOWDA MALGOWDA PATIL v. TANIBAI BHRATAR. 1924 Bom. 112.

—Art. 182—Application to review pending execution—Limitation—Starting point—Joint decree—Application to execute against some Judgment-debtors—Saving of limitation against others.

Execution proceedings are not closed by the Court by merely recording them, and the decree-holder's right to apply for their continuance accrues from day to day and will not be barred until three years have elapsed after the proceedings have ceased to be pending. 31 M. 71 : 36 M. 553 relied on.

Where a decree has been passed jointly against defendants 9 and 10 for recovery of possession and against defendants 1 to 8 for recovery of certain sums of money and against the 9th defendant severally in respect of certain sums of money, an application for execution against the 9th defendant alone keeps the decree alive as against the 10th defendant under Explanation 1 to Art. 182 of the Limitation Act. 30 M. 268 followed. (*Jackson, J.*) PUTTAYYA v. PUTTANNAYYA.

20 L.W. 585: 1925 Mad. 152: 35 M.L.T. 107 (H.C.): 47 M. L. J. 608.

—Art. 182—Award—Decree of Court—Execution.

An award under the Arbitration Act when filed in court becomes enforceable as a decree of court under S. 15 of the Act and an application in execution is governed by art. 182, Lim. Act. (*Harrison, J.*) POKHAR DAS v. RADHA KISHEN. 1924 Lah. 544.

—Art. 182—Condition in the decree not complied with—Darkhast for execution if in accordance with law.

The plaintiff got a decree under which he was to produce in the Court within 18th March, 1916 for payment to defendant No. 1 Rs. 1,000. He took out a Darkhast No. 115 of 1919 but it was struck off as the 1000 rupees were not paid into Court.

Held that it cannot be said that that Darkhast was not in accordance with law merely because the party did not comply with the conditions of the decree. (*Macleod, C. J. and Crump, J.*) MAHOMED SHIDICK v. MAHOMED HASSAN. 1924 Bom. 64.

—Art. 182—Darkhast not in accordance with law—Point not taken in previous Darkhast cannot be taken in a subsequent one.

A judgment-debtor, who did not appeal against a previous order for execution of a portion of the decree and who did not dispute the validity of such order, cannot in the matter of a subsequent application for execution of the remaining portion of the decree contend that the first application was not "in accordance with law." 15 B 242 Foll. (*Macleod, C.J.*) BABA GOWDA v. TANIBAI. 1924 Bom. 112.

—Art. 182 Discharged insolvent—Application against—If step-in-aid.

1924 Bom. 180,

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—Art. 182—Execution—Application for revival of—Fresh application—Execution proceedings postponed till determination of another proceeding.

Pending a suit for mesne profits by the judgment-debtor the decreeholder applied for execution of his decree and by consent of parties the execution case was consigned to the record room pending the determination of the suit for mesne profits though it was not so stated in the order. After the suit was determined the decreeholder applied for execution and the judgment-debtor pleaded the bar of limitation. Held that the omission of words to the effect that the execution case was consigned to the record room only till the disposal of the suit was accidental and that the application in question was substantially one to revive a pending execution. (*Kendall, A. J. C.*) MIR ZAMIN ALI v. SHAFI ULLAH. 10 O. & A. L. R. 973.

—Art. 182—Execution of decree—Limitation—Step-in-aid of execution—Batta for process—Payment of—Memo not applying for issue of process—Effect.

The payment of process fees for issue of a warrant of arrest in execution of a decree, where the batta memo. itself does not apply for the issue of process is not a step in aid of execution so as to save limitation. (*Wallace, J.*) ARUNACHALAM CHETTIAR v. LUTCHUMANAN CHETTIAR. 20 L. W. 713 : 35 M. L. T. (H. C.) 97 : 1924 Mad. 906: 82 I. C. 497 : 1924 M. W. N. 840 : 47 M. L. J. 537.

—Art. 182—Execution of decree—Revival of limitation—Judgment Debtor found to have no saleable interest.

A decree holder obtained a decree on 20-6-1914 against two persons. On 15-5-1916 an execution sale of the property of one of the debtors was held at which the decree holder himself was the purchaser and this sale was confirmed on 15-6-1916. On that day final satisfaction of the decree was entered up and the execution case was struck off. The decree holder purchaser alleged that he took possession of the property which he had bought and that, after some considerable time, he was fined for criminal trespass on 21-11-1917. The decree holder applied for sale of other properties of the judgment debtor in 1920 alleging that under the previous execution sale he had purchased nothing to which the judgment debtor had a lawful title. Held that the application for execution could not be considered as one for the revival of the previous execution and that the application was barred by time. (*Rankin and B. B. Ghose, JJ.*) BALODEV SARMA KHAUND v. SONTI BORDOTI. 40 C. L. J. 246.

—Art. 182—Execution—Partition decree—Decree not drawn up owing to delay in furnishing stamp papers—Time for execution.

1924 Cal. 351.

—Art. 182—Incorrectness or superfluity of reliefs asked for in prior application—If a step in aid.

Where a prior execution application is dismissed on the ground the reliefs claimed are

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superfluous or incorrect is still an application in accordance with law and saves limitation. (*Mullick and Bucknill, JJ.*) *BISHORI MAL v. JAGDISH NARAYAN SINGH.* 3 Pat. 42 : 75 I. C. 312. 1924 P. 471.

—Art. 182—Mortgage decree and money decree—Combination of—Execution of money decree—Limitation.

In a suit on a mortgage, a decree for sale of properties was given and also a money decree against A. First the properties were sold and within 3 years from the date of the last execution application but more than 3 years from the date of the decree, execution was sought against A. Held there was only one decree and what was sought to be executed was not a "several decree" and it was not barred. (*Bucknill and Foster, JJ.*) *BISHUN CHAND v. ABHOYKOMAR CHAND.* 5 Pat. L. T. 276 : 76 I. C. 452 : 1924 P. 700.

—Art. 182—Prior application—Execution allowed to proceed—Default of judgment-debtor—If can raise question again. 2 Pat. L. R. 163 : 1924 P. 122.

—Art. 182—Redemption decree—Money to be paid in 6 months—No provision as to default executable.

A redemption decree directed possession to be given on payment of a certain sum within 6 months, but did not provide as to what should follow in case of default of payment. Held it could be enforced at any time within 3 years as provided by Art. 182. (*Moti Sagar, J.*) *MAHABIR PERSHAD v. KARTAR SINGH.* 1924 Lah. 635 :

—Art. 182—Step-in-aid—Instalment decree—Application to make decree final may be a step-in-aid.

A decree was payable by yearly instalments the first of which was payable on the 31st March, 1914. On failure to pay any one instalment in time the decree allowed sale of the mortgage property or a sufficient portion thereof to recover the amount of the instalment overdue. The creditors sought to make the decree final on default instead of applying for sale. On the 30th October 1919 the creditors applied to make the decree final as regards the instalment due on 31st March 1917. The application was rejected.

Held that an application to make a decree final may in one case be considered a step-in-aid although it may in other cases be not so and that the application of 30th October 1919 was a step-in-aid which started a new period of limitation running. 1922 Bom. 118 Ref. (*Macleod, C. J. and Crump, J.*) *BINDU GOVIND v. HANMANTA GOVIND.* 1924 Bom. 71.

—Art. 182—Step-in-aid—Order for attachment. 1924 Mad. 186.

—Art. 182—Step-in-aid—Suspension of execution proceedings. 77 I. C. 871.

—Art. 182—Trusteeship—Right to manage—Term of 2 years—Execution application within 3 years of one of the terms—If barred.

Under the terms of a decree the right to manage a trust was to go by rotation to two parties, in turns of two years each. One of them having

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been kept out for a number of years, put in an execution application more than 3 years from the date of a prior application but within 3 years of his right to a turn Held as the right is of a recurring nature, the application is within time. (*Phillips and Odgers, JJ.*) *KOTHANDARAMASAMI NAIDU v. PAPPAMMAL.* 79 I. C. 891 : 1925 Mad. 218.

—Art. 182—"Where there has been an appeal—Meaning of—Appeal incompetent—Effect.

The expression where there has been an appeal "must be construed in its plain sense." Where though an appeal is incompetent in law, an appeal was *bona fide* presented, it satisfies the terms of Art. 182. (*Kennedy, J. C. and Madgavkar, A. J. C.*) *DONALD GRAHAM & CO. v. KEWALRAM.* 79 I. C. 477.

—Art. 182 (1)—Execution of decree by legal representative—Limitation—Starting point—Date of appellate decree.

A decree holder died pending an appeal against the decree and a wrong legal representative was brought on record in the appeal instead of his widow, the right legal representative. The appeal was decided on a compromise. Subsequently the widow applied to execute the decree. Held that time began to run when the appeal was decided i.e. from the date of the appellate decree. (*Chatterjee and Panton, JJ.*) *KRISHNA LAL BURMAN v. SATYABALA DEBI.* 51 Cal. 342 : 81 I. C. 569 : 1924 Cal. 686.

—Art. 182 (2)—Decree—Execution—Starting point—Appeal as regards portion of the claim or some of the parties—Effect of, C. P. Code O. 41, R. 33.

O. 41, R. 33, C. P. Code enables the appellate Court to deal with the entire decree although the appeal may be as to a part of the decree, and also to give direction in favour of parties who have not actually filed any appeal or objection. Art 182 (2) of the Limitation Act applies where there has been an appeal from a part or whole of the decree or only when some of the parties to the suit have brought the appeal. It does not in any way qualify the final decree. A decree is not barred even with respect to the portion against which no appeal had been preferred until the appeal against the other portion of the decree is finally determined. 26 M. 91, 47 C. 813, 25 C. 594, 33 I. C. 833 Rel. on. (*Jwala Prasad and Kulwant Sahay, JJ.*) *SOMAR SINGH v. MT. PREMDEI KUER.* 3 Pat. 327 : 1924 P. H. C. G. 105 : 5 Pat. L. T. 21. 79 I. C. 794 : 1925 P. 40.

—Art. 182 (4)—Decree barred—Amendment—Effect of. 1924 Lah. 329.

—Art. 182 (5)—Affidavit of incumbrances—If a step-in-aid.

In the absence of an application to proceed with the sale, the mere filing of an affidavit by the decree holder stating that there were no incumbrances over the property does not amount to a step-in-aid of execution. (*Ryves and Mukherji, JJ.*) *CHIRAUNJI LAL v. GANGA SAHAI.*

22 A. L. J. 410 : L. R. 5 A. 318 : 10 O. & A. L. R. 549 : 78 I. C. 631 : 1924 All. 811.

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—Art. 182 (5)—*Application to sanction and record adjustment of decree—If a step-in-aid.*

An application for sanctioning and recording an adjustment made by all the decree holders and the judgment debtor is a step-in-aid of execution. (*Baker, J. C. and Hallifax, A. J. C.*) *MT. PERABAI v. BHAVANI PRASHAD* 1924 Nag. 185.

—Art. 182 (5)—*Execution of decree—Decree transferred to another Court—Part satisfaction—Omission to send certificate of partial execution—Civil Pro. Code (Act V of 1908), S. 41—Payment certified to the Court which passed the decree—Jurisdiction—Time if saved.*

According to law and sound practice jurisdiction of the Court to which execution is sent should cease only when that Court sends a certificate to that Court which passed the decree under S. 41 of the Code of Civil Procedure. Therefore where in a Court to which the decree was sent for execution the parties came to an arrangement by which a certain sum was paid in cash and the balance was agreed to be paid by instalments and the Court did not send a certificate of part execution and the payment was certified to the Court which passed the decree *Held*, that the application to certify payment being made to a Court which had no jurisdiction, it did not save limitation under Art. 182 (5) of the Limitation Act. (*Dalal, J. C.*) *MAHOMED SHAKIR v. JUGAL KISHORE.* 10 W. N. 794.

—Art. 182 (5)—*Limitation—Starting point—Date of prior application—Application struck off—Effect.*

Time runs from the date of the presentation of the last execution application and not from the date of its disposal by the executing Court. 10 C. L. J. 479; 13 C. L. J. 26, Ref. Where without any default on the part of the decree-holder or his transferees an application for execution is struck off, a subsequent execution proceeding should be held to be a continuation of the previous execution proceedings. (*Adami and Bucknill, JJ.*) *BHAGWANTA KOER v. ZAMIR AHMED KHAN.* 1924 P. H. C. C. 221; 2 Pat. L. R. 249.

—Art. 182 (5)—*Payment towards decree—Step in aid of execution.*

A payment towards a decree amount out of Court does not by itself operate as a step in aid of execution, but an application to certify payment may give a fresh starting point of limitation under Art. 182 (5) of the Limitation Act. (*Jackson J.*) *NARAYANA NAIR v. KUNHI RAMAN NAIR.*

20 L. W. 190; (1924) M. W. N. 674; 82 I. C. 743; 1925 Mad. 131.

—Art. 182 (5)—*Step-in aid—Commencement of limitation—Striking off for no default—Effect.*

Limitation under Art. 182 (5) runs from the date applying to take some step-in-aid of execution and not from the date of the order passed thereon.

Where an execution proceeding is struck off without any default on the part of the decree-holder, a subsequent application is only in continuation of the previous one and no question

LIMITATION ACT (IX OF 1908), Art. 182.

of limitation arises. (*Adami and Bucknill, JJ.*) *MT. BHAGWANTA KOER v. ZAMIR AHMED KHAN.* 5 Pat. L. T. 451; 78 I. C. 766.

3 Pat. 96; 1924 P. 211; 2 Pat. L. R. 249; 1924 Pat. 576.

—Art. 182 (5)—*Step-in-aid of execution—Application by transferee of decree to recognise transfer and execute the decree—Saving of limitation.*

An application by a transferee decree-holder for a recognition of his transfer and to execute the decree is a step-in-aid of execution and saves limitation. 12 M. L. J. 348 foll. (*Phillips and Odgers, JJ.*) *KALEPALLI RAJITAGIRIPATHY v. KALEPALLI BHAVANI SANKARAN.*

47 Mad. 641; 80 I. C. 103; 1924 Mad. 673; 19 L. W. 650; (1924) M. W. N. 527; 47 M. L. J. 4.

—Art. 182 (5)—*Step-in-aid of execution—Application in accordance with law—Application for joint execution against all judgment-debtors when decree allows separate execution against defendants.*

Even though a decree provides for execution against the co-defendants separately according to a list attached therewith, an application for joint execution against all the judgment-debtors with a prayer that the decretal amount in the case should be added to the decretal amount in a previous case in which the judgment-debtor's property had been put up for sale, is an application in accordance with law and would save limitation. The words "in accordance with law" should not be pressed too far in favour of a defaulting judgment-debtor. 12 A. 64; 24 C. 778; 37 B. 42 Ref. (*Pullan, A. J. C.*) *RUDRA PRATAB SINGH v. SHEO PRASAD UPADHIYA.*

10 O. & A. L. R. 413; 79 I. C. 880; 11 O. L. J. 604; 1925 Oudh 77.

—Art. 182 cl. (5)—*Step-in-aid—Transfer of decree—Application to court from which decree has been transferred—Not a step-in-aid.*

1924 P. H. C. C. 362.

—Art. 182 (5)—*Step-in-aid—Transfer of decree for execution—Satisfaction of decree—Application to certify payment made to court which passed the decree—Not a Step-in-aid. See C. P. CODE, S. 41.*

10 O & A. L. R. 1277.

—Art. 182 (5)—*Transfer of decree for execution—Application to first court—If a step-in-aid.*

Where after a decree is transferred to another court for execution an application for further execution is made to the court which passed the decree while the transfer was in force, it is not a step-in-aid of execution as it is not made to the proper court. (*Campbell, J.*) *THE FIRM SHERU MAL CHINA MAL v. THE FIRM HIRA LAL ANANT RAM.* 78 I. C. 241.

—Art. 182 (6)—*Scope of—Applied for—Meaning of.*

Art. 182 (6) has to be read with clause 5 and the words "applied for" mean as provided in sub-clause 5. (*Campbell, J.*) *THE FIRM SHERU MAL CHINA MAL v. THE FIRM HIRA LAL ANANT RAM.* 78 I. C. 241.

LIMITATION ACT (IX OF 1908), Art. 183.

—Art. 183—*Execution of decree—Limitation—Payment by Court—Effect of—Saving of limitation.*

Properties belonging to the judgment-debtor were sold and the proceeds brought into Court. The Court ordered payment thereof to the decree-holder but the money was actually paid only some time later. *Held* that the payment by Court operated to give a fresh starting point of limitation for execution of the decree under Art. 183 of the Limitation Act. (*Kumaraswami Sastri, J.*) *SABAPATHY CHETTY v. SHANMUGAPPA CHETTY.*

19 L. W. 582 : 1924 Mad. 638 : 78 I. C. 832 : 46 M. L. J. 453.

—Art. 183—*Mortgage decree—Several mortgagees—No community of interest—Revivor in favour of one—If enures to the other.*

When for the sake of convenience several mortgagees are ranged as plaintiffs and a decree is passed, but there is no community of interest among them, an order which operates as revivor in favour of one of them does not enure to the benefit of the others.

To see if an order operates as revivor, the decree should be capable of execution and the decree holder entitled to enforce it. (*Richardson and Page, JJ.*) *NARAIN DAS DATT v. BANKU BEHARY CHATTOPADHYA.*

78 I. C. 1001 : 1925 Cal 213.

—Art. 183—*Mortgage suit—Preliminary decree passed by the Privy Council—Final decree—Limitation—C. P. Code, O. 45, R. 15—Provisions mandatory.*

Where the preliminary decree in a mortgagee suit was an order of His Majesty in Council, the preparation of the final decree was a purely ministerial act to enable the order of his Majesty in Council to be enforced. Under Art. 183 of the Lim. Act, twelve years limitation would begin to run from the date of the order of his Majesty in Council. The provisions of O. 45, R. 15, C. P. Code are mandatory and failure to comply with them renders an application for execution liable to dismissal. 20 C. W. N. 1051 Ref. (*Adamy and Bucknill, JJ.*) *BHAGWANTA KOER v. ZAMIR AHMAD KHAN.*

1924 P. H. C. C. 221 : 2 Pat. L. R. 249 : 5 Pat. L. T. 451 : 78 I. C. 766 : 3 Pat. 596 : 1924 P. 576

—Art. 183—*Revivor—Notice issued under O. 21, R. 16, C. P. Code.*

The issue of a notice under O. 21, R. 16, C. P. Code does not operate as a revivor under art. 183 of the Lim. Act. (*Newbould and Ghose, JJ.*) *KHAJEH SALAUDDIN v. AFZAL BEGUM.*

39 C. L. J. 590 : 28 C. W. N. 963 : 1925 Cal. 23.

LIQUIDATION—Voluntary, removal of liquidation—Power of Court—Due cause. 49 B. 471.

LOWER BURMA LAND AND REVENUE ACT (II OF 1876), S. 56—*Only claims against Government are cognizable by Revenue Courts—Claims between rival proprietors or cultivators are cognizable by Civil Court.*

The claims and disputes referred to in the Lower Burma Land and Revenue Act, (II of

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1876), over which the Civil Courts have no jurisdiction but which are under the sole jurisdiction of the Revenue Courts, relate only to claims against Government and not to disputes between rival proprietors or cultivators. (*Dawson Miller, C. J. Mullick and Foster, JJ.*) *HARIHAR PRASAD v. KESHEO PRASAD.*

1925 Pat. 68 : 5 Pat. L. T. Supp. 1.

—R. 107, G.—*Brickmaking—Digging clay without license—Owner of land—Supply of labour—Liability for.*

The accused contracted to dig clay and supply labour to another person for the purpose of making bricks without a license. Bricks were actually made without a license. *Held* that the owner of the field who engaged the contractors was liable but that the accused were not guilty under R. 107 G of the Lower Burma Land and Rev. Act. (*Heald, J.*) *KABUDIN v. EMPEROR.*

3 Bur. L. J. 145.

LUNACY ACT (IV OF 1912), Ss. 38, 41 and 62—*Lunacy—Duty of Judge holding inquisition.*

To have an inquisition into the state of health, the state of mind, the state of property and the general capacity of a person is a thing which affects that person so prejudicially that it ought not to be taken except it be first ordered on a careful consideration of evidence. It is the duty of the judge before ordering an inquisition with respect to an alleged lunatic to personally examine the alleged lunatic if so required, with a view to determine whether there is any need for holding an inquisition. (*Rankin and Page, JJ.*) *MAHOMED MANAWAR SULTAN v. SHAMSUNESSA BEGAM.*

28 C. W. N. 513 : 51 Cal. 480 : 80 I. C. 798 : 1924 Cal. 658.

MADRAS (ADMINISTRATION OF ESTATES) REGULATION (III of 1802), S. 16, Cl. 7—*Scope of—Duty of Court—More than one claimant to the estate of the deceased—Jurisdiction to decide on rival claims.*

Madras Regulation III of 1802 dealt with rules of Civil Procedure which were in force till a more elaborate system was devised and enacted in the form of the Code of Civil Procedure and Civil Courts Act. All the Sections have now been repealed except S. 16, cls. 2 to 7. Scope of the clauses considered. When a person dies intestate leaving personal property, the duty of a Judge under S. 16 of the Regulation, if more than one claimant appears before him is to refer the parties to a regular suit. He has no jurisdiction to give any decision acting under this Regulation, when more than one claimant appears and claims property under S. 16, cl. 7. (*Venkatasubba Rao and Jackson, JJ.*) *MARUTHAVANASWAMI v. SUBRAMANIA THAMBIRAN.*

1925 Mad. 240 : (1925) M.W.N. 166 : 47 M. L. J. 770.

MADRAS CITY MUN. ACT (IV of 1919), S. 110—R. 7, Sch. IV of the taxation rules under the Act—*Incorporated companies transacting business in the City of Madras with paid-up capital in currency other than the currency of British India—Liability of such companies to be taxed under S. 110 and the taxation rules—Principles of construction of taxing statutes.*

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Incorporated companies which transact business in the city of Madras and whose paid-up capital is in a currency other than that of British India are liable to be taxed under S. 110 of the Madras City Municipal Act of 1919 and R. 7, Sch. IV of the taxation rules under the Act.

The principles of construction of taxing statutes enunciated. (*Schwabe, C. J., Coutts Trotter and Ramesam, JJ.*) **BEST & CO. LTD. v. CORPORATION OF MADRAS.** 47 Mad. 262 : 1924 Mad. 420 : 19 L. W. 142 : 34 M. L. T. (H. C.) 65 : 79 I. C. 928 : (1924) M. W. N. 249 : 46 M. L. J. 217.

—S. 110 and Sch. IV, R. 7 Proviso—"Gross income received in or from the City" of Madras—Meaning of.

The expression "gross income received in or from the city" in the proviso to Rule 7 of Sch. IV of the Madras City Municipal Act does not include income arising out of business transacted outside Madras, the proceeds whereof are transmitted to and received by the agents of the incorporated company in Madras. *Smidth & Co. v. Greenwood* (1921) 3 K B. 583 : *Board of Revenue v. Madras Export Co.* (1923) 46 M. 360 : 44 M. L. J. 290 : *Board of Revenue v. Ripon Press* (1923) 44 M. L. J. 523 : *Municipal Council of Cocanada v. The Clan Line Steamers, Ltd.* (1918) 1 L. R. 42 M. 455 : Referred to. "Gross income" means the difference between the price at which the goods are sold and the cost price of the goods at Madras without making allowance for commission, cost of establishment and other charges. (*Spencer, O. C. J. and Devadoss, J.*) **BEST & CO. LTD. v. THE CORPORATION OF MADRAS.**

1924 Mad. 754 : 20 L. W. 347 : 46 M. L. J. 505.

MADRAS CITY POLICE ACT (III of 1889), S. 6—Keeping a common gaming-house—Conviction for—Essentials of offence.

A common gaming-house is one in which a large number of persons are invited habitually to congregate for the purpose of gaming. It does not make any difference that the use of the house and the gaming therein are limited to the subscribers and members of the club and that it is not open to all persons who might be desirous of using the same. 1 Weir 917 Ref. (*Venkatasubba Rao, J.*) **CHINNIAH, In re.**

47 Mad. 426 : 1924 Mad. 729 : (1924) M. W. N. 237 : 34 M. L. T. (H. C.) 195 : 77 I. C. 303 : 25 Cr. L. J. 367 : 19 L. W. 219 : 46 M. L. J. 309.

MADRAS CITY TENANTS PROTECTION ACT (III OF 1922), S. 9—Applicability—Ejectment decree—Appeal—Pendency of—Application for purchasing landlord's interest—Rights of parties.

The lessee from the trustees of a temple in the City of Madras obtained a decree in ejectment against his tenants in the City Civil Court. The tenants appealed to the High Court and stay of execution was ordered. During the pendency of the appeals the Madras City Tenants' Protection Act (III of 1922) came into force and the tenants applied to the High Court within 15 days thereof for orders directing the landlord to sell the land to them. Held S. 9 of the Act is intended to

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apply to cases in which suits are pending and where suits have resulted in decrees but such decrees have not been executed. The decision in A. A. O. No. 182 of 1922 (46 Mad. 836 : 44 M. L. J. 271) dissented from.

As an appeal is really a continuation of the proceedings in the suit and a stage in the same, the application was properly made to the High Court ; if there had been no appeal pending, the application under S. 9 lay to the City Civil Court, because it was the intention of the Act that, after the decree but before execution, at any time an application could be made to the Court having control of the suit.

Scope of S. 10 and the mode of valuation under S. 9 considered. (*Schwabe, C. J. and Wallace, J.*) **KANNIAPPA CHETTIAR v. RAMACHANDRA IYER.**

19 L. W. 587 : 1924 Mad. 731 : (1924) M. W. N. 386 : 79 I. C. 92 : 46 M. L. J. 407.

S. 9—Applicability—Tenant against whom decree in ejectment had been obtained but who had not been actually ejected in execution at date of Act—Right to apply for sale of.

S. 9 of Madras Act III of 1922 applies to a case where the suit in ejectment has resulted in judgment but not been executed or completed by the process of ejectment. The tenant intended by the section is a person who is threatened with ejectment as the result of legal proceedings instituted against him but has not in pursuance of those proceedings been actually ejected. It is immaterial whether or not the proceedings resulted in a decree which might lead, but has not led, to an actual ejectment of the tenant. (*Coutts Trotter, C. J. Ramesam and Wallace, JJ.*) **SYED OMER SAHIB v. GOPAL.**

20 L. W. 444 : 35 M. L. T. (H. C.) 40 : (1924) M. W. N. 687 : 1925 Mad. 12 : 82 I. C. 454 : 47 Mad. 813 : 47 M. L. J. 350.

S. 9—Tenant in possession of temple land—Right to compel trustee to sell the land.

S. 9 of the Madras City Tenants Protection Act applies to landlords who hold their land as trustees of a religious institution and a tenant in occupation of such land can enforce a compulsory sale of the land and require the trustees to deliver the land to him at a valuation to be made by the Court. (*Coutts Trotter, C. J. Ramesam and Wallace, JJ.*) **DORAIVELU MUDALIYAR v. NATESA GRAMANI.**

20 L. W. 165 : 1925 Mad. 7 : 35 M. L. T. (H. C.) 1 : 82 I. C. 445 : 47 Mad. 761 : 47 M. L. J. 211

MADRAS CIVIL RULES OF PRACTICE—Rr. 131—133—Delay in payment—Excuse.

1924 Mad. 324.

MADRAS CRIM. RULES OF PRACTICE, s. 161—Vakalat not necessary, (Wallace, J.) MANIKONDA LIGAYYA v. EMPEROR.

25 Cr. L. J. 73 : 75 I. C. 985 : 1924 Mad. 192.

MADRAS DISTRICT MUN. ACT (V OF 1920)—Election—Validity—Ballot paper—Initials of polling officer placed on face of—Effect—Serial number printed on face of ballot paper—Effect—Election Rules, 14 (1), 17 (1)—Rule requiring marking of—Serial number on back of ballot paper—Validity.

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The placing by the polling officer of his initial on the face of the ballot papers does not *per se* contravene Rs. 14 (1) of the Election Rules framed under Madras Act V of 1920, and does not itself invalidate the votes. The placing of such initials does not in any way facilitate the identification of the particular voter and consequently, the provisions of R. 17 (1) are not infringed thereby.

The serial number printed on the ballot paper is not a mark by which the voter may be identified within the meaning of R. 17 (1); and the fact that the serial number appearing in the counterfoil of the ballot papers was printed not only on the back of the ballot paper itself but also upon its face does not invalidate the election.

It must be only from the mark itself that the means of identification must be obtained.

The rule providing for the making of the serial number on the back of the ballot paper is not *ultra vires* of the Government. (*Phillips and Odgers, JJ.*) VISWANATHA PILLAI v. PERIASWAMI PILLAI 34 M. L. T. (H.C.) 207 : 1924 Mad. 766. 19 L. W. 636 : (1924) M. W. N. 631 : 80 I. C. 573. 46 M. L. J. 491.

—Ss. 3 (21) 180—*Building buttress wall—If an encroachment—Offence—Limitation for prosecution.*

Building a buttress wall to a compound wall projecting into a municipal street is an offence punishable under S. 180 Dt. Mun. Act and a prosecution therefor should be launched within 3 months of the encroachment. (*Krishnan, J.*) VILLURI JAGANNATHAN NAIDU v. RAMA RAO.

20 L. W. 834 : 47 M. L. J. 917.

—S. 9 (1), R. 17 (1)—*Ballot papers given to voters with serial number and voters' own number on electoral roll inserted on back—Validity of election—Effect on—Election declared void—Effect—New election—Retiring Councillor if deemed to have been re-elected.*

At a Municipal election, the polling officer when giving out the ballot papers to the voters, put not only the serial number on the back of them but also the voters' own number on the electoral roll, with the result that any one seeing this number on a voting paper could, by a reference to the electoral roll which was available to every body, identify the particular voter. As a matter of fact, the numbers were not particularly noticed at the time of election in question, and the voters were not identified thereby.

Held, that the votes were invalid under R. 17 (1) of the Election Rules framed under Madras Act V of 1920, and that, as all the votes cast at the election were invalid no proper election had been held and that the candidate returned had not been properly elected.

Held further, that the effect of the election being declared void was that a fresh election should be held and not that the retiring council or should be deemed to have been re-elected.

Rule 17 (1) of the Election Rules does not require that the identification shall be made but merely that there is a possibility of such identification by reason of the mark.

S. 9 (1) of the Madras Act V of 1920 is not meant to apply to cases where an election had

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been held and is subsequently declared void. (*Phillips and Odgers, JJ.*) SETHURAMA MUDALIAR v. MANGALA GOUNDAR.

34 M. L. T. (H.C.) 204 : 19 L. W. 632 : 1924 Mad 764 : 80 I. C. 401 : 46 M. L. J. 494.

—S. 48—*Rules under R. 8 c)—Election dispute—Revision authority—Admission of claim by—Validity of—If can be questioned in election dispute—"Preparation" in R. 8 (e)—Meaning.*

The petitioner obtained 37 votes and the respondent 14 votes at a poll for filling up the vacancy of councillor in a Municipality. The respondent filed an election petition contending *inter alia* that the petitioner's name had been wrongly entered in the electoral roll and that therefore he was disqualified under s. 48 (1) of Madras Act V of 1920. The court below found that, although the petitioner's name had not been clearly entered in the preliminary roll the matter had been taken before the revising authority and his claim for registration had been admitted. The order admitting the claim was, however, signed by the Chairman and by only one of the unofficial gentleman nominated by the Collector. The Court below therefore held that the revision was *ultra vires* and unseated the petitioner as being an unqualified candidate.

Held, reversing the Court below, that the validity and conclusiveness of the register could not under R. 8 (e) of the Rules for the Preparation of Electoral Rolls be questioned in the election proceedings, and that the petitioner must be held to have been duly elected. In R. 8 (e) the word "preparation" is used in general sense and includes the action of the revising authority. (*Wallace and Jackson, JJ.*) PALANISAMI PILLAI v. SRINIVASARANGACHARIAR

1925 Mad. 160 : 20 L. W. 851 : 47 M. L. J. 795.

—Ss. 54 (b) (ii) and 59 (c)—*Offence under—Deposit—Object of—No costs or Compensation ordered—Deposit to be returned.*

It is not an offence under S. 54 (b) (ii) of the Madras Dt. Municipalities Act to say of a candidate for municipal election, "He failed in getting elected in his own place and has come here expecting to be elected". The deposit required under S. 59 (c) is presumably intended as security for costs incurred by the accused and compensation, if any, payable. Where a Court in dismissing a complaint has not directed payment of costs or compensation the intention of the legislature must be taken to be the amount should be refunded to the complainant. (*Venkatasubba Rao, J.*) SIVAPATHA MUDALIAR v. ABDUL RAZAK

(1924) M. W. N. 490 : 1924 Mad 815 :

81 I. C. 599 : 25 Cr. L. J. 951 :

47 M. L. J. 199.

—S. 55 (1)—*Abetment of election offences—Offence under S. 171-A, I. P. C.—Penal Code, Ss. 40, 109 and 171-A—Sanction—Necessity for.*

Petitioner charged respondents with abetment of an offence under S. 55 (1) of the Madras Act V of 1920, the substance of the charge being that they abetted a case of double voting by a voter at a Municipal election. The Sub divisional Magistrate held that since S. 171-A of the Indian Penal Code specifically provided for such an abetment, that

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S. 109 of that Code could not be called in aid; and that such abetment was chargeable and punishable only under S. 171-A and not under S. 55 (1) of the Madras Act V of 1920, read with S. 40, I. P. C. and that since petitioner had not obtained the authority of Government, requisite under S. 196, Cr. P. Code for a prosecution under S. 171-A, I. P. C. his charge could not stand. *Held* in revision, that the complaint in so far as it alleged only an offence under S. 55 (1) of Madras Act V of 1920 read with S. 109, I. P. C. was sustainable even though the facts alleged constituted an offence under S. 171-A I. P. C. (*Odgers and Wallace, JJ.*) *SESHA AIYAR v. VENKATASUBBA CHETTY.*

33 M. L. T. 263 (H. C.): (1924) M. W. N. 268 :
77 I. C. 730 : 25 Cr. L. J. 442 :
19 L. W. 201 : 1924 Mad. 487.

—S. 182—*Power of Municipal Council under—Wall not built upon public street—Removal of—Order for—Validity—Land encroached upon once a street, but accused in possession thereof for over the statutory period—Removal of encroachment in such a case—Order for—Validity—Distinction—Accused's right in such a case—Law under Act IV of 1884 and under Act V of 1920—Distinction.*

The Chairman of a Municipal Council cannot under S. 182 of the District Municipalities Act V of 1920 call upon the owner or occupier of any premises to remove a wall not built upon any part of a public street and on his failing to do so get him convicted under S. 313 of the Act. The law is not that the Municipal Council can do this and that the relief to which the accused would be entitled is compensation mentioned in S. 182. Where the wall constitutes an encroachment, but it is proved that the accused has been in possession of that part of the street which was encroached upon for over the statutory period, the municipality will be justified in calling upon him to remove it, and he is bound to obey the order. Only in such a case he will be entitled to a reasonable compensation from the Municipal Council. Under the Act V of 1920 if it is proved that the portion on which the encroachment exists was once a street the right of Municipality follows as a necessary result 38 M. 456 a decision on S. 168 of the Repealed Act IV of 1884 is no authority on cases falling to be decided under the new Act. *Semle* 38 M. 456 is not reconcilable with 38 M. 6. (*Venkata Subba Rao, J.*) *PUBLIC PROSECUTOR v. VARADA RAJULU NAIDU.*

20 L. W. 573 : 1925 Mad. 64 : 47 Mad. 716 :
(1924) M. W. N. 880 : 81 I. C. 894 :
25 Cr. L. J. 1070 :
47 M. L. J. 470.

—S. 221—*Money due under a contract to municipality—Suit—Recovery by summary process in Magistrate's Court—Legality of.*

It has long been recognised law that money due to a municipality under a contract cannot be summarily recovered by a municipality under the provisions of S. 269 of the old Municipal Act. Act XIV of 1920 has not effected any alteration in this respect. 26 M. 475 Ref. (*Ramesam and Jackson, JJ.*) *MAHABAB ALLI KHAN v. THE PRESIDENT TALUK BOARD, KURNOOL.*

(1924) M. W. N. 545 : 1924 Mad. 898 (2).

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—S. 303—*Rules framed under R. 6—Enquiry into election dispute—Power of Court to issue interim injunction—Discretion—C. P. Code. S. 94 and O. 39, R. 2—Applicability of.*

A District Judge inquiring into a petition contesting the validity of an election to a Municipal Council under Madras Act V of 1920, has no power, statutory or inherent, to restrain the successful candidate by interim injunction from taking his seat in the Council pending the enquiry. R. 6 of the rules framed by the Local Government for the decision of election disputes has not the effect of making the provisions of S. 94, and O. 39, R. 2, C. P. Code. applicable to election inquiries. (*Jackson, J.*) *VENKATASUBBA CHETTIAR v. SESA IYER.*

20 L. W. 148 : (1924) M. W. N. 538 :
1924 Mad. 797 : 80 I. C. 664 : 47 Mad. 700 :
47 M. L. J. 201.

—Rules. 1 and 7 (1)—*Candidate deemed to be duly elected under R. 7 (1)—Validity of election of—Dispute as to—Decision of—District or Sub-Judge—Jurisdiction—R. 1—Scope of.*

Under the rules framed by Government for the decision of disputes as to the validity of an election held under the Madras District Municipalities Act, 1920, the District or Subordinate Judge has no jurisdiction to decide a dispute when the number of candidates being less than the number of vacancies a candidate has been deemed to be duly elected under R. 7 (1) of the Rules for the conduct of elections.

R. 1 must be limited in its scope to cases where a poll has been held. (*Jackson, J.*) *SRINIVASACHARIAR v. B. S. VENKATARAMA AIYAR*
47 M. L. J. 762.

MADRAS ESTATES LAND ACT (I OF 1908), S. 3.—*Melvaram and Kudivaram interests in land granted to one person—The lands if form an "estate".*

Where it was found that the melvaram and the kudivaram interests in the lands of the village of Mangal were at some time before 1723 granted by a Raja of Tanjore, and regranted in 1723 by the then Raja of Tanjore, to the Temple,

Held that the lands in suit are not an "estate" within the meaning of Act I of 1908. (*Sir John Edge.*) *NAINA PILLAI MARACAYAR v. RAMANATHAN CHETTIAR.*

47 Mad. 337 :
22 A. L. J. 130 : 34 M. L. T. (P.C.) 10 :
(1924) M. W. N. 293 : 1924 P. C. 65 :
L. R. 5 P. C. 33 : 10 O & A L. R. 464 :
28 C. W. N. 809 : 82 I. C. 226 : 51 I. A. 83 :
19 L. W. 259 : 46 M. L. J. 546 (P.C.).

—S. 3 (2) (d)—*Estate—Minor inam—Mokhasa grant—Pre-settlement inam—Jurisdiction—Civil or Revenue Court.*

A minor inamdar in a Mokhasa is a landholder 45 M. 716 Rel. The land in dispute was part of the *Nuzvid* Zemindari and the village in which the land was situate was granted as Mokhasa in 1747. The mokhasa was not excluded from the Zemindari at the time of the Permanent Settlement and that was treated as part of the Zemindari *Held* that it was an estate within the meaning of S. 3 (2) (d) of the Estates Land Act and the Civil Court had no jurisdiction to entertain a

MADRAS ESTATES LAND ACT, S. 3.

suit for ejectment by the inamdar. (*Spencer and Kumaraswami Sastri, JJ.*) SANAGVARAPU J WALA LAKSHMI NARASIMHAM v. VEERABHADRADU. (1924) M. W. N. 244 : 19 L. W. 671. 1924 Mad. 589.

— S. 3. Cl. 2 (d) — Inam — Grant of both melvaram and kudivaram — Tenant holding from grantee — Rights of — Claim of occupancy right.

Where it was found that at the time of the grant of an inam both the melvaram and the kudivaram were granted and subsequently the land was let by the grantee to tenants who claimed permanent rights of occupancy in the land *held*, that the land not being an estate within the meaning of S. 3, Cl. 2 (d) of the Madras Estates Land Act, the tenants were not entitled to an occupancy right under the Act and they had not succeeded in proving that they were entitled to occupancy rights apart from the Act. Neither the payment of uniform rent nor the construction of wells and the transfer of the holdings would amount to proof of their occupancy rights. (*Jackson, J.*) PANDIKALVA CHENGA REDDI v. VENKATA LAKSHMI NARASAYYA.

35 M. L. T. 56 : 20 L. W. 549 : (1924) M. W. N. 761.

— S. 3 (2) (a) — Inamdar — Suit in ejectment — Claim of permanent occupancy.

There is no presumption that an Inam grant is a grant of the land revenue only and each case must be decided with reference to the circumstances connected with it. When the origin of the tenancy is not known, evidence of the acts and conduct of the parties constitutes the best and the only evidence to prove the nature of the tenancy. Where it is found that for three generations the defendant's family have been occupying the land without any alteration in terms and at a uniform rent it may be held that the tenant has proved his claim of permanent tenancy. (*Venkatasubba Rao, J.*) CHIDAMBARA GURUKKAL v. SIVAGNANA SUNDARAM PILLAY.

(1924) M. W. N. 487 : 1924 Mad. 833 : 79 I. C. 619 : 47 M. L. J. 598.

— S. 3 (2) (e) — Pre-settlement inam — Estates — Test of.

A pre-settlement inam will not form part of a Zemindari unless it falls under any of the clauses of S. 3 (2). It is necessary to see if at the time of the Permanent Settlement the pre-settlement inam was treated as part of the assets and the income taken into account for the purpose of the grant of the Sanad. The question has to be decided with reference to the terms of the Sanad and Ss. 3 and 4 of Regulation XXV of 1802.

Where a *mokhasa* granted as inam was not excluded from the *zemindari* at the time of the Permanent Settlement and was treated as part of the Zemindari, it falls under the definition of "estate".

When at the time of the P. S. lands which the Govt. might have excluded from assessment under S. 4 of the Regulation of 1902 were actually included in fixing *peishchush* and where Government and the Zemindar acted on the footing that the inam forms part of the Zemindari, the tenants

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cannot question the acts. (*Spencer and Kumaraswami Sastri, JJ.*) MULPURI VEERABHADRADU v. MEDAPUDI SUBBARINA. 78 I. C. 287.

— S. 3 (5) — Darmila inam lands — Suit for possession by inamdars against tenants — Jurisdiction — Civil or revenue courts — Inamdars alleging to be originally kudivaramdars only — Subsequent grant of melvaram — Effect

The plaintiffs who were *darmila* inamdars brought a suit in a civil court for recovery of possession on the strength of oral lease given to the defendant. They alleged that they owned the kudivaram interest to start with and that it was only subsequently that they obtained by grant the melvaram interest from the Zamindar. On the question arising whether the suit was cognizable by the civil or revenue courts, *held*, if the plaintiffs proved that they originally owned the kudivaram and were subsequently granted melvaram they would not be land holders within the meaning of S. 3 (5) of the Estates Land Act and could maintain the suit in the Civil Court. 45 M. 716 : M. L. J. 229 (F. B.) dist. 39 M. L. J. 225 (F. B.) followed. (*Krishnan and Odgers, JJ.*) GANIAM MANIKYAMBA v. PASALA MALLAYYA.

20 L. W. 387 : 1924 Mad. 782 : 35 M. L. T. (H. C.) 70 : 1924 M. W. N. 779 : 82 I. C. 929 : 47 Mad. 942 : 47 M. L. J. 393.

— S. 3 (5) — Mokhasa — Minor inamdar — If a landholder.

A minor inamdar in a *mokhasa* is a landholder within the meaning of S. 3 (5). (*Spencer and Kumaraswami Sastri, JJ.*) MULPURI VEERABHADRADU v. MEDAPUDI SUBBARINA.

78 I. C. 287.

— Ss. 5 and 125 — Sale of a ryot's holding for arrears of rent — Effect on prior incumbrance — Mortgage created after the Act in renewal of a prior mortgage before the Act — Decree on mortgage — Rights of purchaser at execution sale.

A ryot's holding had been mortgaged by him in 1897 and for a portion of the amount due under that mortgage he executed a fresh mortgage of the holding in 1909 after the Madras Estates Land Act came into force. In execution of a decree for sale on the latter mortgage the plaintiffs purchased the holding. In the meanwhile the landlord had brought the holding to sale in execution of a decree for arrears of rent and the holding was purchased by the defendants. On a question arising as to the rights of the two rival purchasers, *held* that the plaintiffs' purchase prevailed.

A mortgagee by taking a further security for his money that is charged upon land cannot be taken to have intended to give up his right under the earlier deed. The plaintiffs in the present case could rely on the rights under the earlier mortgage as against the defendants whose rights must, under S. 125 of the Madras Estates Land Act, be treated as subject to those rights. 23 A. 313 Rel. on. (*Krishnan, J.*) SREEKANTA SUNDARAMIAH v. VENKATASUBBIAH.

(1924) M. W. N. 320 : 1924 Mad. 619 (2) : 34 M. L. T. (H. C.) 107 : 19 L. W. 537 : 46 M. L. J. 380.

— S. 6 — Kamalam lands — Permanent occupancy rights — Waram tenants.

MADRAS ESTATES LAND ACT, S. 8.

S. 6 of the Estates Land Act does not confer permanent occupancy rights in lands which are Kamatam.

Tenants paying waram cannot convert themselves into permanent occupancy ryots by merely asserting that they hold the land under such a right. (*Krishnan, J.*) **PALANI NAYAKKAN v. PARVATI AMMAL.**

82 I. C. 597 : 1925 Mad. 291.

— Ss 8 (4) 153, 157 and 189—*Landholder purchasing kuzivaram interest in holding—Ejection of non-occupancy ryot under time-expired lease for one year—Jurisdiction of Civil Court—Benamidar—Right to sue in ejectment.*

Held by the full bench; S. 153 of the Madras Estates Land Act is only exhaustive of the grounds on which a suit to eject a non-occupancy ryot can be filed before the Collector. The section does not prohibit the ejectment of a non-occupancy ryot on grounds other than those specified therein and a suit for ejectment based on such grounds can be maintained in the civil court. Observation of Spencer, J. in 26 M. L. J. 285 approved. (*Coutts Trotter, C. J., Ramesam and Wallace, JJ.*) **GOVINDA NAIDU v. CHENGALROYA MUDALI.**

35 M. L. T. (H. C.) 29 : 1925 Mad. 22 :

47 Mad. 896. (1924) M. W. N. 733 :

47 M. L. J. 415.

— Ss. 24 and 187—*Enhanced rent—Claim or—Contract between landholder and ryot.*

S. 24 of the Madras Estates Land Act precludes the landholder from claiming enhanced rent under contracts entered into with the tenant whether before or after the passing of the Act. (*Devadoss, J.*) **SREEWEDHANDHI SWAMIGAL v. VALAI IBRAHIM.**

20 L. W. 582

(1924) M. W. N. 897 : 1924 Mad. 897

— S. 125—*Rent sale—Defaulter remaining in possession—Mortgage—Execution sale—Right of purchaser.*

Where a person purchases a holding in execution of a decree for arrears of rent he takes it free of incumbrances created after the Act but subject to those created before the Act. Where the landlord who purchased a holding at a rent sale never put an end to the encumbrance on the holding but accepted rent from the plaintiff who was a purchaser in execution of a mortgage decree against the defaulter, the landlord cannot thereafter defeat the rights of the plaintiff. (*Wallace, J.*) **PACHALLA DORAISWAMI IYENGAR v. SRI MAHANT PRAYAG DASJEE VARU.**

(1924) M. W. N. 670 : 82 I. C. 721 (2) :

1924 Mad. 918.

— S. 131—*Sale for arrears of rent—Deposit in Court—Amount of arrears not known but amount required by Collector paid on—Delay—Power of Court to excuse.*

A sale for arrears of rent was held on the 13th of March 1922. On 6th April, an application was put in, for the purpose of setting aside the sale on the ground of irregularity. The Deputy Collector, probably under the impression that no application would lie to set aside the sale on the ground of irregularity advised the petitioner if so inclined, to apply to set aside the sale under

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S. 131 of the Estates Land Act. He put in the application and deposited Rs. 150 at the time. The petitioner was asked to come on the 10th April for the purpose of ascertaining the balance to be deposited. On the 10th April the petitioner came and wanted to know how much more he had to pay and on ascertaining the amount he paid it. The money having been drawn out by the purchaser who had no objection to the sale being set aside though the period of 30 days had expired when the full amount was deposited, the Court below set aside the sale. Held that the delay in depositing the entire amount was due to an act of the court that the court had power to excuse the delay and that there was no ground for interference in revision. (*Kumaraswami Sastri, J.*) **ADIMOOLA MUDALIAR v. MANICKA MUDALIAR.**

34 M. L. T. (H. C.) 10 :

1924 Mad. 592 : (1924) M. W. N. 230 :

78 I. C. 142 : 19 L. W. 238 : 46 M. L. J. 329.

— S. 163 (2)—*Suit for mesne profits—Waste land—Occasional cultivation—If converts land into ryoti land.*

Ryoti land does not include waste land where no cultivation is ordinarily carried on. When the definition of ryoti land speaks of cultivable land it means land that is ordinarily and usually cultivated and does not refer to waste land even though waste land can at times be cultivated with labour and expenditure of money. A suit for mesne profits in respect of such waste land can be entertained by the Civil Court. (*Krishnan, J.*) **ARETI SUBBAYYA v. SRI RAJA VENKATA RAMIAH APPA RAO BAHADUR.**

34 M. L. T. 233 : 1924 Mad. 832 :

19 L. W. 626 (H. C.) : 79 I. C. 718 (2) :

(1924) M. W. N. 630 : 47 M. L. J. 469.

— S. 205—*Order of District Collector—Powers of Board of Revenue to revise the order.*

The Board of Revenue acting under Section 205 of the Madras Estates Land Act has no power to revise an order of the District Collector passed on an appeal from the orders of the Sub Collector. The remedy of the aggrieved party is by way of revision to the High Court. (*Marjoribanks, F. M.*) **RAGUNATHA PATRO v. GOVINDA PATRO.**

19 L. W. 559.

Ss. 205 and 74—*Order of Revenue officer—Revision application to Collector—Rejection of—Revision application to the Board—Maintainability of.*

Where the order of a Revenue officer was taken up in revision to the District Collector and he saw no reason to interfere with the order, a revision application to the Board of Revenue is maintainable.

In such a case the Board is not moved to revise any order of the District Collector but to revise the order of the Revenue officer which order the District Collector saw no reason to interfere with. S. 74 of the Estates Land Act deals with applications for appraisal only in cases where the relationship of land holder and ryot is undisputed in regard to the particular land in respect of which application is made. (*Marjoribanks, F. M.*) **DASARI KAMBAYYA DHORA v. NOTOBAL CHOWDARI.**

19 L. W. 661.

MAD. HERIDITARY VILLAGE OFFICES ACT, S. 13.

MADRAS HERIDITARY VILLAGE OFFICES ACT (II OF 1895), S. 13 and 21—Blacksmiths Inam—Lessee of—Suit for emoluments—Jurisdiction—Collector

Ss. 13 and 21 of Madras Act III of 1895 should be read together and in spite of the generality of language of section 21 the jurisdiction of the Civil Court is taken away only in those cases where it is conferred on the Revenue court by S. 13. A lessee of the office of a village blacksmith can sue for recovery of the emoluments before the Civil Court. If a holder of the office wants to sue, the legislature has provided the revenue court as his forum; if any other person is suing it has provided the ordinary Civil Court. (*Jackson, J.*) **SAHADEVA REDDI v. LINGAPPA ASARI.**

20 L. W. 451 : 82 I. C. 942 : (1924) M. W. N. 833 : 1924 Mad. 867.

MADRAS HIGH COURT RULES (Appellate side), R. 41—Appeals from insolvency—Jurisdiction—Vakil's fees.

The proper construction of R. 41 of the Appellate Side Rules is that "Original Side" in the Rule means the Original Side when exercising the jurisdiction referred to in the preamble to the Original Side Rules and it was not intended to have and has no application at all to insolvency. That being so, the privileges under R. 41 of the Appellate Side Rules as to special fees in difficult cases extend to appeals to the High Court from its Insolvency side. (*Schwabe, C. J. and Ramesam, J.*) **OFFICIAL ASSIGNEE OF MADRAS v. OFFICIAL ASSIGNEE OF RANGOON.**

19 L. W. 316 : (1924) M. W. N. 458 : 1924 Mad. 662 : 34 M. L. T. (H.C.) 99 : 46 M. L. J. 580.

MADRAS IMPARTIBLE ESTATES ACT, S. 4—Impartible estate—Assets of deceased holder—Decree for money against predecessor—Execution against money payable under a lease granted by predecessor but for period subsequent to his death—Money if assets in the hands of successor.

In execution of a decree for money obtained against a previous Zamindar of Ayakudi plaintiff applied for attachment of certain sums of money payable to the succeeding Zamindar under a lease which was granted by the previous Zamindar, but for a period subsequent to his death. The decree was sought to be executed against the succeeding Zamindar as the legal representative of his predecessor against the assets in his hands.

Held, that the money sought to be attached could not be considered to be the assets of the Zamindar at all, for it was money that had accrued due after the late Zamindar's death and after the estate had passed into the hands of his successor by survivorship.

If the judgment-creditor was able to show that his debt was for a sum of money borrowed for the benefit of the estate, under S. 4 of the Madras Impartible Estates Act, his debt would be a debt binding on the impartible estate and he would be entitled to enforce his debt as against the estate in the hands of the succeeding Zamindar. Even then the Zamindar would not become the assets of the late Zamindar in the hands of his successor, and the proper remedy of the plaintiff would be to

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bring a suit, and, after obtaining a declaration that his debt was binding on the impartible estate and upon the income that had accrued due from the impartible estate in the hands of the successor, to apply then in execution of his decree to have it executed against such property.

The learned Judges declined, in the circumstances of the case, to convert the execution petition into such a suit. (*Krishnan and Waller, JJ.*) **IMMUDIPATTAM JANAKIRAMA K. K. S. N. BOMMAYYA NAICKEN v. SUBRAMANIA IYER.**

1924 Mad. 707 : (1924) M. W. N. 342 : 46 M. L. J. 374

S. 4—Successor to impartible estate—Liability for debts of predecessor—Breach of trust—Misapplication of trust funds.

Where a decree for money was passed against the holder of an impartible estate in respect of his misapplication of the funds of the temple of which he was the trustee and the judgment-debtor died and the estate passed to his son, *held*, that the impartible estate in the hands of the son was not liable for the decree debt of the deceased Zamindar. 30 M. 454 : 8 I. C. 392 dist. (*Krishnan and Odgers, JJ.*) **VENKATALINGAM NAYANIM BAHADUR v. ARUNACHALAM CHETTIAR.**

19 L. W. 132 : (1924) M. W. N. 214 : 78 I. C. 1012 : 1924 Mad. 511.

MADRAS LAND ENCROACHMENT ACT (III OF 1905 Ss 7 and 14—Levy of assessment—Suit not brought within 6 months from that date—Effect of—Bar of suit—Levy of assessment on tenants—Right of Zamindar to sue. See MAD. PERM. SETT. REGN. S. 4.

47 M. L. J. 784.

S. 14—Suit for declaration—Cause of action—Limitation—First notice—Service of—Effect.

Plaintiff was in occupation of some land cultivating it by a tenant. The Government claimed that it was their land and on the 17th of April, 1919 the Govt. sent her a notice to quit under S. 6 of Act III of 1905. Nothing happened for a time. In May, 1919, the plaintiff put in a petition for a review of this notice to the Deputy Collector. On 18th Sept. 1919 the Deputy Collector dismissed the review petition. On 2nd Oct. 1919, an order which amounted practically to a notice to quit went to the plaintiff. On 22nd Dec. 1919 the plaintiff filed the present suit for declaration of her title. *Held* that the suit was not barred and that the plaintiff need not, if she so chose, treat herself aggrieved by the notice of 17th April 1919. 39 M. 727 dist. (*Coutts Trotter, C. J. and Ramesam, J.*) **KUMMATI VEETIL KOTTA PARAMBATH MALIYAKKAL KUNHIBI v. SECRETARY OF STATE FOR INDIA.**

35 M. L. T. (H.C.) 74 : 20 L. W. 288 : 1924 Mad. 825 : 82 I. C. 414 : 47 Mad. 927 : 1924 M. W. N. 765 : 47 M. L. J. 379.

MADRAS LOCAL BOARDS ACT (V OF 1884), Ss. 16 and 144—Rules 33 (e) and 35 of rules framed under S. 144 Validity—Order setting aside election on ground specified in R. 33 (e)—Validity—Inquiry—Opportunity to show cause against order—Necessity—Rule authorised by Act but purporting to be framed under wrong section—Validity.

MADRAS LOCAL BOARDS ACT, S. 55.

Rule 33 (e) and Rule 35 of the rules framed by the Local Government under S. 144 of the Madras Local Boards Act of 1884 are not *ultra vires*.

An order setting aside the election of a person on the ground specified in R. 33 (e) that is, that presence of the person in the Taluk Board as a member would bring the Local Fund Administration into contempt is not invalid on the ground that there was no enquiry by the Government into the matter, and that no opportunity was given to the person affected to show cause against the allegations made against him.

Where the Government makes a rule which it is empowered by the Act to make, the fact that it purports to make the rule under one section rather than another would not be a ground for holding that the rule is *ultra vires*. (*Odgers, J.*) KONA THIMMA REDDI v. THE SECRETARY OF STATE FOR INDIA. 47 Mad. 325 : 19 L. W. 59 : (1924) M. W. N. 146 : 1924 Mad. 523 : 33 M. L. T. (H. C.) 255 : 78 I. C. 91 : 46 M. L. J. 60.

—S. 55 (2) (iv)—*Disqualification for election—Honorary Magistrate—Resignation of office—If removes disqualification—Acceptance by Government necessary.*

An Honorary Magistrate who is disqualified for election as a member of a Local Board under S. 55 (2) (iv) of the Madras Local Boards Act cannot relieve himself of that disqualification by merely submitting his resignation to Government. The disqualification subsists until the Government accepts the same. 45 M. L. J. 798 referred to, (*Jackson, J.*) THE PRESIDENT TALUK BOARD HSPET v. JUTUR CHANDRAPPA.

1925 Mad. 173 : 20 L. W. 868 : 47 M. L. J. 774.

—S. 73 PROVISIO—"Tenant"—*Meaning of—Licensee from inamdar—Payment of local tax by intermediate landholder—Right to recover from licensee.*

A licensee under a dharmila inamdar in a Zamindari, for a period of ten years with a right to tap date trees is not a "tenant" within the meaning of S. 73 of Madras Act V of 1884 so as to be liable to his licensor for the land cess payable by the latter under the Act. (*Wallace, J.*) CHINTAKAYALA THAMMIAH NAIDU GARU v. ATTIL MUSALIAH,

35 M. L. T. (H. C.) 67 : 82 I. C. 391 : (1924) M. W. N. 769 : 1924 Mad. 818 : 20 L. W. 453 : 47 M. L. J. 383.

—(XIV OF 1920), S. 57—*Rules by Local Government—Rules 1, 4 (3) and 12 (2)—Election of President of a Taluk Board—Objection to election—Scope of the enquiry—Decision of District Judge—Persona designata—Court—Finality of decision—Revision—Interference by High Court—C. P. Code, S. 115.*

A District Judge enquiring into an objection to the election of the President of a Taluk Board under Rule 1 of the Rules made by the Local Government under Madras Act XIV of 1920 is not a *persona designata* but a "Court" subject to the revisional jurisdiction of the High Court under S. 115, C. P. Code. National Telephone Co., Ltd. v. Postmaster-General (1913) A. C. 546, 562 relied on.

MAD. PERMANENT SETTLEMENT RGN. S. 4.

The decision of the District Judge on the enquiry is revisable by the High Court in spite of the fact that his decision is declared "final" by S. 57 and R. 12 (2) of the rules framed under the Act.

The petitioner, a qualified person, was appointed a member of a Taluk Board by the President of the District Board acting under S. 9 of the Local Boards Act. Subsequently the petitioner was duly elected President of the Taluk Board. A petition was thereupon filed before the District Judge for a declaration that the election might be declared void and annulled and that the respondent, a defeated candidate in the election, should be declared to be duly elected. The District Judge held that the petitioner had not been properly appointed a member of the Taluk Board and was therefore not eligible for the election to the Presidentship of that Board and annulled his election. The petitioner preferred a revision petition to the High Court. *Held*, that in the absence of any of the disqualifications enumerated in Ss. 55 and 56 of the Madras Local Boards Act the appointment of the petitioner by the President of the District Board could not be questioned by the District Judge. Further it was not competent to the Judge on a petition dealing with an election to the Presidentship to go into the question whether a particular candidate was duly appointed a member of the Taluk Board. The order of the District Judge was therefore set aside. (*Schwabe, C. J., Ramesam and Waller, JJ.*) KOKKU PARTHASARATHY NAIDU v. KALESWARA RAO. 47 Mad. 369 :

19 L. W. 402 : 1924 Mad. 561 : 34 M. L. T. (H. C.) 50 : (1924) M. W. N. 272 : 78 I. C. 98 : 46 M. L. J. 201.

—(XV OF 1920), S. 221—*Toll contract—Money due under—"Other sum"—Interpretation of.* The amount due under a contract of lease though of the toll cannot be treated as falling within S. 221 of the Madras Local Boards Act—"other sums" in S. 221 must be read *ejusdem generis* with what goes before. (*Krishnan and Odgers, JJ.*) *In re* PUNYA SYMALO.

47 Mad. 381 : 25 Cr. L. J. 352 : 77 I. C. 240 : 1924 Mad. 669.

MADRAS MUNICIPAL ELECTION RULES, R. 14.

—(1)—*Effect of infringement.*

1924 Mad. 38.

MADRAS PERMANENT SETTLEMENT REGULATION (XXV OF 1802) S. 4—*Zamindari—Lands in, dedicated as cattle-paths prior to Permanent Settlement—Declaration of Zamindar's right to—Suit for—Villagers using lands as cattle-paths if necessary parties to—Maintainability of suit against Government—Conditions—Onus of proof on Zamindar—Land Encroachment Act of 1905—Penal assessment—Levy of, from occupiers of lands let in by Zamindar—If affords cause of action to Zamindar—S. 7 of Act—Preliminary notice under—If affords cause of action—Lakshiraj lands—Public roads if.*

The plaintiff claiming to be the Zamindar of a village included in his estate, sued the Secretary of State for India in Council for a declaration of ownership and for recovery of possession and for

MAD, PRESIDENCY Sm. C. C. RULES.

injunction in respect of certain puntas or lands used as cattlepaths in that village.

The plaintiff's case was that the suit puntas were dedicated for public use by the plaintiff's predecessors, that subsequently about the year 1883 the plaintiff's predecessors unlawfully entered upon the puntas and diverting them from their use as highways, let them to agricultural tenants, and doing so for over the statutory period succeeded in reducing them to their own private ownership; that in 1914, after the plaintiff had acquired an absolute title in respect of the suit lands, the Government took proceedings under the Land Encroachment Act, III of 1905 against the tenants in occupation let in by the plaintiff, and that, as the lands did not belong to the Government, their action under the Act was *ultra vires*. No members of the village community that used the suit paths in exercise of their communal rights were made parties to the suit.

It was found that the suit lands had been used as puntas even before the Permanent Settlement; that the lands had not been dedicated as highways by plaintiff's predecessors in interest, as alleged by the plaintiff; that the plaintiff had failed to prove that the right which the public got by dedication of the puntas for use as a means of communication had ceased owing to disuse, or otherwise; and that the plaintiff had not acquired any prescriptive right over them.

Held, that the suit was rightly dismissed by the Court below.

Per Officiating Chief Justice.—The fact that assessment was levied under the Land Encroachment Act from the occupants of the suit lands would not give the plaintiff a right of action against the Government. Further, as the suit was not brought within six months from that date, it was barred under S. 14 of that Act. A preliminary notice served on the plaintiff under S. 7 of the Act did not give rise to a cause of action.

The right of the public to the enjoyment of the whole width of land which has been set apart from time immemorial for use as a public way stands upon a higher footing than a mere easement over property belonging to another.

Per Srinivasa Aiyangar, J.—The plaintiff in effect seeks a declaration that by adverse possession he has become the private owner of the suit lands. No such declaration can be made, as the members of the village against whom plaintiff's possession was alleged to have become adverse, have not been made parties to the suit.

The suit lands are not "lakhiraj lands" within the meaning of S. 4 of Regulation XXV of 1802. (*Spencer, O. C. J. and Srinivasa Aiyangar, J.*) SREE RAJA RAO VENKATA KUMARA MAHIPATHI SURYAN RAO BAHADRU v. SECRETARY OF STATE FOR INDIA IN COUNCIL. 47 M. L. J. 784.

MADRAS PRESIDENCY SMALL CAUSE COURT RULES, O. 37, R. 1 and form 13—If *ultra vires*, 1924 Mad. 46.

MADRAS PROPRIETARY ESTATE VILLAGE SERVICE ACT (II OF 1894) S. 15 (cl. 2)—Validity of

MADRAS REVENUE RECOVERY ACT, S. 63.

notice to the proprietor by the Divisional officer—Appointment by sub. divisional officer against proprietor's nomination—Validity of.

A notice to the proprietor under S. 15 of the Act calling upon him to send in his nomination is the statutory duty cast upon the collector and it cannot be stated that any notice by a subordinate fulfils the conditions under the Act. (2) Where the divisional officer issued the notice and did not receive any nomination from the proprietor within the prescribed time, and he thereupon made the appointment himself. *Held* that the nominee of the divisional officer was not validly appointed as his action is unwarranted and illegal. (*Devadoss J.*) DHENUVAKONDA VENKATASUBBAYYA v. RAJA OF VENKATAGIRI. 20 L. W. 826.

MADRAS REGULATION (II OF 1819), S. 2—Judicial Proceedings—Effect of—Reasons for policy if open to attack. 76 L.C. 187; 25 Cr. L. J. 123.

—(X of 1831) S. 2—Sale of minors estate—Regular course of inheritance—Meaning of—If exclude survivorship—Madras Revenue Recovery Act (II of 1864), S. 63—Effect of—Unregistered landholder.

S. 2 of the Madras Regulation X of 1831 is wide enough to cover property belonging to a joint Hindu family and devolving on a minor by the operation of the law of survivorship. Regulation X of 1831 applies to all minor owners of property, whether registered or not. S. 63 of Madras Act II of 1864 does not limit the application of the Regulation to the case of registered owners of property who are minors. 41 M. 783 referred to. (*Ramesam and Reilly, JJ*) KATTA MANCHI KRISHNA REDDI v. RAMAKRISHNAYYA CHETTY. 20 L. W. 794; 47 M. L. J. 667.

MADRAS REVENUE RECOVERY ACT (II OF 1864), S. 63—Effect of—Unregistered landholder—Sale of minor's estate—Legality of. See MADRAS REGN. X OF 1831, S. 2. 47 M. L. J. 667.

—Revenue Settlement—Lands assessed as dry—Rates if can be altered during period of settlement—Levy of enhanced rate—Suit against Government—If lies—If a bar.

Once a settlement is duly notified by Government the Collector acting under the orders of the Board of Revenue cannot vary the rates of assessment. The annual payment fixed is incapable of being increased during the period for which the settlement is made. 40 Mad. 886 at 897 followed.

Where lands assessed as dry at a Revenue Settlement are, within the period of 30 years for which the settlement is to remain in force, re-assessed as wet and an enhanced rate is levied, the re-assessment is illegal and *ultra vires* and the assessee is not debarred by S. 58, Revenue Recovery Act, from filing a suit to have the enhancement declared illegal and for the recovery of the excess amount levied.

As the Government may be trusted to see that justice is done in accordance with decrees of

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Court; in such cases no permanent injunction need be passed against the Government restraining them from levying enhanced rate. (*Devadoss and Jackson, JJ.*) SECRETARY OF STATE *v.* RAMANUJACHARIAR 20 L. W. 973 : 47 M. L. J. 780.

MAHOMEDAN LAW—Divorce—Inability to support wife—Effect.

Under the Hanafi Law, mere inability to maintain the wife is no ground for granting a divorce (*Musrije, J.*) SREEMATI ASMATI BIBI *v.* SAMUDDI PATHAN. 79 I. C. 991.

———Dower—Agreement to pay by husband—Age of majority. See Majority Act S. 2. (*Suhrawardy and Duval, JJ.*) MOZHARUL ISLAM *v.* ABDUL GANI ALA. 80 I. C. 914.

———Dower—Right of widow—Lien—Possession—Precedents—Value of.

Where with the express or implied consent of the husband or his other heirs a Mahomedan lady takes possession of his estate she has a lien thereupon for her dower debt and can liquidate by appropriating the rents and profits. Otherwise her rights are the same as those of a simple money creditor. 38 All. 581 (P. C.) relied on. (*Rankin and Ghose, JJ.*) SABUR BIBI *v.* ISMILE SHEIKH. 40 C. L. J. 171.

———Dower—Right of widow—Nature of.

A widow's right to dower does not amount to a charge on her husband's property unless she is in possession at the time of his death. She is however a creditor of her sons to the extent of her dower debt and her right has precedence over debts incurred subsequent to the marriage. (*Kendall, A. J. C.*) ZAMIN HUSAIN KHAN *v.* TASADDUQ ALI KHAN. 80 I. C. 692 : 1925 Oudh 171.

———Dower—Widow's lien—Extent of.

Where a Mahomedan widow is in lawful and peaceful possession of her husband's property in lieu of her unpaid dower the heirs cannot obtain possession without satisfying her dower. Nor is she liable to be sued piecemeal by every separate heir. She is entitled to retain the entire property until the entire dower is paid. (*Daniels, J.*) MT. IAN BIBI *v.* MT. BATULAN BIBI. 78 I. C. 214 (1) : 1924 All. 729.

———Gift—Delivery of possession—Necessity for.

Where a deed of gift is executed by a person governed by the Mahomedan Law and the possession of the property comprised in the gift has not been delivered, the gift would be void *ab initio*, and no question of limitation will arise in such circumstances. The right of the plaintiff to impeach such a gift can only accrue from the moment when by receipt of possession the gift becomes operative by law. (*Kanhaiya Lal, J.*) MULANI *v.* MAULA BUX. 46 A. 260 : 22 A. L. J. 149 : L. R. 5 A. 104 : 78 I. C. 222, 124 A. 370.

———Gift—Hiba-bil-ewaz—Past services—Gift in lieu of—Revocation—Power of donor.

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Under the Mahomedan law past services rendered are not property and a gift made only in consideration of past services is revocable at the pleasure of the donor. Such a gift is not a hiba-bil-ewaz and past services are not "property" in the legal sense. A donor may revoke the gift even where he has purported to waive his right of revocation at the time of or after the declaration of gift provided that where he has accepted something in return for the waiver, he cannot revoke the gift.

Per Wazir Hasan, A. J. C.—The narrow sense in which the Mahomedan jurists understood the term "property" is wholly unsuited to the modern and progressive state of society. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) IMDAD ALI *v.* AHMAD ALI. 10 O. & A. L. R. 1215 : 1 O. W. N. 868.

———Gift of house and lands—Delivery of possession of house—Lands mortgaged and in mortgagee's possession—Decree obtaining possession later—Validity of gift.

Where a father by a registered gift deed gives his daughter a house and land, of which he gave her possession of the house but the lands being in the possession of a mortgagee, the donee got possession only later on, the whole gift is valid.

Quare If the gift of an equity of redemption possession being with the mortgagee is valid. (*Macleod, C. J. and Shah, J.*) HASHIMBI YAKUB-SAHIB BEG *v.* AJAMATBI. 48 Bom. 396 : 26 Bom. L. R. 337 : 80 I. C. 208 : 1924 Bom. 410.

———Gift—Hiba-bil-ewaz—Oral evidence—Admissibility.

A hiba-bil-ewaz has incidents very different from those of a simple gift. For instance the taking of possession is necessary to validate a gift pure and simple whereas in the case of a hiba-bil-ewaz the taking of possession is not necessary. It is not open to a plaintiff to adduce evidence to prove contrary to the terms of the deed of gift that the transaction was in reality a hiba-bil-ewaz (*Scott Smith and Fforde, JJ.*) HAFIZ FERAZ UDDIN *v.* SIRDAR SHAH. 6 Lah. L. J. 221 : 79 I. C. 81 : 1924 Lah. 562.

———Gift—Marz-ul-maut—Validity of.

When an old Mahomedan of 80 who was suffering from carbuncle died on account of the disease after executing a deed of gift 4 days before his death, the doctrine of marz-ul-maut applies and the gift is invalid. (*Stuart, J.*) MT. FAIZ BIBI *v.* QUDRAT ULLAH. 1924 All. 935.

———Gift—Marz-ul-maut—Meaning of.

It is not the Mahomedan Law that a woman who is pregnant is considered to be suffering from a mortal disease and on the face of it would be an absurdity to support such a doctrine. The Mahomedan Law takes the common sense view that the danger does not begin until the pains begin. (*Stuart, J.*) SYED SHAMSUL HASAN *v.* SYED HASAN. 1923 All. 173 (2).

———Marz-ul-maut—Doctrine of.

The Mahomedan Law doctrine of marz-ul-maut contemplates an apprehension of immediate

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death. The mere fact the donor was suffering from phthisis or that he died a few days after the execution of the deed is not sufficient. In fact lingering diseases like phthisis remove the suspicion of apprehension of immediate death on the mind of the patient. (*Suhrawardy, J.*) **SYED REZA ALI v. KAZI NURUDEEN AHMED.** 78 I. C. 174.

— *Marz-ul-maut—Effect—Death of husband during iddat—Right of inheritance.*

Where a Mahomedan husband pronounces an irrevocable divorce during his death illness (*marz-ul-maut*) and dies during his wife's *iddat* the widow is still entitled to inherit to him. Conditions for *marz-ul-maut* explained. (*Kincaid, J. C.*) and *Raymond, A. J. C.*) **MT. BHAGBHARI v. MT. KHATUN.** 80 I. C. 118.

— *Gift—Named—Donees—Use of the word 'waqf'.* 1924 Lah. 28.

— *Gift—Revocation power of donor—Hanafi School.*

According to the Hanafi Law a gift cannot be revoked after the subject of the gift was increased in value owing to some accession thereto made by the donee, which is inseparable from it. (*Kanhaiya Lal, J.*) **MULANI v. MAULA BUX.** 46 A. 260 : 22 A. L. J. 149 : L. R. 5 A. 104 : 78 I. C. 222 : 1924 All. 370.

— *Guardianship—De facto guardian—Position of.*

Under Mahomedan Law, a *de facto* guardian has no recognised position and is no better than an officious intermeddler. (*Ki khede, A. J. C.*) **NARAYAN v. DHARMA.** 81 I. C. 273 : 1925 Nag. 134.

— *Guardianship—De facto guardian—Powers of alienation.*

The *de facto* guardian of a Mahomedan minor cannot bind his property by any act whether there be any necessity for the act or it was for his benefit. (*Stuart and Mukerji, J.J.*) **GANESHI LAL v. NOBIN CHANDRA BOSE.** 78 I. C. 1024.

— *Guardianship—Minor—Mother de facto Guardian.*

Under Muhammadan law a person who has charge of the person or property of a minor without being his legal guardian and who may therefore be conveniently called a *de facto* guardian, has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. (*Campbell, J.*) **MAHOMED SADDIG v. KHUDA BAKSH.** 6 Lah. L. J. 227 : 80 I. C. 506 : 1924 Lah. 564.

— *Guardianship—Mother—Sale of immovable property.* 1924 Lah. 200.

— *Guardianship—Property uncle and nephew.*

Under Mahomedan Law, an uncle is not the legal or natural guardian of the property of his nephew and cannot bind him by his acts. (*Moti Sagar, J.*) **COURT OF WARDS OF NAWABZADA v. ABRAR ALI.** 1924 Lah. 681.

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Hanafi sunni sect—Wakfnamah—Wakf making himself the mutawalli—Reservation of wakif's life interest whether invalid—Power of all-ratation reserved by the wakif—Effect of invalid clauses—Nature of evidence necessary for a valid verbal wakf.

In a suit for a declaration that three was a valid wakif for religious and charitable purposes and for an order for directing the wakif to deliver possession *Held* that the intention of the wakif was to create a valid wakf, and that reservation to the wakif (1) as mutawalli of the occupation of the property and income, without the corpus is not objectionable (23 C. W. N. 781 relied upon) (2) that the wakif as mutawalli may make such alterations in the rules, as may be necessary under changed conditions and that the wakif's act did not denote that the deed was revocable or that he intended to change the corpus (3) that wakf was completely dedication. The wakif's changing the character of his possession from owner to mutawalli was adequate coupled with his carrying out several objects of the trust during his life time (4) that the clauses must not be read each by itself but must be read in connection with the whole deed (5) and that the presence of invalid clauses in the wakfnamah will not vitiate the wakf (6) and that a verbal declaration of intention to create a wakf is sufficient when made in the presence of witnesses, who are prepared to testify that there was a divesting of property and that delivery of possession is not essential for a valid wakf. (*Duckworth and Godfrey, J.J.*) **MAE KHIN v. MAUNG SEIN.** 2 Rang. 495 : 1925 Rang. 71.

— *Inheritance—Qureshis of Muttan—Special custom of the family in controversion of the Islamic Law—Proof.* **MT. HAJRA BIBI v. MT. JANAT BIBI.** 76 I. C. 267.

— *Inheritance—Transfer of rights—Validity.*

The transfer of a right of inheritance before that right vests in the transferor is prohibited by Mahomedan Law. (*Kincaid, J. C. and Raymond, A. J. C.*) **MT. BHAGBHARI v. MT. KHATUN.** 80 I. C. 118.

— *Joint family—Acquisition by one member—Presumption.*

When the members of a Mahomedan family live in commensality they do not form a joint family in the sense in which that expression is used with regard to Hindus, and in Mahomedan Law there is not, as there is in Hindu Law, any presumption that the acquisitions of the several members are made for the benefit of the family jointly. (*Fremantle, S. M. and Burn, J. M.*) **MD. MUNIR ALAM v. NINUTH LOHAR.** L. R. 5 A. 101 (Rev.)

— *Legitimacy—Acknowledgment—When possible.* **MAN MOHAN SAW v. MAHOMED HUSAIN KHAN.** 1924 P. 191.

— *Legitimacy—Presumption as to* 1924 Oudh 19.

— *Marriage—Breach of contract—Damage.* 75 I. C. 746.

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———Marriage—Consent of the girl—Minor—Puberty.

Where a woman has not attained puberty, in fact, when she was married, her consent to the marriage is immaterial and unnecessary. Puberty is established by natural signs or by age which is 15 years in males, and 9 in females. The determining factor is puberty and, in the absence of evidence, the age has to be considered. Where a girl has not attained puberty it is open to her grand-father to consent to her marriage and a marriage celebrated with such consent is valid, under the Shiah Law. (*Mukerji, J.*) *ZAITUN v. SHAIKH KOMMAL*. 22 A. L. J. 423 : L. R. 5 A. 296: 79 I. C. 907 : 1924 All. 870.

———Marriage—Guardian for marriage—Marriage by person not guardian—Effect. *MT. GHULAM FATIMA v. KHAIRA*.

77 I. C. 901.

———Marriage—Minority—Question if depends on Majority Act.

The Indian Majority Act does not affect the Mahomedan Law of Marriage, Divorce, etc. Under the Mahomedan Law minority terminates on the completion of the 15th year and thereafter a person though under 18 years of age can marry. (*Moti Sagar, J.*) *MT. BEGUM BIBI v. RAHMAT KHAN*. 1924 Lah. 673.

———Marriage—Option of puberty—Principle of—Acquiescence.

The only principle underlying the option of puberty under Mah. Law is that there should be no acquiescence in the marriage relation after signs of puberty appear and the question should be decided as one of fact. (*Campbell, J.*) *KHANOO v. MT. BHAG BHARI*. 76 I. C. 45: 1925 Lah. 66.

———Marriage—Option of puberty—When to be exercised. *MT. GULAM FATIMA v. KHAIRA*.

77 I. C. 901.

———Marriage—Puberty—Age of *MT. NAWAB BIBI v. ALLAH DITTA*.

1924 Lah. 188 (2).

———Marriage—Settlement—Ariat—Meaning of.

"Ariat" is a term used in the Hanafi law for a gratuitous loan and the essentials of an ariat are : —(1) that it can be revoked (2) that it cannot be transfer of property (3) that it must be for a definite period and (4) that it does not devolve upon the heirs of the recipient. Where a deed of gift executed by a father-in-law in favour of his daughter-in-law at the time of her marriage with his son recited that the donor and his representatives had no power to make any changes or alterations in the deed or interfere in any way with the property or create a burden thereon and there was a transfer of the usufruct and the deed did not purport to operate for any definite period, it cannot be taken to be an "ariat" under the Mahomedan law. (*Kendall and Rullan, A.J. Cs.*) *MAHOMED SHER KHAN v. MT. KAMAL-UN-NISSA*.

10 O. & A. L. R. 597 : 79 I. C. 716 : 11 O. L. J. 703 : 1 O. W. N. 307.

———Mutawali *de facto*—Right to collect money due. *MUIZUDDIN v. MAHOMED IKHLAQ*.

1924 All. 59.

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———Property—Joint funds—Presumption.

The presumption of Hindu law that money for acquisitions comes from joint funds is not applicable to Mahomedans. There is no such thing as joint family property among them. (*Raymond, A.J.C.*) *YUSIF MAHOMED v. ABUBACKER IBRAHIM*.

78 I. C. 817 : 1925 Sind 26.

———Religious endowment—Khankh, meaning of—Succession of eldest son is not by right.

77 I. C. 1009.

———Representation—Doctrine of.

In Mahomedan Law there is no representation of the family as under the Hindu Law. (*Mukerjee and Suhrawardy, JJ.*) *LUKHAN CHANDRA MANDAL v. TAKIM DHALI*.

30 I. C. 357.

———Restitution of conjugal rights—Defence in action—Legal cruelty—Simple chastisement.

In a suit for restitution of conjugal rights between a Mahomedan husband and wife where ill-treatment is pleaded in defence, it need not amount to such cruelty as under English Law would be sufficient to obtain a divorce. It is enough if ill-treatment of some sort which would create in the defendant an apprehension to life or safety is proved. Simple chastisement once or twice does not amount to such ill-treatment. (*Mukerjee, J.*) *SREMATI ASMATI BIBI v. SAIMUDDI PATHAN*.

79 I. C. 991.

———Restitution of conjugal rights—Impotency of husband—Suit for annulment of marriage—Form of relief.

A Mahomedan husband and wife had been married for 6 years. Subsequently the husband sued for restitution of conjugal rights and the wife for annulment of the marriage on the ground of the husband's impotency. The medical evidence was that the marriage had not been consummated for these six years and the wife remained *virgo intacta*. At the same time it was found that the husband was not suffering from any physical disability rendering conjugal functions impossible. Held that under the circumstances the proper course was to enforce the rule of Mahomedan Law and give the husband a period of one year for showing that he was able to exercise his marital rights.

Under the Mahomedan law a wife has no absolute right to obtain a divorce. She has that right under certain specific contingencies and conditions. The mere fact that since the marriage the husband had no intercourse with her and that therefore, she is still a virgin would not *ipso facto* entitle her to a divorce unless it is proved that the husband is incapable of cohabitation with her. The Mahomedan law contemplates that there may be impotence with regard to one woman though not with regard to others. It therefore recognises that the husband should have full opportunity, after he has once been challenged, to prove that he is not impotent. This is a substantive right and not a mere rule of procedure. (*Sulaiman and Mookerjee, JJ.*) *MAHOMED IBRAHIM v. ALTAFAH*.

22 A. L. J. 1045 : 1925 All. 24.

———Restitution of conjugal rights—Marriage of minor—Husband neglecting her even after puberty—Effect. *MT. NAWAB BIBI v. ALLAH DITTA*.

1924 Lah. 188 (2).

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———*Sunnis—Administration suit by divorced wife—Whether maintainable—Whether secondary evidence admissible.*

In a suit by a Mahomedan widow, after the death of her husband, for administration of her husband's properties she was alleged to have been divorced orally in the presence of witnesses and by written divorce by post before his death, and the defendant being unable to prove the divorce, and to produce the letter of divorce tried to prove the contents of the letter by secondary evidence under S. 63 of the Evidence Act. *Held*, that the particular form of secondary evidence which the defendants produce comes under S. 63 Cl. 5, and that the statement of witnesses as oral accounts of the contents of the document, are inadmissible, as none of them can be said to have "seen" the document within the meaning of S. 63 of the Evidence Act relying on *Maung-chit v. Maung Ta Ku*: and that a person seeing the document without understanding the language or hearing from other people who have seen, is giving merely hearsay evidence and the objection overruled. (*Baguley and Young, JJ.*) *KALENTHAR AMMAL v. MAMI*,
2 Bang. 400 : 1924 Rang. 363.

———*Waqf—Conditional grant constitutes waqf—Doubtful where grantor is a Hindu—Use of word 'waqf.'*

A grant sub-condition cannot be considered to be a waqf. It is not necessary in order to constitute a waqf that the term "waqf" be used, if from the general nature of the grant itself that tenure can be inferred. 2 M. I. A. 390 Foll. *Quere*:—Whether a grant by Hindu to a Mahomedan community is incompetent as the foundation of a waqf. (*Lord Shaw*.) *MAHOMED RAZA v. SYED YADGAR HUSSAIN*,
51 Cal. 446 :

L. R. 5 P. C. 76 : 7 N. L. J. 116 : 20 L. W. 3 :
(1924) M. W. N. 447 : 80 I. C. 645 :
28 C. W. N. 937 : 21 N. L. R. 1 : 1924 P. C. 109.

———*Waqf—Dedication—Dower constituting himself Mutwalli—Gift of a portion of income for maintenance of daughter-in-law of donor—Legality of.*

According to the Hanafi law, a waqfidar can appoint himself mutwalli of the waqf created by him. Where a house yielding a rental of Rs. 22 a month is set apart for a mosque, the mere fact that out of the income a sum of Rs. 2 a month is given for the maintenance of the daughter-in-law of the donor does not affect the validity of the dedication. (*Broadway and Abdul Raoof, JJ.*) *TAFAZZAL BEG v. MAJID ULLAH*
5 Lah. 59 :
79 I. C. 120 : 1924 Lah. 432.

———*Waqf—Dedication—Retention of residue of income for Mutwalli—Waqf valid.*

A Mahomedan settlor directed that the income of certain shops should be applied in the first instance to the upkeep of a mosque, and that the residue, if any, should be remuneration of the mutwalli. *Held*, that there was nothing contrary to law in a trust of this nature.

The situation would have been entirely different had the dedication allowed mutwallis to appropriate, in the first instance, whatever amount they pleased and obliged them only to apply the re-

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mainder, if any, for the purposes of the mosque. (*Campbell and Broadway, JJ.*) *ZULFIKAR ALI v. NABI BAKHSH*,
6 L. L. J. 155 : 80 I. C. 324 :
1924 Lah. 459.

———*Waqf—Dedication—Use—Burial ground—Patiah in the name of individual.*

It is not enough to say that a certain property was used as a burial ground, for that to amount to a dedication of the property as waqf property. The mere fact that a Mahomedan chooses to bury the body of another Mahomedan in his garden would not make that property waqf property. Where the property is registered in the municipal books in the name of a private owner as a burial ground, it does not constitute the property a public burial ground. 40 C. 297 (P. C.) Dist. (*Schwabe, C. J.*) *ABDUL RAHIMAN SAHIB CHOWDURY v. MURUGAPPA NAICKER*,
19 L. W. 352 : (1924) M. W. N. 359 (2) :
34 M. L. T. (H. C.) 312 :
83 I. C. 536 : 1924 Mad. 577.

———*Waqf—Deduction—Validity of—Reservation of life interest—Appointment of trustee.*
1924 All. 113.

———*Wakf—Takia—If alienable or partible.*

A takia is property owned in common by the members of the community using it and cannot be alienated or partitioned except with the consent of all. Nature of takias in general discussed. (*Le Rossignol and Zafar Ali, JJ.*) *DIN MAHOMED v. PIR BAKHSH*,
1924 Lah. 652.

———*Waqf—Essentials of—Shiah law—Completion of the trust—English law.* *MT. BIBI KANIZ ZAINAB v. SYED MOBARACK HUSSAIN*,
1924 Pat. 284.

———*Waqf—Interference with user Construction—Removal of construction.*

On certain waqf property consisting of a well and *Chabutra*, defendant erected a certain construction which obstructed the plaintiffs' right to use the well and *Chabutra* for drinking purposes and for purposes of worship. *Held* that the plaintiffs were entitled to get the removal of the construction. (*Daniels and Neave, JJ.*) *FUTLI KUNWAR v. JANKI DAS*,
22 A. L. J. 747 :
L. R. 5 A. 603 : 81 I. C. 294 :
46 A. 813 : 1924 All. 850.

———*Waqf—Mussalman waqf validating Act of 13.*

The Act has reaffirmed the view taken in the case of *Joe John Bebe v. Abdulla* (1833 Fulton 345) and that decisions in India are given according to the tenets of Abu Yousuf and not according to Imam Mahomed. The case of *Azizudu v. Legal Remembrancer* (15 All. 321) which relied upon a majority of the judgments but not on that of *Amir Ali, J.* in 20 Cal. 116 in regard to wakf made in India after Act VI of 1913 came into force. (*Duckworth and Godfrey, JJ.*) *MA EKHIN v. MAUNG SEIN*,
2 Rang. 495 at 502 :
1925 Rang. 71.

———*Waqf—Mutwalli—Appointment by District Judge—Selection and nomination.* *MOHINUDDIN CHOUDHURY v. ANUNUDDIN CHOUDHURY*
1924 Cal. 441.

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— — — Waqf—Mutawalli—Lease of property—Permission—In whom power lies.
51 Cal. 331 : 77 I. C. 949 : 1924 Cal. 473

— — — Waqf—Mutawalli—Power to mortgage—Necessity—Onus.

A *mutawalli* is only a manager and has no power to mortgage the *waqf* property without permission of the Kazi or the Court. Where the deed authorises him to borrow for necessary purposes a mortgagee who advances money must satisfy himself that necessity exists. The onus is not on the party who challenges the alienation, to prove there was no necessity. (*Suhrawardy and Chotzner, JJ.*) MAHIMJAN BIBI v. MIR RAHIM ALI. 79 I. C. 360 : 1925 Cal. 431

— — — Waqf—*mutawalli* whether necessary—Whether delivery of possession essential—Delivery of possession to others as *mutawallis* is not essential.

A *waqf* need not appoint a *mutawalli*. He is presumed himself to be the *mutawalli* according to Abu Yousuf. 18 C. 241 referred to. The appointment of a *mutawalli* is not essential to the validity of an appropriation. (*Buckworth and Godfrey, JJ.*) MA E KHIN v. MAUNG SEIN. 2 Rang. 495 at 511 : 1925 Rang. 71.

— — — Waqf—Objects of dedication—Maintenance of relatives, MUKARRAM ALI KHAN v. ANJUMAN-UN-NISSA. 1924 All. 223.

— — — Waqf—Suit in a representative capacity if necessary—Rights of worshippers—Suit for possession.

A public mosque is a place to which all Mahomedans are entitled to go as of right and to perform their devotions and every Mahomedan has an inherent right to see that the property belonging to the mosque is being properly administered. The interest of a worshipper is a personal right and though it may be enjoyed in common with others, it cannot be said that it is a joint right vested in the whole body of worshippers. A worshipper who sues for a declaration that the property is *waqf* property need not bring a representative suit and comply with the provisions of O. 1, R. 8, C. P. Code. The plaintiff could not in such a case sue for possession of property wrongfully alienated by the *mutawalli*. (*Plumer, O. C. J. and Ramaswami Iyengar, J.*) SYED MARUFF MEAH v. THIMMI. 2 Mys. L. J. 220.

— — — Waqf—Validity—*Mutawalli* not acting—Effect.

A *waqf* which has been validly constituted cannot cease to be a valid one merely because the *mutawalli* appointed does not act as per the terms of the deed. (*Suhrawardy, J.*) SYED REZA ALI v. KAZI NURUDDIN AHMED. 78 I. C. 174.

— — — Will—Bequests—Extent of—Validity—Prior consent—Effect.

Under Mahomedan Law, bequests can only take effect to the extent of one third of the next assets after payment of funeral expenses and debts, unless the excess is rendered valid by the consent, given after the death of the testator, of the inheritors whose rights are infringed thereby. A consent prior to death is of no avail, because

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rights of inheritance vest in the heirs only after death and a prior release or renunciation is prohibited under the Mahomedan Law. (*Kinnaird, J. C. and Raymond, A. J. C.*) MT. BHAGBHARI v. MT. KHATUN. 80 I. C. 118.

— — — Will—Exclusion of heir—Effect MT. AMRIT BIBI v. MUSTAFA HUSSAIN. 77 I. C. 66

— — — Will—Legacy of one third of estate—what is included in. MIRZA MAHOMED v. OFFICIAL ASSIGNEE. 77 I. C. 755.

MAJORITY ACT, S. 2—"To act in the matter of dower"—Meaning of.

"To act in the matter of dower" means to act or do such acts as may relate to the dower.

A contract entered into by a Mahomedan husband, who is a minor under the Majority Act but a major according to his personal law, to pay dower to his wife is valid and there is nothing in S. 11 Contract Act invalidating the same. (*Suhrawardy and Duval, JJ.*) MUZHARAL ISLAM v. ABDUL GANI ALA. 80 I. C. 914 : 1925 Cal. 322.

— — — S. 2 (a)—Indian Christians—Minority—When ceases

Under S. 2 (a) of the Indian Majority Act, in the case of an Indian Christian the age of majority for purposes of a divorce suit is 21 and if one of the parties is below that age, a guardian should be appointed for him or her. (*Kennedy, J. C.*) G. E. G. R. v. E. M. R. 79 I. C. 535 : 1925 S. 95.

— — — S. 3—Married woman governed by the Succession Act (X of 1865)—Guardian appointed by Court—Age of minority extends to 21 years of age—Incapacity to make a will. See SUCCESSION ACT, Ss. 3 AND 46. 28 C. W. N. 527.

— — — S. 3—Person cannot be major with respect to one and minor with respect to another property.

Where minor was adopted after 18 but before 21 years of his age and a guardian had been appointed before his 18th age.

Held, that he cannot be minor with respect to the property of his natural father and major with respect to the property inherited by him from his adoptive father. (*Mukerjee and Dalal, JJ.*) MT. CHAMBE v. TARA CHAND. 1924 All. 892.

MALABAR LAW—*Devaswom*—Uralan—Nambudiri who returns from jail if can continue as *uralan*—*Melcharth* by *de facto* manager—Validity.

In the case of a Nambudiri *uralan*, continuance in caste is an essential requisite for his continuance as *uralan*. If he is convicted and returns from jail he loses caste and cannot continue as *uralan*. A *melcharth* granted by the two other *uralans* and another member of the *illam* who acted as *de facto uralan* is valid. (*Krishnan, J.*) HARIHASA AIYAR v. UKKANDAN VARIAR. 81 I. C. 498 : 1925 Mad. 207.

— — — Kanam—Renewal during the currency of a prior Kanam—*Bona fide* Settlement of disputes—Karnavan misappropriating benefit—Liability of Kanomdar. 75 I. C. 476.

MALABAR LAW.

— Karnavan—Alienation of tarwad property—Junior members—Minors—Suit to set aside alienation—Limitation—Art. 144 applicable and not Art. 44 or 91. See LIM. ACT, ARTS. 91 AND 144. 46 M. L. J. 340.

— Karnavan—Powers of. MEENAKSHI NETHIAR AMMA v. PARVATI NETHIAR.

1924 Mad. 174.

— Nambudris—Law applicable—Special usage—Pleading and proof *Nambudris illoom*—Mortgage by step-mother of family property—Necessity—Existence of, if validates mortgage.

Nambudris of Malabar are governed by the Hindu law as laid down by Mitakshara except so far as it is shown to have been modified by usage or custom having the force of law. In dealing with Nambudris courts will apply the ordinary Hindu Law unless either party shows that the special usage or custom unknown to the ordinary Hindu Law has either been established by precedents or adduces evidence in the trial in proof of such usage. When such special usage is not pleaded or proved in the trial court, the High Court would not, on second appeal, allow the parties an opportunity to amend their pleadings and adduce evidence in support of the usage.

A Nambudri's *illoom* consisted of a father who was an idiot, his two sons who were minors, and their step-mother who was managing the household and looking after the minors. The step-mother borrowed money on a mortgage of the family properties for family necessity. A suit to enforce the mortgage *held*, that the mortgagor had no authority either as guardian of the members of the family or as its surviving efficient member to mortgage the family estate and that the mortgage was not enforceable against the family properties (*Jackson, J.*) NARAYANAN NAMBUDDRI v. RAVUNNI NAIR. 20 L. W. 876; 35 M. L. T. (H.C.) 127; 1924 M. W. N. 792.

1925 Mad. 250; 47 M. L. J. 986.

— Stanom—Stanomdar—Power of alienation. 1924 Mad. 247.

— Tarwad Gift - *Putravakam* gift—Absolute property of the donee.

A Mahomedan of North Malabar following the Marumakkattayam Law was the sole survivor and senior member of his tarwad. He executed a deed of gift to his daughter referring her in the singular and the deed went on to say that "in future except for you and your offspring (*Santanam*) there is no claim, concern, or right of entry for me over this paramba you and your *santanam* should hold the said paramba in possession and enjoy the same as your *jeninom*." *Held*, that the gift was not for the donee's exclusive benefit but for her children also and that the property gifted was therefore *putravakam* property belonging to the donee's *tavazhi*. 16 M. 201; 29 M. 22; 38 M. 79; 39 M. 317 *Ref. Wal lace, J.* GHATHOTH PARKUM K. K. KUNHAMMAD KUTTI v. PARAMBATH C.E. P.K. CHERIA MAMMAD. 20 L. W. 41; (1924) M. W. N. 480; 1924 Mad. 787; 34 M.L.T. 238 (H.C.); 79 I. C. 886; 47 M. L. J. 679.

— Tarwad—Grant of property for life time of a member—Reverter to tarwad—Limitation.

MALABAR LAW.

Where property is granted to a member of a tarwad for his life by the tarwad, the property reverts back to the tarwad on the death of the grantee and it is competent to the manager of the tarwad for the time being to sue for recovery of the property on the grantee's death. Any incumbrance created by the grantee would cease to be binding on the property after the death of grantee and there is no question of adverse possession against the tarwad during the life time of the grantee (*Madhavan Nair, J.*) THITHI KUTTI v. NELLAYA VARIATH.

(1924) M. W. N. 526; 82 I. C. 183.

1925 Mad. 225.

— Tarwad—Karnavan—Partnership with strangers—Dissolution—Right of junior members of the Tarwad or Tavazhi.

Where the Karnavan of a Malabar Tavazhi enters into a partnership with strangers for the purpose of carrying on a trade, the Karnavan is the trading partner and represents the interests of the Tarwad. That being the case the members of the Tavazhi would have no right to interfere in the management of the affairs of the partnership so long as it was a going concern. But when once the partnership has been dissolved, the junior members of the Tavazhi would not be bound by any arrangement entered into by the Karnavan whereby he takes a smaller share of the assets of the partnership than the Tarwad would be entitled to on the taking of accounts at the date of the dissolution of the partnership (*Spencer and Devados, JJ.*) OTTAPUDAKKAL THAZHATH SOOPI v. K. P. C. ABDULLA. 20 L. W. 390; 82 I. C. 198; 1924 Mad. 909; 1924 M.W.N. 782; 47 M.L.J. 554.

— Tarwad and tavazhi—Acquisitions by Karnavan—Presumption—Alienation of tarwad property for maintenance by Karnavan—Right of junior members to set aside—Denial of rights of tarwad in Tavazhi Karar—If works out of forfeiture.

In the absence of evidence to the contrary, there is a presumption that property acquired by the Karnavan of a Tavazhi was acquired for the Tavazhi and with the Tavazhi funds and this presumption must prevail unless the person who avers that such property is his, self acquisition proves that fact by evidence. Junior members of a Tarwad cannot set aside an arrangement that has been made by the Karnavan for the enjoyment of the Tarwad properties by the members thereof. It is only the Karnavan that can ask for return of possession from them. The members of a Tavazhi who were in possession of certain Tarwad properties under a maintenance arrangement made by the Karnavan made a statement in a Karar that those properties were the *jeninom* property of the Tavazhi. A suit was filed by some of the junior members of the Tarwad for recovering possession of the same, whereupon the defendants admitted the title of Tarwad but claimed the value of improvements for the Tavazhi. *Held* the denial of title in the Karar is no ground for taking away possession from the defendant as the case is different from a tenant's forfeiture of rights by denying the title of his landlord. (*Krishnan, J.*) APPATTA CHATHU NAMBIAR v. SEKHARAN NAMBIAR. 47 M. L. J. 695.

MALICIOUS PROSECUTION.

———Tarward—Tavazhi—Exclusion of male members—Custom. 1924 Mad. 28.

MALICIOUS PROSECUTION—Cause of action—Damages—Essentials to be proved—Prosecution—What amounts to.

In an action for malicious prosecution the plaintiff has to prove—

(1) that he was prosecuted by the defendant, (2) that he was innocent of the charge upon which he was tried, (3) that the prosecution was instituted against him without any reasonable and probable cause, (4) that it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect. The plaintiff must prove his innocence beyond doubt.

If a Court takes action as a result of a prior malicious proceedings originated by the defendant, the latter cannot escape liability on the excuse that the Court had acted of its own motion. Inquiry should be aimed at a discovery whether the Court in taking action was or was not influenced by the proceedings of the defendant. Where a person accused of an offence makes a confession incriminating another as co-accused as a result of which proceedings are taken against the latter, he is liable in an action for malicious prosecution. (*Dalal, J. C. and Cuming, A. J. C.*)

BADRI SAH v. BALBHADDAR SINGH.

10 O. L. J. 468 : 79 I. C. 697 : 1924 Oudh 145.

———Damages—Malice—Proof of—Conviction by first Court—Acquittal on appeal—Effects of.

It cannot be laid down as a hard and fast rule that a suit for malicious prosecution is not maintainable where there is a conviction by the court of first instance and an acquittal by the appellate Criminal Court. 21 A. 26 Dist. (*Mukerjee, J.*)

MADHO SINGH v. MANGAL SINGH.

L. R. 5 A. 375 : 79 I. C. 1023 : 1924 A. 535.

———Damages—Malice—Proof of—Indirect motive—Advice of Counsel—Effect of—Quantum of damages—Interference on appeal.

Where in an action for damages for malicious prosecution the Court finds that the defendant preferred an unfounded criminal charge against the plaintiff with the indirect motive of bringing pressure on the latter to settle a civil dispute then pending between the parties, the defendant must be held to have been actuated by malice. The opinion of Counsel as to the propriety of instituting a prosecution will not excuse the defendant from liability unless he shows that he laid all the facts of his case fairly before him and acted *bona fide* on the opinion given by that Counsel. *Ravenga v. Mackintosh*, 2 B. & C 593 referred to.

In an action for damages for malicious prosecution the trial Judge has a wide discretion, on the facts of the case before him, to say what, in his view, the damages should be; and an appellate Court will not substitute its own discretion and interfere with the award of damages unless it finds that the trial Judge erred in law in awarding the damages that he did.

MASTER AND SERVANT.

(*Schwabe, C. J. and Ramesam, J.*) *NURSE v. RUSTOMJI DORABJI.* 46 M.L.J. 353 : 19 L.W. 397 : 34 M. L. T. (H. C.) 25 : (1924) M.W.N. 382 : 77 I. C. 787 : 1924 Mad 565.

———Prosecutor—Person acting behind the scenes—Liability of Damages.

Though a criminal prosecution was not actually launched by the defendant but it was found that the defendant engaged vakils to instruct the Public Prosecutor, and to cross-examine the defence witnesses and when the Magistrate dismissed the case, the defendant applied to the District Magistrate for revision of the order and for further enquiry and it was also further found that the defendant was actuated by malice, held that for all practical purposes, the defendant was the real prosecutor and he was liable in damages.

The question in all cases of this kind must be, who was the prosecutor. And the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion. The conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say that the prosecution was instituted and conducted by the Police. Theoretically all prosecutions are conducted in the name of the Crown but in practice this duty is often left in the hands of the person immediately aggrieved by the offence. The foundation of the action is malice, and malice may be shown at any time in the course of the enquiry. (*Daniels and Neave, JJ.*) *RADHAKISHAN v. KEDAR NATH.* 46 A. 815 : 22 A. L. J. 761 : 80 I. C. 874 : L. R. 5 A. 536 : 1924 A. 845.

MANDAMUS—Writ of—Power of High Court to issue—Conditions to be fulfilled—Injury to property, franchise or personal right—Demand and refusal of Justice—Alternative remedies available—Effect of. See SP. REL. ACT, S. 45. 40 C.L.J. 44.

MASTER AND SERVANT—Dismissal without notice—Justification.

It is open to a master before the expiry of the full term of service and without serving any notice beforehand, to dispense with the services of a skilled servant employed for a particular work on the ground that he found him unfit for it. If want of notice is alleged, the servant will have to prove either a stipulation as to notice in the terms of his engagement or a custom requiring such notice. In an action for wrongful dismissal it is a sufficient defence if the master can show that a good ground for dismissal existed, even though he alleged another ground or was unaware of it at the time. There is no difference in principle between a dismissal for incompetency or for negligence and misconduct. All these are questions of fact. Where a skilled labourer is employed there is an implied warranty on his part that he has the skill reasonably necessary to the task. In such cases, even if the agreement is for a term, the master can dismiss for good cause at any time. (*Kinkhede, A. J. C.*) *PANDURANG v. JAIRAMDAS.*

82 I. C. 727.

———Liability of master for acts of servants—Criminal law.

MASTER AND SERVANT.

Where a particular intent or state of mind is not of the essence of an offence a master can be made criminally liable for his servant's acts if an act is expressly prohibited but not otherwise, and he cannot be so made liable if the act provides for liability for permitting and causing a certain thing unless it can be shown that the act was done with the master's knowledge and assent, express or implied. (*Greaves and Duval, JJ.*)
VARAJ LALL v. EMPEROR. 28 C.W.N. 854.
 51 Cal. 948; 82 I. C. 137; 25 Cr. L. J. 1209; 1925 Cal. 985.

——— *Notice for terminating contract—Period.*

The service of a servant paid by the month can be terminated after 14 days' notice in the absence of an express agreement or established custom to the contrary. (*Moti Sagar, J.*) **GANGA RAM v. DUNI CHAND BHANDARI.** 78 I. C. 763.
 1925 Lah. 186.

MAXIM—*Falsus in uno falsus omnibus*—*Application in India of the principle of—Evidence believed against some accused but not against others, whether a ground for interference in revision.*

Held, that the principle *falsus in uno falsus in omnibus* cannot be universally applied in India and the fact that statements of witnesses are believed against some and not against the other accused persons, is no ground for interference in revision. (*Pullan, A. J. C.*) **PRAG v. EMPEROR.**

1 O. W. N. 473; 10 O. & A. L. R. 871;
 82 I. C. 33; 25 Cr. L. J. 1169;
 11 O. L. J. 693; 1925 Oudh 65.

——— He who seeks equity must do equity—Meaning of. See 82 I. C. 309.

——— *In pari delicto potior est conditio possidentis*—Applicability. See—EQUITY.

78 I. C. 260.

MEDICAL CERTIFICATE—Medical certificates by qualified doctors should be accepted as true, unless there is reason to believe they are not genuine. See Cr. P. Code, S. 526. 81 I. C. 126;
 25 Cr. L. J. 638; 1925 Lah. 101.

MEDICAL DEGREES ACT (VII OF 1916), S. 6—*Addition of initials to sign board—Offence.*

A person was conducting a dispensary with a sign board which contained the initials M. D. B., L. M. H. attached to his name. They were contractions for Doctor of Biochemic Medicines and Licentiate of Homœopathic Medicines. He was convicted under S. 6 of the Medical Degrees Act. Held, the conviction was wrong in as much as the initials did not represent any degree, diploma, license or certificate issued by any body or society referred to in the section.

Quære: if such a person could call himself a Doctor and escape liability under the section? (*Kennedy, J. C. and Raymond, A. J. C.*) **ATAL RAI KISHENCHAND v. EMPEROR.**

25 Cr. L. J. 709; 81 I. C. 197; 1925 Sind 71.

MESNE PROFITS—*Acceptance of—Rent—Effect.*

Acceptance of rent, though under mistake of law, from trespasser disentitles owner from

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claiming mesne profits. (*Lord Shaw*) **MITRA SEN SINGH v. MT. JANKI KUAR.** 20 L.W. 566;
 26 Bom. L. R. 1134; 40 C. L. J. 468;
 35 M. L. T. 247 (P. C.); 46 A. 728;
 51 I. A. 326; 1 O. W. N. 426; 82 I. C. 946;
 1924 P. C. 213; 47 M. L. J. 591.

——— *Joint Hindu family—Alienation of co-parcener's share or interest—Alienee in possession—Not liable for past profits. See HINDU LAW, JOINT FAMILY.* 26 Bom. L. R. 464.

——— *Liability for.*

Wrongful possession essential—Lands under attachment under S. 146, Cr. P. Code—Defendant not liable for mesne profits for period of attachment. See C. P. CODE, S. 2 (12).

39 C. L. J. 447.

——— *Jurisdiction—Sum claimed in excess of pecuniary jurisdiction—Procedure.*

1924 Cal. 167.

——— *Measure of—Basis of calculation—Lands in the possession and cultivation of defendant—Allegation of cultivation at a loss for successive seasons—What should plaintiff prove. See C. P. CODE, S. 2 (12).*

47 M. L. J. 730.

——— *Proof of—Burden on trespasser of proving receipts from land.*

In a suit for mesne profits against a trespasser as soon as the plaintiff has given some evidence proving *prima facie* that the profits were somewhere about the sum he alleges, the burden of proving that they were less shifts to the shoulders of the defendant. It must not be supposed that it is for the person out of possession to prove what profits the man in possession of his property made out of it, and that the latter can be made to pay only so much of the profits as the ousted owner can manage to find evidence to prove in detail in the face of opposition from the trespasser who is the only person who knows anything about it. (*Halifax, A. J. C.*) **JAI LAL SAO v. LAL FETEH SINGH.** 20 N. L. R. 52; 75 I. C. 826;
 1924 Nag. 117.

——— *Right to—Mortgagee purchasing property at Court sale—Right of landlord to apportionment.*

Where a mortgagee purchases the mortgaged land at a court auction sale and obtains possession after confirmation of the sale he is entitled to the whole of the paddy rent from the land which falls due at the end of the agricultural year in which he makes the purchase. The landlord has no claim for apportionment but in cases where the landlord has equities in his favour or in the case of rent accruing monthly, a claim for apportionment may be made. 2 B. 670 appr. (*Lentaigne, J.*) **U KYAW ZAN v. AH DOE.**

3 Bur. L. J. 151; 1924 Rang. 365.

——— *Suit for—Effect of proceedings under S. 145, Cr. P. C.* 1924 Mad. 224.

MINES AND MINERALS—*Surface land not covered by the grant—Use of.*

It is settled law that a right of using the surface to which the mine owner may be entitled by implication is confined to such things as are reasonably and strictly necessary for the convenient

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working of the mines, (*C. C. Ghose and Panton, JJ.*)
HARIPADA BANDOPADYA v. EQUITABLE COAL CO.,
 LTD. 1923 Cal. 335.

MINERALS — Permanently settled estate—
 Rights of Zamindar and Government. See
 GRANT-CONSTRUCTION. 1924 F. R. C. C. 201.

MINOR—Agent appointed by guardian—Suit
 against agent—If maintainable.

A minor can maintain a suit against an agent
 appointed by his guardian for the benefit of the
 estate, in all cases and particularly in respect of
 properties received by the agent and not account-
 ed for to the guardian. (*Coutts, Trotter, C. J.,*
Ramesam and Wallace, JJ.) *SUYAMPRAKASAM v.*
MURUGESA PILLAI.

35 M. L. T. (H. C.) 8 : 20 L. W. 272 :
 1925 Mad. 17 : 81 I. C. 779 : 47 Mad. 774 :
 47 M. L. J. 205.

———Contract of guardian — Estate when
 bound.

A guardian cannot bind his wards estate except
 by a document purporting to bind it. Where a
 guardian contracts a debt to pay land revenue,
 the minor's estate will be bound inasmuch as the
 assessment is a necessary charge. (*Baker, J. C.*)
JAGESHWAR RAO v. GUJAB RAO.

1924 Nag. 168.

———Contract for sale by *de facto* guar-
 dian—No specific performance against minor.
 See SPECIFIC RELIEF ACT, S. 27. 2 Pat. L. R. 181.

———Decree against—Appointment of certi-
 ficated guardian of minor—Subsequent adoption
 of minor—Partition suit against father—Decree
 against minor—Whether binding on him.

After the appointment of a certificated guardian
 for the person and property of a minor boy he
 was adopted by another person. During the mi-
 nority of the boy, the appellant sued the adoptive
 father for partition of a house. The adoptive
 father died after the conclusion of the hearing and
 delivery of judgment. The minor boy was brought
 on record but no guardian *ad litem* was appoint-
 ed. The minor contested the suit by engaging
 counsel. Against the preliminary and final de-
 crees passed in the suit the minor unsuccessfully
 appealed. Subsequently he sued to set aside the
 decrees as not binding on him. *Held*, that a
 guardian having been appointed for the minor,
 he continued to be such till the age of 21 and
 that the decrees passed against the minor without
 being represented by a guardian were not bind-
 ing on him. 4 Pat. L. J. 240 : 30 C. 1021 : 32 C.
 296 : 20 A. L. J. 329 Ref. (*Mukerjee and Dalal, JJ.*)
CHAMPI v. TARA CHAND. 22 A. L. J. 665.

L. R. 5 A 502 : 82 I. C. 516 (2) : 46 A. 744 :
 1924 A. 892.

———Decree against—Consent of guardian
ad litem—Whether must be expressed or may be
 implied—Want of consent—Effect on decree.
 See C. P. CODE, O. 32, R. 4 (3). 47 M. L. J. 273.

———Decree against Ex parte—Suit by minor
 for declaration that decree against was nullity—
 Irregular appointment of guardian—No pre-
 judice to minor—Effect of.

MINOR.

Where the minors in a suit, sought to set aside
 an *ex parte* decree passed against them, as minors
 under their father's guardianship on two grounds,
 (1) that their father was irregularly ap-
 pointed, (2) that they were prejudiced by his
 appointment, as there was no pious obligation
 on their part to pay their father's debts during his
 life time. *Held*, as regards (1), that under O 32,
 R. 4 (3) though no person could be appointed guar-
 dian without his consent, in this case consent
 must be presumed, as he was given an oppor-
 tunity to object to his appointment, and he did
 not do so, (2) and that there was no defence open
 to the minors which the father would not have
 taken in the previous suit and that the second
 contention was exploded by the F. C. decision in
 46 A. 95, *Narayan v. Mangal Prasad* (*Daniels*
and Neave, JJ.) *RAJA BABU v. BALMUKUND AND*
OTHERS. L. R. 5 All. 692 (Civ.).

———Decree against—Guardian absent—Cross
 negligence.

Where though the guardian of a minor defend-
 ant had taken out subpoenas for witnesses he
 was absent at the hearing and hence his pleader
 could not explain what steps had been taken, and
 on an adjournment being refused a decree was
 passed against the minor, the guardian is guilty
 of gross negligence and the decree is not binding
 on the minor. (*Devadas, J.*) *DADA SAHIB v.*
GAJRAJ SINGH. 20 L. W. 854 : 1925 Mad. 204 :
 47 M. L. J. 928.

———Decree against—No proper represent-
 ation—Decree set aside—Effect

Where a decree passed against a minor defend-
 ant is set aside on the ground he was not prop-
 erly represented, plaintiff is entitled to have a
 fresh hearing on the suit after remedying the
 defect in representation as the setting aside of the
 decree is to revive the original suit and restore
 the *status quo ante*. (*Suhawardy, J.*) *ICHHAMOYI*
PAL v. PEARYMOHAN SAH 78 I. C. 427.

———Decree against—Res-judicata—Condi-
 tions—Gross negligence of guardian *ad litem*—
 Omission to rely on material evidence—Effect of,
 see C. P. CODE, S. 11. 47 M. L. J. 700.

———Decree against—Sanction of court—
 Effect of—Negligence of guardian.

Failure by a guardian to take a wholly untenable
 objection cannot be regarded as negligence on his
 part and where a compromise decree binding the
 minor has been sanctioned by Court, it is not
 competent to the minor to impeach it (*Schwabe,*
C. J. and Waller, J.) *SIVA SUBRAMANIA PILLAI*
v. RAKKUMUTHU MOOPPAN. 19 L. W. 502 :
 (1924) M. W. N. 454 : 79 I. C. 418 : 1924 Mad. 645.

———Execution sale—Minor not properly
 represented—Sale not a nullity. See EXECUTION
 SALE, MINOR 39 C. L. J. 284.

———Guardian *ad litem*—Appointment of
 Head Clerk of the Court—Omission of notice to
 person having custody of minors—Irregularity—
 Effect on decree. See C. P. CODE, O. 32, R. 3 (5).
 46 M. L. J. 363.

———Guardian Contract for sale of immov-
 able property—Enforceability—Subsequent sale to
 another for higher price—Right of vendee under
 prior contract—Sp. performance.

MINOR.

Under the Hindu Law it is competent to the guardian of a minor to enter into a valid contract for the sale of his immovable property for the purpose of discharging debts of the minor's father for which the property in the minor's hands would be liable. 36 M. L. J. 29 and 42 Mad. 185 Rel. on.

The contract for sale by the guardian if entered into in the interests of the minor and for a proper price, can be enforced against a subsequent purchaser of the property with notice, even though the latter has bought it for a higher price than that stipulated under the prior contract 29 A. 213. Dist (Dera-doss, J) KASIVASI CHIDAMBARA SWAMIGAL v. RAMAKRISHNA REDDIAR.

20 L. W. 559 : 35 M. L. T. (H. C.) 110 :

1924 Mad. 863 : 82 I. C. 926 :

(1924) M. W. N. 878 : 47 M. L. J. 683.

———Guardian — Powers of — Expenses — Authority to incur. 1924 Lah. 339.

———Lease in favour of — Guardian acting for the minor — Lease when binding. MT. HAFIZAN v. AKHLESWARI PRASAD. 1924 P. 186.

———Mortgage in favour of — Enforceability.

A mortgage in favour of a minor is enforceable by the minor where the consideration for the assignment has been paid in full to the assignor and the minor is therefore under no obligation to any one and not precluded from suing on such contract : relying on *Steinberg v. Seala, Ltd.* 92 L. J. 944 Ref. 40 M. 308 ; 38 A. 62 ; 38 A. 154 ; 33 A. 657 ; 28 I. C. 451 Foll. 30 Cal. referred to. (*Broadway and Campbell, JJ.*) THAKURDAS v. MST. PUTLI. 82 I. C. 96 : 5 Lah. 317.

———Sale in favour of — Validity of — Covenants annexed to contract of sale — Enforceability. See DEED CONSTRUCTION. 46 M. L. J. 464.

———Specific performance of contract to sell entered into by manager of joint Hindu family against minor members. See SPECIFIC PERFORMANCE. 46 M. L. J. 575.

———Sale by guardian — Avoidance of sale — Conveyance of properties to stranger. 1924 Mad. 322.

———Seeking relief — Equity — Estoppel. 75 I. C. 269.

———Transferee cannot challenge validity. 75 I. C. 99 : 6 Lah. L. J. 42.

MORTGAGE — Consideration — Onus of proof of — Suit to enforce mortgage — Transfer of Property Act, Ss. 86–90 — Mortgage — Consideration for it being payment of debt due to third party by mortgagor — Non-payment thereof by mortgagee — Effect — Suit by mortgagee to enforce mortgage — Maintainability — Right to decree for sale.

Firm P. of which the respondent and V were partners owed a debt to firm O. On the dissolution of firm P, its business was taken over by the respondent, who also became personally responsible for its debts and liabilities, including the debt due to firm O. On 12th May, 1910, the amount of the debt due to firm O was Rs. 36,000. On that date the respondent executed in favour of S, a *benamidar* for V, a mortgage for Rs. 20,000.

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a promissory-note for Rs. 16,000 and a letter which recited the execution of the mortgage and of the pro-notes, directed and to pay the sum of Rs. 36,000, the amount secured by the mortgage and by the promissory-note, to firm O and to tell that firm that it should be credited towards firm P in their account, and promised to send S the money on the due date.

In a suit to enforce the mortgage of the 12th May, 1910 by the assignee, it was found that, though the deed stated to be for consideration received, and, on the face of it, bore no relation at all to the dissolution agreement of firm P, the record of the transaction of 12th May, 1910 was not to be found in the mortgage of that date, but in the mortgage, the pro-note and the letter of that date, that no consideration passed for the mortgage of that date, and that the respondent was required by V to give to him, in the name of S, his *benami*, the suit mortgage and the promissory note for the reason that firm O were pressing V to pay their debt and the respondent was neglecting to settle it. It was further found that V had not at the date of suit paid anything to firm O.

Held, that the plaintiff had entirely failed to establish any case whatever, either for a decree or for an account.

Ss. 86-90 of the Transfer of Property Act no embodied in effect in O. 34 of the Schedule to the C. P. Code, protect a defendant-mortgagor against a decree for sale, unless the amount due upon his mortgage, if not admitted, has either at the hearing been proved by the plaintiff or has been ascertained after the hearing by an account then directed on, of course, a case for the taking of such an account having by evidence first been made. (*Lord Blanesburgh*.) VEERAPPA CHETTY v. ARUNACHELLAM CHETTY.

26 Bom. L. R. 661 : (1924) M. W. N. 559 :

20 L. W. 368 : 35 M. L. T. (P. C.) 161 :

47 M. L. J. 168.

———Consideration — Part payment — Agreement to pay balance on certain day — Payment on later day — Acceptance of payment — Effect.

Portion only of the consideration for a mortgage was paid at the time of the transaction and it was agreed the balance was to be paid on a certain date. It was not paid then but later when it was accepted. *Held*, the acceptance amounts to a waiver of the term and a suit could be brought for the whole amount. (*Jwala Prasad and Ross, JJ.*) MT. BIBI HAFIZUNNISSA v. IMAMUDDIN KHAN. 1924 P. 825.

———Consideration — Proof of — Recitals.

Where in a mortgage suit execution is admitted or proved, the mortgagor has to prove that recital of consideration is false. If the person contesting is a stranger, recitals as to consideration are not binding on him and the ordinary rule applies. (*Kinkhede, A J. C.*) BALIRAM v. KAMALJA.

1924 Nag. 367.

———Construction — Interest if charge — Redemption.

Under 'a mortgage deed the mortgagor was to pay interest regularly every year. On default

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the mortgagee could recover principal and interest by sale and there followed a clause that the mortgagor could redeem at any time by payment of a fixed sum, the mortgage amount. *Held*, on a construction of the deed, redemption did not involve payment of interest, but the mortgagee could bring a suit for the sale of the property for unpaid interest. In such a suit, he could claim interest subject to a maximum of 12 years under the Limitation Act. (*Harrison and Raoof, JJ.*) *RAMJI LAL v. MUNSHI LAL.* 79 I. C. 24.

Construction—Interest—Profits—Appropriation of profits towards interest—Redemption.

A mortgage at its inception was simple mortgage deed for a sum of Rs. 82,000 repayable at the end of five years. During that term interest at 9½ anwas per cent, per mensem was to run with six monthly rests. It was stipulated in the first clause that if the interest be not paid on due date it would be added to the principal and interest at the above rate would run on the total amount of principal and interest. The second clause gave the mortgagor power to redeem the mortgaged property on payment of the entire principal, interest and compound interest after five years in the fallow season. The third clause gave the mortgagee option to take possession of the mortgaged property in lieu of principal amount for a period of 12 years from the date of entering into possession in default of payment of four consecutive instalments of interest or on the property not being redeemed at the end of five years, or to permit interest to run on the principal at the compound rate. Under the fifth clause the mortgagor declared that he will have no right of redemption during the period of 12 years if the mortgagee took possession. Interest was not paid on the stipulated dates and the principal also fell due. The mortgagee thereupon sued for possession of the mortgaged property and obtained a decree. Before the expiry of 12 years from the taking of possession by the mortgagee, the mortgagor brought a suit for redemption which was dismissed by the courts in India, but decreed by the Privy Council. In due course a preliminary and final decree for redemption were subsequently passed. The mortgagee appealed against both the decrees and claimed more interest than was allowed by the Court below. *Held* that under the terms of mortgage, the mortgagee was not entitled to any interest at all. The profits of the property were to be appropriated not only towards the interest on Rs. 82,000 the original principal amount but on the whole amount of principal and interest due at the time when the mortgagee took possession. (*Dalal, J. C. and Neave, A. J. C.*) *RAJA SETH SWAMI DAYAL v. RAJA MAHOMED SHER KHAN.* 11 O. L. J. 148.

Construction—Mortgage with possession and lease back—Part of the same transaction. See C. P. CODE, O. 34, R. 14. 47 M.L.J. 798.

Construction—Personal liability of executant—Fiduciary capacity, when presumed.

Where there is nothing in a mortgage deed to show that the mortgagor is acting in a fiduciary capacity, viz. as guardian of an adopted son, and the evidence in the case showed the mortgagor throughout ignored the adoption and the mort-

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gagee was a near relation who must have known all the facts, there is no warrant for drawing the presumption that the mortgagor acted otherwise than in his personal capacity. In each case the language of the document and the circumstances in which it was executed have to be considered. (*Ramesam and Jackson, JJ.*) *AMMAKANNU AYI v. MURUGAYYA ODAYAR.* 47 Mad. 850.

(1924) M. W. N. 623 : 1924 Mad. 716 : 20 L. W. 207 : 47 M. L. J. 85.

Construction—Right to redeem—Interest—If payable before redemption. 1924 P 302.

Construction—Suit for sale—Difficulty in obtaining possession.

Under a usufructuary mortgage, the mortgagee was entitled to sue for sale in case there was any "filur" in obtaining possession. *Held*, that he was entitled to sue for sale if there was difficulty in obtaining possession. (*Dalal, J.*) *SHEO KUMAR PANDEY v. BABU NANDAN DUBE.*

L. R. 5 A. 431 : 1924 A. 928.

Creation of—Foreclosure—Agreement with mortgagor to allow redemption in 4 years—Effect.

A foreclosure decree having been passed, and money not being paid in time, the mortgagee sued for possession as owner. The suit was compromised and possession was given to the mortgagee but the mortgagor could if he paid a certain sum in 4 years get back the property. *Held*, this did not amount to the creation of a new mortgage and the mortgagor could not claim to redeem the lands after the expiry of 4 years. The old mortgage had ceased to exist and the mortgagee had become a full owner. (*Martineau and Moti Sagar, JJ.*) *KOKAN v. SOHAN.* 1924 Lah 696.

Crops to be grown—Effect—Bona fide purchaser—Rights of.

A mortgage of a future crop, neither sown nor cultivated at the time, is recognised and enforced in India as an executory agreement binding on the parties to the transaction. The transaction is not governed by the T. P. Act or the Contract Act in so far as it is neither a mortgage of immoveable property nor a pledge of existing moveable property. It is in the nature of an agreement to mortgage immoveable property that may come into existence in future and as such it creates an equitable charge which is valid and enforceable. But a bona fide purchaser of such property without notice of the prior charge is not liable for the money due under such a charge. (*Kanhaiya Lal, J.*) *RAM SARUP v. LALA MOHAN LAL.*

1924 A. 833.

Decree—Execution—Limitation.

1924 Cal. 131.

Decree—Construction—Form immaterial—Decree directing execution by sale of mortgaged property.

Where the Court in a suit on a mortgage ordered that a decree be granted *ex parte* against the defendants and further added that the decree could be executed by sale of the villages hypothecated.

Held, that the decree must be regarded as a mortgage decree, notwithstanding the fact that

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it was incorrect in form and the property had been attached and list of subsequent usufructuary mortgages had been entered in the sale statement. 26 C. 166, 22 I. C. 293; 107 C. 975; & 22 A. 401 Ref. (*Kendall and Pullan, A. J., Cs.*) MT. RAJ KUNWARI v. MT. RAVI MAHRAJ KUNWAR.

82 I. C. 832 : 1 O. W. N. 710.

—Decree — Nature of—Specific performance.

A mortgage decree is practically a decree for specific performance of the contract between the mortgagor and mortgagee. (*Das and Ross, JJ.*) ABDUL HADI v. MT. KABULTUNISSA.

80 I. C. 901 : 1925 P. 139.

—Decree for sale—Power of Court to direct conditions as to order of sales.

It is not open to a Court when passing a decree on a mortgage to direct the mortgagee to proceed against certain items in the first instance, in the absence of circumstances justifying that course. (*Devadoss and Madhavan Nair, JJ.*) ANANJAPERUMAL KONAR v. PICHAMUTHU NADAR.

20 L. W. 968 : 47 M. L. J. 910.

—Final decree in — Application for—Limitation—C. P. Code, S. 105—Ex parte decree—Propriety of—If and when can be questioned in appeal from final decree in suit—Mortgage suit—Ex parte decrees preliminary and final in—Order setting aside final decree while retaining preliminary decree—Propriety of—If can be questioned in appeal from final decree.

An application for a final decree in a mortgage suit is a proceeding in the suit and not in execution. Only one such application is permissible, and it must be put in within three years of the preliminary decree. An order setting aside the *ex parte* final decree in a mortgage while retaining the *ex parte* preliminary decree therein is an order "affecting the decision of the case" within the meaning of S. 105, Civil Procedure Code. The propriety of such an order can be challenged in appeal against the decree finally passed in the suit. (*Wallace and Jackson, JJ.*) ATHAMSA ROWTHER v. GANESAN.

20 L. W. 954 :

1924 Mad. 890 : 35 M. L. T. (H. C.) 13 :

(1924) M. W. N. 884 : 47 M. L. J. 641.

—If can be created by an award out of Court.

An award though unattested and unregistered, can create a legal and valid mortgage. (*Kennedy, J., C. and Madgavakar, A. J., Cs.*) HOTCHAND BAL CHAND v. KISHEN CHAND.

1924 S. 23 :

83 I. C. 548 (2) : 17 S. L. R. 178.

—Interest—Charge on property in respect of—Rule—Exception.

The general rule is that the mortgagee in the absence of any contract to the contrary is entitled to treat the interest due under the mortgage as a charge on the estate, and it is most important that this general rule should not be shaken in any particular. *Held*, that there was nothing in the mortgage deeds in question, in the case which

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served to displace the general rule. (*Lord Dundee*) GANGA RAM v. NATHA SINGH.

22 A. L. J. 688 : 20 L. W. 101 :

26 Bom. L. R. 750 : L. R. 5 P. C. 133 :

(1924) M. W. N. 599 : 35 M. L. T. (P. C.) 141 :

6 Pat. L. T. 97 : 2 Pat. L. R. 257 :

5 Lah. 425 : 80 I. C. 820 : 11 O. L. J. 534 :

O. W. N. 469 : 51 I. A. 377 :

47 M. L. J. 64.

—Interest—Dandapat—Dispossession of mortgagee by mortgagor—Effect of.

In the case of a usufructuary mortgage where a mortgagee is in possession of the mortgaged property either in lieu of interest entirely or on the terms that he must render an account of rent and profits against interest, the rule of Dandapat would apply. But when the terms of the mortgage have been departed from, and the mortgagors have deprived the mortgagees of possession, then it is clear that that principle can no longer be considered as binding as the relationship of the parties had changed and the mortgagor must pay interest. (*Macleod, C. J. and Shah, J.*) NILKANTH BALVANT v. STRIVIDYA SHANKAR.

26 Bom. L. R. 455 : 80 I. C. 393 : 1924 Bom. 387.

—Interest—Liability to pay after period fixed for redemption. 77 I. C. 122.

—Interest—Post-diem—Presumption.

Even though a mortgage deed does not provide for the payment of interest after the date fixed for repayment of the principal money, still the ordinary presumption is that where money is lent interest would be charged all along till the repayment though the term fixed has expired. (*Lindsay and Sulaiman, JJ.*) BENAIR RAO v. PUTTAIN SINGH.

1924 A. 929 : 79 I. C. 69 :

L. R. 5. A. 335.

—Interest—Right to, whether a charge on property—Rights of mortgagee.

In the absence of a contract to the contrary, the mortgagee is entitled in a settlement of his accounts with his mortgagor to treat the interest due under the mortgage as charge on the estate and the mortgagee is entitled to all interest due under the mortgage within twelve years before the date of suit. (*Moti Sagar, J.*) BANWARI LAL v. KALLUKHAN.

6 Lah. L. J. 331 :

82 I. C. 622 : 1925 Lah. 113, (2).

—Minors—When binding on.

When the mortgagors never purported to act on behalf of certain minors and in fact even ignored the existence of the minors or their rights in the properties, the mortgage is not binding on them. (*Mukerjee and Dalal, JJ.*) LAUMAN v. KALKA PRASAD.

81 I. C. 1041 : L. R. 5 A. 729.

—Moveables—Sale of hypotheca by owner—Purchase of similar articles—Mortgagee's lien if attaches to new article.

The owner of two bulls hypothecated them to another retaining possession with himself. He subsequently sold the bulls and with sale proceeds purchased two new bulls a few days after. When a creditor tried to attach these bulls, the mort-

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gagee claimed that his hypothecation right extended to the substituted bulls. *Held*, the right of a hypothecatee of chattels does not attach itself to goods or chattels purchased with the sale proceeds of chattels or goods mortgaged, unless there is a contract that he should have a right against the substituted articles. 5 M. 330 followed. (1914) A. C. 398 referred to. The right of a mortgagee of immovable property distinguished. (*Devadoss, J.*) KANDASAMI CHETTI v. ADIMOOLA CHETTI. 1925 Mad. 275 : 47 M. L. J. 704.

—*Moveables to come into existence later—Validity—Transferee with notice—Rights of.*

A mortgage of moveables not in existence at the time of the contract is not invalid and can be enforced against a transferee who purchased it with notice of the same. (*Sulaiman, J.*) JUGAL KISHORE v. RAM NARAIN. 1923 A. 199.

—*Moveables—Title conferred.*

There can be in law a mortgage or hypothecation of moveables; such mortgage or hypothecation not accompanied by possession confers a good title upon the person in whose favour it is made and law recognises the transaction as security and equity gives effect to it. (*Mukerjee, J.*) JATINDRA CHANDRA CHOUDHURY v. RANGPOOR TOBACCO COY. 1924 Cal. 990.

—*Payment of prior mortgage—Partnership—Effect.* 75 I. C. 287.

—*Prior and puisne mortgagee—Decree on mortgage—Subsequent suit for maintenance and declaration of charge—Decree subject to rights of prior mortgagee—Sale in execution of mortgage decree—Rights of purchaser—Lis pendens.*

Where a first mortgagee sues on his mortgage without making the second mortgagee a party, brings the property to sale and purchases it, in execution, the right of the second mortgagee to redeem the first mortgage is not extinguished by the proceedings in such a suit to which he was not a party. 21 M. L. J. 213 (F. B.) ref. to.

But this rule cannot apply where the so-called second mortgage did not exist either at the time of suit or decree or even at the time of the sale in execution of the decree on the mortgage.

The doctrine of *Lis pendens* affects private alienations as well as execution sales of property in respect of which a charge is claimed in a suit for maintenance by a Hindu widow. 14 M. 491 ; 29 M. 508; 16 M. L. J. 413 relied on.

The respondent's predecessor in title obtained a decree for sale on a mortgage. Subsequently a Hindu widow sued for her maintenance and claimed a charge on the properties mortgaged, impleading the mortgage-decree holder as a party. A decree was passed for maintenance which was made a charge on the interests of the mortgagor in the properties, subject to the lien claimed by the mortgage-decree holder. Pending the suit for maintenance the mortgage-decree holder brought the properties to sale in execution and purchased them himself. The properties were then conveyed to the respondent. Later on, in execution of the decree for maintenance the properties were sold and purchased by the appellant. On a question arising as to the rights of the parties with reference to the properties sold in execution, *held* that the respondent had acquired a valid title to

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the properties. (*Schwabe, C. J., Coutts-Trotter and Ramesam, JJ.*) VENKATRAMA AIYAR v. RANGIAN CHETTY. 19 L. W. 381 :

(1924) M. W. N. 344 :

1924 Mad. 449; 34 M. L. T. (H. C.) 345 :

77 I. C. 504 : 46 M. L. J. 258.

—*Prior and subsequent—Failure to plead prior mortgage—Effect—Difference between case of mortgagor and puisne mortgagee.*

The principle of law that a prior mortgagee who though impleaded in a suit by a subsequent mortgagee fails to set up his priority is thereafter precluded from claiming priority against the puisne mortgagee or person who purchases in execution of that decree has no application as against the mortgagor or a person who has purchased the equity of redemption. The principle of the distinction explained. (*Daniels, J.*) KUNDAN LAL v. JAGAT RAM. 1924 A. 927.

—*Prior and subsequent—Failure to redeem prior mortgage—Rights of mortgagor—Equity—Covenants how far binding.*

The principle of equity that where upon a sale by the first mortgagee the property is bought by the mortgagor himself, he acquires the estate only subject to the claims of the second mortgagee is inapplicable to a case where the subsequent mortgagee takes his mortgage with full knowledge of the liabilities and risks created under the first mortgage and actually undertakes to free the property from the mortgage but still fails to carry out the obligations incurred by him. In such a case to allow the subsequent mortgagee to enforce his mortgage in full against the interest purchased would be to allow him to profit by his own laches and put a premium on default. (*Kinkhede, A. J. C.*) AMARCHAND v. SARDAR SINGH. 82 I. C. 190 : 1925 Nag. 90.

—*Prior and subsequent—Foreclosure decree obtained by puisne mortgagee—Effect—Prior mortgagee obtaining decree against mortgagor—Position of.*

A puisne mortgagee in possession obtained a foreclosure decree and thereafter a prior mortgagee obtained a decree on his mortgage and had the properties sold. *Held* the purchaser did not obtain anything, as at the time of the prior mortgagee's suit, the mortgagor's rights had been lost as a result of the foreclosure proceedings. (*Baker, O. J. C.*) MULCHAND v. BABULAL. 1924 Nag. 210.

—*Prior and subsequent—Prior mortgagee and subsequent mortgagee—Suit on both mortgages—Prior mortgagee failing to set up priority—Effect of—If debarred from suing on his own mortgage. See C. P. CODE, S. 11, Expl. IV.*

80 I. C. 389.

—*Prior and subsequent—Puisne mortgagee's suit—Purchaser at execution sale—Rights of parties.*

The mortgagor created two mortgages one after the other and later sold a portion of the property to the first mortgagee, at the same time keeping alive that mortgage. The puisne mortgagee obtained a decree on his mortgage and in execution thereof the property was purchased by the plaintiff. In a suit by the plaintiff purchaser for possession against the prior mortgagee. *Held*

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the prior mortgage could not resist the suit for possession but was entitled to redeem the property. (*Jwala Prasad and Ross, JJ.*) BIRINCHI SINGH v. SARODA PRASAD MUKHERJI. 3 Pat. 114 : 5 Pat. L. T. 95 : 75 I. C. 942 : 1924 P. 452.

—Prior and subsequent—Rights of parties.

A subsequent mortgagee with notice of the prior mortgage cannot resist a suit by the latter on the ground the condition in his mortgage operates as a clog on the equity of redemption. (*Abdul Raouf, J.*) RAHMAT ALI v. SHADI RAM. 75 I. C. 877 : 1925 Lah. 45.

—Prior and subsequent—Suit by prior mortgagee without impleading puisne mortgagee—Execution sale—Purchase by decree-holder—Subsequent suit by puisne mortgagee impleading prior mortgagee—Decree—Sale in execution—Rights of purchasers. See C. P. CODE, O. 34, R. 1. 5 Pat. L. T. 103.

—Prior and subsequent—Tenancy rent-free created by prior mortgagee in favour of mortgagor—Redemption by second mortgagee—Tenancy rights—Effect on.

Where a prior mortgagee in possession creates a rent-free tenancy in favour of the mortgagor and is himself redeemed by the subsequent mortgagee, the latter cannot claim cultivating possession from the mortgagor as if the tenant's right has become non-existent. All that he can claim is a declaration that he is not bound by the special contract exempting the mortgagor tenant from liability to pay rent. (*Kinkhede, A. J. C.*) AMARCHAND v. SARDAR SINGH. 82 I. C. 190 : 1925 Nag. 90.

—Redemption—Period fixed for redemption—Limitation.

Where a mortgage deed has fixed a period for redeeming, the mortgagee cannot foreclose before it expires, and limitation will run only from the date of expiry of the period fixed. (*Baker, J. C.*) HARBHAGAT v. NARAYAN RAO. 78 I. C. 338.

—Redemption—Proof of mortgage—Admission of defendant—Effect of.

Where a plaintiff in a suit on a mortgage fails to prove the mortgage on which he relies and which he alleges in his plaint, he cannot succeed, upon the mere fact that the defendant admits that he is the mortgagee of the land. (*Neave, A. J. C.*) JAGJIWAN SINGH v. GAJRAJ SINGH. 10 O. & A. L. R. 298 : 80 I. C. 543 : 1 O. W. 130.

—Redemption—Construction of deed—Arrears from tenants—Premia occupancy tenants. 46 A. 115 : L. R. 5 A. 1 : 79 I. C. 314 : 10 O. & A. L. R. 97 : 1924 A. 153

—Redemption—Deed of further charge—Construction—Personal covenant—Transferee of mortgage, whether bound.

A deed styled as *amasuk zari mazid* and giving no details of the property but a mere reference to the original mortgage cannot be regarded as a deed of further charge. It creates only a personal covenant against the mortgagor and does not involve his transferee in any liability (p. 681). 17 O. C. 303, Foll. 2 O. L. J. 601, 6 O. L. J. 147, 25 O. C. 135, 8 O. C. 227 dist. 9 O. L. J. 434 and 9 B. 233 ref. to. (*Neave, A. J. C.*) KANDHIYA BAKHS

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PANDE v. RAM CHARITAR. 1 O. W. N. 678 : 10 O. & A. L. R. 1065.

—Redemption—Right to—Occupancy holding—Lessee. 76 I. C. 862.

—Redemption—Satisfaction of the mortgage—Whether mortgagor entitled to interest on the Surplus money with the mortgagee, T. P. Act, Ss. 72 and 76.

Where there is no stipulation as to payment of interest on the surplus mortgage money, a mortgagor who sues for redemption is not entitled to any interest on the surplus that is found with the mortgagee after the satisfaction of his mortgage. Further Ss. 76 and 77 of the T. P. Act make no mention of payment of interest by the mortgagee, in connection with the surplus usufruct. But the mortgagor will be entitled to interest on the surplus mortgage money from the date of the institution of the suit. (*Janoji v. Janoji, 7 B 185, Lake v. Bell, 34 Ch. 462, foll. (Mookerjee and Dalal, JJ.) ISMAIL HASAN v. SYED MEHDI HASAN AND OTHERS. 22 A.L.J. 833 : 80 I. C. 63 : L. R. 5 All. 625 (Civil) : 1924 A. 881.*)

—Redemption of usufructuary mortgage—Defence of sale to the mortgagee without registered conveyance—Whether other evidence as to sale admissible—Intention of the mortgagor to extinguish the mortgage.

In a suit for redemption by the mortgagor, the mortgagee in possession pleaded a subsequent sale by the mortgagor, and that the latter is debarred from right to redeem, and it was contended, by the plaintiff that the sale is invalid (1) on account of absence of registered conveyance, *Held*, that there was a transaction which can be treated as an agreement to sell the land, and omission to execute a registered conveyance cannot disturb the title, and possession of the respondents and, where there was no evidence that the vendor refused more than three years prior to suit, to give a conveyance, and even if time for specific performance had elapsed, the same equities would apply. (*Venkateswar Damodar v. Bhimappa. 46 Bom. 722 Foll. (Duckworth, J.) MA MA E v. MAUNG TON. 2 Rang. 479 : 3 Bur. L. J. 214 : 1925 Rang. 119.*)

—Redemption—Transferee from mortgagor—Claim for interest barred—Liability to pay.

The transferee from a mortgagor is not bound at the time of redemption to pay a claim for interest which has become barred by limitation. In the case of a usufructuary mortgage, no claim for interest will arise as the enjoyment of profits takes the place of interest. (*Madhavan Nair, J.*) MANJUNATH SHANBHAGA v. SAMAYYA. (1924) M. W. N. 776 : 1924 Mad. 852.

—Sale by auction of mortgaged property—Extinction of previous mortgage—Repurchase from the auction-purchaser by the mortgagor's representative-in-interest—Revival of extinguished rights.

When the mortgaged property passes by the auction sale into the hands of a stranger, the sale extinguishes the previous mortgages, and if the property is subsequently repurchased by the mortgagor's representative-in-interest, the rights extinguished by the auction-purchaser do not come back into existence.

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Otter v. Lord Vaux, 2 K & J. 650, 23 C. 397, 25 A. 371, 29 M. 113 dist, 11 C.W.N. 284 referred to. (*Wazir Hasan and Pullan, A. J. Cs.*) MT. CHANDRA KUNWAR v. SHEO DAYAL.

1 O. W. N. 372 : 11 O. L. J. 707.

—Sub-mortgage—Rights of—Redemption by mortgagor—Effect of.

Where a mortgagor has notice of a sub-mortgage, the mortgagee in possession is entitled to keep his possession until redeemed. Redemption of the mortgagee alone would not enable the mortgagor to recover possession when he had notice of the sub-mortgage. (*Duckworth and Godfrey, JJ.*) MA MYAT GVI v. MA MA NYAN.

2 Rang. 561: 1925 Rang. 140 (2.)

—Subrogation—Assignment of security if necessary. 1924 Oudh 85.

—Subrogation—Mortgage prior—Decree on—Sale in execution—Puisne mortgagee's payment to avert—Subrogation to prior mortgagee's rights—Puisne mortgagee's right to—Nature and extent of rights acquired by subrogation—Prior mortgage as mortgage charge or as decree charge—Limitation to enforce right—Suit or execution proceedings—Appropriate procedure to enforce right of subrogation in such case—Decree of prior mortgagee satisfied by puisne mortgagee's payment—Effect.

The manager of a joint Hindu family of which defendants 2 and 3 and the husband of the 5th defendant were the other members mortgaged plaint item (1) to S. and subsequently assigned his half share in the plaint items to the 1st defendant, the wife of the 2nd defendant. The son of S sued on the mortgage to S. obtained a decree, and brought the property to sale in execution. The sale was held, but before confirmation, the 1st defendant raised money from plaintiff on a hypothecation bond, the plaintiff undertaking to pay up the sale amount and release the property. The plaintiff did so and the decree was thereby satisfied. In a subsequent suit for partition brought by the 3rd defendant, to which the 1st defendant was made a party, but not the plaintiff, the assignment by the manager to the 1st defendant was, however, held to be a sham. The plaintiff subsequently sued to recover her loan with interest by the sale of the mortgaged property or by a charge on item (1).

Held, that the plaintiff, as a puisne mortgagee, was interested in paying off the prior mortgagee, and was by such payment, subrogated to the charge which she had paid off, that by such payment the plaintiff was to be subrogated not merely to the prior mortgage in its original form as a mortgage charge, but to the decree charge held by the prior mortgagee, i. e., the right to hold the property to sale to discharge the decree debt, that right being free of any restriction it would be worked out within the period of limitation for the original mortgage; and that, as the prior mortgagee's decree had been satisfied, and was therefore unenforceable, the plaintiff was entitled to enforce his lien by way of suit. (*Wallace, J.*) PARVATI AMMAL v. VENKATARAMA AIYAR.

20 L. W. 278 : (1924) M. W. N. 510: 1925 Mad. 80 : 81 I. C. 771 : 47 M. L. J. 316.

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—Subrogation—Payment purchaser or puisne mortgagee—Presumption—Order absolute for sale—T. P. Act, S. 89—Effect of.

The rule of subrogation is founded on equitable principles and if a subsequent mortgagee or purchaser is subrogated to the rights of the prior mortgagee, whose debts he discharged, a co-mortgagor is equally subrogated. The benefit of subrogation may be claimed by any person who redeems a mortgage on an estate in which he is only partly interested. The question whether a person paying off a prior mortgage is entitled to the benefit of that charge as against other persons depends upon the intention of the party paying off the charge. If there is no express evidence of intention, the ordinary rule is, that a man having a right to act in either of two ways, shall be deemed to have acted according to his interests. A claim to subrogation can be sustained when there is an agreement with the debtor that the lender shall be subrogated to the rights of the mortgagees. Such an agreement may be expressed or may be presumed from the circumstances of the case. The question is whether the new lender was lending money on the personal security of the borrower or on the understanding that he would be substituted in the place of the former mortgagee. Where an order absolute for sale had been made under S. 89 of the T. P. Act, it has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage which are extinguished. Consequently where the payments are made after the making of an order absolute for sale the person making the payment is not entitled to subrogation. (*Dalal and Simpson, JJ.*) LOOTAR RAM v. LAL RANJIT SINGH. 11 O. L. J. 381.

—Subrogation—Right—Payment of incumbrances—Void mortgage.

The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation he being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or properties of his own. Any one who is under no legal obligation or liability to pay the debt is a stranger and if he pays the debt, he is a mere volunteer. (*Dalal, J. C. and Neave, A. J. C.*) AKBAR HUSAIN v. SHAHANSHAH BEGAM.

27 O. C. 56 : 11 O. L. J. 82 : 1924 Oudh 302

—Subrogation—Whether 3rd mortgagee has priority over the 2nd mortgagee.

In a suit by the 1st mortgagee, without impleading the 2nd mortgagee as a party, and in order to satisfy the decree debt, a third mortgage was executed by the mortgagor, and in a suit by 3rd mortgagee against the mortgagor and puisne mortgagee. Held (1) that the 3rd mortgagee is entitled to priority over the 2nd mortgagee and that a person who advances money for the purpose of getting a mortgage and bears the consideration for the mortgagee of a prior encumbrancer is not a volunteer, and is entitled to get the benefit of subrogation. (*Butler v. Rice* 2 Ch. 277 foll. 7 Pat. 332 followed. (*Devadoss, J.*) AVUDAI AMMAL v. CHINNA RAMASWAMI NAICK.

20 L. W. 651 : 35 M. L. T. 112 (H. C.) : 82 I. C. 849 :

1925 Mad. 129.

MORTGAGE.

—Substituted security—Award—Partition—Remedies of mortgagee.

If a number of co-sharers own undivided shares in a number of villages constituting an estate and one of such co-sharers mortgages shares in some of the villages only and as a result of a subsequent partition the villages are redistributed, it is just and equitable that the charge should attach to that fraction of the share allowed to the mortgagor which represents the share mortgaged by him originally. The charge cannot be allowed to be enforced against the whole of the property allotted to the mortgagor as part of it obviously represents that interest of his which was unencumbered. This principle is in consonance with the principles of justice, equity and good conscience. The true way to find out the substituted security is by determining the ratio which the value of the shares owned by the mortgagor in the mortgaged properties at the time of the partition bore to the mortgagor's actual share in the entire family property. This would at once give what fractional share of his interest in the entire estate he had mortgaged. Where there has been no subsequent increase by subsequent inheritance or other acquisition, the substituted equivalent of the mortgaged share will obviously be the very fraction out of the properties allotted to the mortgagor as representing his entire interest at the time of the partition. Where the evidence to show the actual values of the various properties is meagre, the Government revenues assessed on the various village properties may be assumed to bear the right proportion of their respective values. (*Sulainan, Lindsay and Kanhaiya Lal, JJ.*) *SHEO PRAKASH v. ALA-UD-DIN*.

L. R. 5 All 441.

—Substituted security—Doctrine of when applicable. *MT. AFTAB BEGAM v. MAHOMED AYUB*. 1924 A. 65.

—Suit for possession of portion of property—Maintainability.

There is nothing in law to prevent a mortgagee from suing for a portion only of the mortgaged property if he thinks it is sufficient security. (*Abdul Raof and Abdul Kadir, JJ.*) *RAGHO v. DWARKA DAS*. 1924 Lah. 738.

—Suit for balance of mortgage amount—Maintainability—Implied contract.

A mortgagor can maintain a suit for the recovery of unpaid mortgage amount, as there is an implied contract to pay the whole and a suit can be based on such implied contract. (*Martineau, J.*) *IMAM DIN v. DITTU*. 73 I. C. 445 (1).

—Suit—Preliminary decree—Addition of parties thereafter. See C. P. CODE, O. 1, R. 10, 46 M. L. J. 368.

—Undivided share—Subsequent partition—Rights of mortgagee.

Where a mortgagee of a particular property from one of two co-sharers purchases that property in execution of a decree against the mortgagor and it is subsequently found that at a partition prior to the suit of the mortgagee, the property had been allotted to the share of the other co-sharer of the mortgagor the rights of

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the mortgagee purchaser cannot prevail as against those of the co-sharer who had obtained the property at the partition. (*Daniels and Neave, JJ.*) *NARAIN v. RAM SARAN DAS*. 22 A. L. J. 853 : L. R. 5 A. 751 : 1924 A. 871.

MORTGAGOR AND MORTGAGEE—Equity of redemption—Compensation for land acquisition—Appropriation by mortgagee towards the unsecured debts of the mortgagor—Rights of purchaser of the equity of redemption.

77 I. C. 26.

—Rights of mortgagee—Foreclosure of a portion of the mortgaged property—Effect of—Right against other items of the hypotheca.

Where a person holding two mortgages has foreclosed some of the mortgaged items under a prior mortgage, he is entitled to throw the entire burden of the other mortgage on the remaining items. A representative of the mortgagor cannot object to his doing so, as he is not entitled to contribution in any event. (*Lindsay and Sulaiman, JJ.*) *BENAIK RAO v. PUTTAIN SINGH*.

L. R. 5 A. 335 : 79 I. C. 69 : 1924 A. 929.

—Right to proceed against properties—Duty of Court. *NARAYANASWAMI CHETTY v. VELLAYA PILLAI*. 1924 Mad 366.

—Sale of property by mortgagor—Privy of contract. *MT. CHET KAUR v. GURMUKH SINGH*. 75 I. C. 940.

—Suit for redemption—Dispute of title.

In a redemption suit it is not open to the mortgagee to dispute the title of the mortgagor. (*Raymond and Madgavkar, A. J. Cs.*) *MAHOMED MOOSA v. KAZI FATEHULLAH*.

79 I. C. 466 : 1925 Sind 167.

MOTOR VEHICLES ACT (VIII OF 1914), S. 11—Rules framed under—Part II, R. 16—Motor lorry—Driven at excessive speed—Liability of owner who was not present and who had prohibited such driving.

Petitioner, the owner of a motor lorry, was prosecuted on the ground that he allowed the driver of the motor lorry to drive it at an excessive speed and thereby committed an offence under Part II, R. 16 of the Rules regulating the use of motor vehicles in Calcutta framed under S. 11 of Act VIII of 1914, the Indian Motor Vehicles Act. The petitioner was not in the lorry at the time of the alleged offence and had cautioned the driver not to exceed the regulation speed and to drive with due care and caution. Held, that the driver and not the owner, was liable under R. 16 inasmuch as the former alone contravened the prohibition against driving at a greater speed than that prescribed by the Rule. The owner of the lorry cannot, in the circumstances, be said to have "caused or permitted" the lorry to be driven in contravention of the Rule. (*Greaves and Duvall, JJ.*) *VARAJ LAL v. EMPEROR*.

51 Cal. 943 : 28 C. W. N. 854 : 82 I. C. 137 : 25 Cr. L. J. 1209 : 1924 Cal. 985.

MYSORE CIVIL PROCEDURE CODE REGULATION (III of 1911), S. 2 (2)—Decree—Appeal dismissed as being out of time.

MYSORE C. P. C. REGULATION, S. 47.

Where the lower appellate Court dismisses an appeal as time-barred, its order is a decree and is appealable as such. (*Subbanna and Ramaswamy Aiyangar, JJ.*) *AYYANNA v. BASAVALINGIAH*.
2 Mys. L. J. 211

—Ss. 47 and 151—*Execution sale—Sale proclamation irregular—Application to set aside sale.*

If the Court makes a mistake in execution proceedings and issues a sale certificate although the sale has not been confirmed, it has inherent jurisdiction to have the mistake rectified even though the person aggrieved by the mistake may have a remedy by suit. Where a sale which is liable to be impeached is confirmed and followed by delivery of possession the party aggrieved by that sale is entitled to apply under S. 47, C.P. Code, to have that sale set aside. (*Plumer and Subbanna, JJ.*) *RANGE GOWDA v. KEMPANMA*.
2 Mys. L. J. 146.

—S. 47 and O. 21, R. 90—*Execution sale—Application to set aside—Remedy by suit when available.*

Where an execution sale is held and confirmed it is not open to the judgment-debtor to sue to set it aside on the ground that the decree-holder who purchased at the execution sale, had not obtained leave to bid and on the ground that the sale proclamation had not been duly published. The remedy of the judgment-debtor was by way of an application under S. 47, C.P. Code. (*Subbanna and Ramaswami Aiyangar, JJ.*) *SIDDAPPA v. GANGAMMA*.
1 Mys. L. J. 157.

—S. 48—*Execution of decree on mortgage—Twelve-years' limitation—Applicability of—Dismissal of application for default—Effect of.*

The twelve-years' rule laid down in S. 48, C. P. Code, governs all applications presented after its enactment for the executions of mortgage decrees passed before the new Code came into force. The rule is one of limitation and hence of procedure and since there can be no vested right in procedure the rule has retrospective effect. Where a prior application for execution had been dismissed on the ground that it could not be proceeded with owing to the decree-holder's default in the payment of the process fees, it cannot save limitation under S. 48, C. P. Code. (*Chandrasekhara Aiyar, C. J. and Plumer, J.*) *SRI CHAMARAJESWARA BANK, LTD. v. VENKATAKRISHNA IYENGAR*. 2 Mys. L. J. 104.

—S. 115—*Interlocutory order—Execution proceedings—Order refusing to grant time for objections and stay sale of properties—Objection by legal representative of surety.*

The petitioner's father had been a surety for a decree debt. After his death, petitioner filed an application in execution proceedings for stay of sale pending an enquiry into his objections to the execution after obtaining a copy of his father's surety bond. No notice of the execution had been served on the petitioner and he had been merely called upon to produce the title-deeds of the properties after their attachment. They refused to adjourn the sale. On revision, *held*, that the order of the lower Court denied to the petitioner

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an opportunity to know the extent of his liability and the order directing the sale was liable to be set aside in revision. (*Subbanna, J.*) *ADAVIAPPA v. SUBBA RAO*.
2 Mys. L. J. 231.

—S. 115—*Revision—Order of refusal to review judgment.*

The Chief Court has power to interfere in revision with an order of the lower Court refusing to review its judgment if sufficient reasons are shown. If the revision petition involves merely a consideration of the question as to the correctness or otherwise of the exercise of discretion by the lower Court, the Chief Court will not interfere. But where the lower Court declines to interfere on a misapprehension of the main points in the case, the Chief Court may interfere in revision. (*Ramaswami Aiyangar, J.*) *VENKATESAN v. DEVOJEE RAO*.
2 Mys. L. J. 212.

—S. 148—*Decree—Extension of time allowed—Not permissible.*

S. 148 of the Mysore C. P. Code Regn. has reference to any period fixed or granted by the Court for the doing of any act prescribed or allowed by the C. P. Code and it is scarcely possible to construe this as applying to a case where the period is fixed in a decree for paying some money, 39 M. 176; 35 A. 582; 40 A. 579, Rel. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) *RAGHAVENDRA DASS v. CHALUVIAH*.
2 Mys. L. J. 75.

—O. 6, R. 17—*Amendment of plaint—Powers of Court—New Code.*

The new C. P. Code confers on the Court wider powers as regards allowing amendments than the old Code. Plaintiff, a widow, brought a suit for cancellation of a sale-deed executed by her husband in favour of the defendants on the ground of its having been brought about by misrepresentation. The vendee had been directed to pay a certain sum for the maintenance of the widow under the sale. The plaintiff subsequently applied for amendment of the plaint by claiming a right of maintenance and residence as against the properties in the hands of the vendee. *Held*, that the amendment was properly allowed. (*Plumer, O. C. J. and Subbanna, J.*) *LACHIAH CHETTY v. ERAMMA*.
2 Mys. L. J. 205.

—O. 6, R. 17—*Pleadings—Amendment—Power of Court—Subsequent events.*

Courts can take cognizance of events that transpired since the institution of the suit and the plaintiff could be allowed to amend his plaint so as to avoid the necessity of a fresh suit. (*Subbanna, J.*) *VEERABHADRA SETTY v. SIDDAMMA*.
2 Mys. L. J. 217.

—O. 9, R. 13 and O. 37—*Ex parte decree—Suit filed under the summary procedure—Setting aside ex parte decree—Appeal against decree.* 3

A decree *ex parte* for the purpose of O. 9, R. 13, C. P. Code is one passed in a suit where the defendant is expected to appear and has every right to appear, and it may be set aside under R. 13 if he satisfies the Court that the summons was not duly served on him or

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R. 2.

that he was prevented by sufficient cause from appearing when the suit was called on for hearing. But under the summary procedure in O. 37, C. P. Code, defendant is debarred from appearing and defending till he obtains leave to do so, and where he does not obtain such leave, the decree passed is not an *ex parte* one. The defendant could not doubt have proceeded under O. 37, R. 4 to have the decree set aside by making out the existence of special circumstances, but not on the basis of its being an *ex parte* decree, and if the order on an application under that rule is adverse to him, he has no right of appeal from it. He can no doubt appeal from the decree itself upon grounds affecting the correctness or validity of the decree. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) *BASAVANNA PPA v. THE MYSORE INDUSTRIAL BANK, LTD.* 2 Mys. L. J. 181.

—O. 17, R. 2—*Absence of plaintiff at adjourned date of hearing—Procedure.*

Under O. 17, R. 2, C. P. Code, if the Court proceeds to "dispose of the suit" it must do so under the rules in O. 9 and in the case of the non-appearance of a plaintiff the rule applicable is O. 9, R. 8, C. P. Code. If the Court does not proceed to dispose of the suit the Court may pass such other order as it thinks fit and the words "such other order" do not entitle the Court to decide the suit on merits or in any other way. They entitle the Court to pass some such order as an adjournment which will not decide, or dispose of the suit. (*Plumer, J.*) *ARUNACHALACHARI v. SUBBA RAO,* 2 Mys. L. J. 115.

—O. 17, Rr. 2 and 3—*Plaintiff absent at adjourned date—Evidence partially adduced—Defendant setting up a new case—Dismissal for default.*

In a suit on a hypothecation bond defendant pleaded discharge the burden of proof of which was on him. The plaintiff had adduced most of his evidence after which the defendant set up a new case. Thereupon the Court adjourned the suit to a new date on which the plaintiff being absent the Court dismissed the suit for default. *Held*, that it was not an exercise of sound judicial discretion for the Court to dismiss the suit for default at that stage. He should either have decided the suit on the materials before it or adjourned to another date. (*Subbanna, J.*) *FAKIRSA v. CHIEKA GOVINDAPPA.* 2 Mys. L. J. 80.

—O. 17, R. 3—*Dismissal of suit summarily—Evidence recorded in part—Plaintiff not absent—Procedure.*

Where evidence had been partly taken in a suit and afterwards on the adjourned date the plaintiff did not take the necessary steps but was present in person himself the Court ought not to dismiss the suit summarily but should proceed to decide the suit under O. 17, R. 3, C. P. Code, on the merits. (*Chandrasekhara Aiyar, C. J. and Plumer, J.*) *SIBI NARASIMHAH v. KEMPANNA.* 2 Mys. L. J. 39.

—O. 21, R. 43 and O. 38, Rr. 7 and 8—*Attachment before judgment of moveables—Claim—Allowed by Court—Compensation—Suit for—Limitation Act, Aris, 29, 36 and 39.*

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MYSORE C. P. CODE REGN. (III OF 1911) O. 44,
R. 1.

Defendant improperly attached before judgment certain moveable property in plaintiff's shop. The plaintiff filed a claim petition which was allowed. In a subsequent suit by plaintiff for damages three years after the date of the attachment but within one year of the date of the decision on the claim petition. *Held*, that the suit was barred under Art. 29 of the Mysore Limitation Regulation which applied to the case. Even if Art. 36 or 49 applied the suit was still barred. The cause of action arose on the date of the seizure and the suit was barred by Art. 29 of the Regulation. The time taken up in deciding the claim case cannot be excluded merely because the plaintiff had claimed damages in his petition. The plaintiff's claim was wholly inadmissible and he could not be said to be prosecuting it in good faith and due diligence in a Court which from defect of jurisdiction or other like cause could not entertain it. (*Subbanna and Ramaswami Aiyangar, JJ.*) *MAHOMED HUSSAIN KHAN v. SALAMCHAND.* 2 Mys. L. J. 247.

—O. 21, R. 89—*Deposit—Deficiency made good within 30 days—Payment outside Court to decree-holder.*

Where a judgment debtor paid the major portion of the decree amount with 5 per cent in addition into Court with a view to set aside the sale under O. 21, R. 89, C. P. Code, and afterwards on discovering that by a mistake he had paid less than the amount due, he paid the balance to the decree-holder out of Court within 30 days of the sale, there is a substantial compliance with the provisions of O. 21, R. 89, C. P. Code, and the sale should be set aside. (*Plumer and Subbanna, JJ.*) *VENKATASWAMI NAIDU v. CHAYAPATHI RAO.* 2 Mys. L. J. 31.

—O. 21, R. 90—*Execution sale—Application to set aside—Right to apply.*

The applicant, though one of the judgment debtors against whom the decree under execution (a hypothecation decree) had been passed, did not own the property which was sold in execution as belonging to another judgment-debtor. *Held*, that the applicant had no *locus standi* to apply under O. 21, R. 90, C. P. Code, inasmuch as his interests were not affected by the sale. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) *RANGAPPA v. SIVARAM.* 2 Mys. L. J. 100.

—O. 32, R. 7—*Decree—Assignment of by next friend—Leave of Court.*

The provisions of O. 32, R. 7, C. P. Code (Mysore) do not form a bar to the recognition of the assignment of a decree effected by a next friend or guardian on behalf of the minor legal representative of a deceased decree-holder. The leave under O. 32, C. P. Code, is necessary but there is nothing to prohibit the Court from granting such leave at any stage. 63 I. C. 285; 62 I. C. 255, *Ref.* (*Chandrasekhara Aiyar, C. J. and Plumer, J.*) *SHROFF VENKATAPPA v. BALAKRISHNA RAO.* 2 Mys. L. J. 86.

—O. 44 R. 1—*Leave to appeal in forma pauperis—Dismissal of—Court fee—Payment of—Increased Court-fee—Amending Act.*

MYSORE C. P. CODE REGN. (III OF 1911), O. 47, R. 1.

An application to be allowed to appeal as a pauper, accompanied by a memorandum of appeal as required by O. 44, R. 1 was presented to the Court on 12-12-1922. The application was dismissed on 19-3-1923, but time was granted to the petitioner till 4-6-1923 for payment of the requisite Court fee. On that date a fixed fee of Rs. 137-8-0 was paid on the valuation of the subject-matter of the appeal calculated in accordance with the Court Fees Regn III of 1900. But that Regulation had in the meantime been amended by Regn. VII of 1922, the object of which was to enhance generally the scale of fees as prescribed in the Regulation of 1900 as and with effect from 1-2-1923. *Held*, that the Court fee payable on the memorandum of appeal was that fixed in the amending Regulation. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) *BAPU KONERI RAO v. YAMUNABAI.* 2 Mys. L. J. 150.

———O. 47, R. 1—*Ex parte decree—Application for review—Maintainability of.*

It is open to a party against whom an *ex parte* decree has been passed to apply for a review of the judgment under O. 47, R. 1, C. P. Code even though his primary remedy under O. 9, R. 13 is barred by time. 7 M. C. C. R. 93; 3 M. C. C. R. 98; 6 A. 66; 9 A. 61; 26 C. 588 Ref. (*Plumer, O. C. J. and Subbanna, J.*) *SOWCAR MOHAMMAD KHASIM KHAN v. SHAKH BUDAN SABI.*

2 Mys. L. J. 195.

MYSORE COMPANIES REGULATION (VIII OF 1917), Ss. 3 (3) AND 271—Winding up of a company—Objection to—Territorial jurisdiction—Company registered outside Mysore but having a branch in Madras.

A foreign company not registered under the Mysore Companies Regulation is an "unregistered company" for the purposes of that Regulation and as such amenable to the provisions contained in Part IX of the Regulation; and if the conditions necessary are fulfilled, it is capable of being wound up in the same way as an unregistered local company. A foreign company may be wound up under S. 271 of the Mysore Companies Regulation if it has a branch office and assets within the jurisdiction. Where the Company was under liquidation in British India and there was an official liquidator already appointed, the court in Mysore would recognise him for the purpose of S. 166 of the Mysore Regulation as representing the Company. (*Chandrasekhara Aiyar, C. J. and Plumer JJ.*) *SYED RAHIM v. SAHAY.*

2 Mys. L. J. 165.

MYSORE COURT FEES REGULATION (III OF 1900), S. 14—Applicability of—Cumulative and alternative reliefs—Court-fee payable—Larger relief.

S. 14 of the Mysore Court Fees Regulation applies only to a case of cumulative reliefs in the case of which the larger of the two reliefs sought ought to determine the court fees. The phrase "two or more distinct subjects" in the section may not admit of a precise definition applicable to all cases and reliefs claimed in the alternative with reference to the same cause of action may not come within the purview of the section, 30

MYSORE COURT FEES REGULATION (III OF 1900), Sch. II, Art. 11 B.

M 61; 29 A. 155 Ref. (*Plumer, O. C. J. and Subbanna, J.*) *LACHIAH CHETTY v. ERAMMA.*

2 Mys. L. J. 205.

———S. 42—*Decree without contest—Agreement of some of the parties—Refund of half the Court fee—Application after the period of Limitation.*

A suit for the recovery of money was instituted against two defendants. It was at first decreed *ex parte* against the first defendant and against second defendant by admission. The first defendant got the *ex parte* decree passed against him set aside and denied liability in his statement. Before issues were framed the plaintiff and first defendant entered into an arrangement that for the whole of the debt and costs there should be a decree against both the defendants but that the first defendant should pay a certain portion of it with proportionate costs within a certain time and for the balance and costs thereon the plaintiff should proceed first against the second defendant and if that was not recovered from him the first defendant should be liable for that also. A decree was passed in accordance with that arrangement on 22-1-1923. On 27-8-1923 the first defendant's legal representative applied to the Court for directing a refund of half the institution fee to the decree-holder and amending the decree accordingly. By this time the Munsif who passed the decree was succeeded by another one and he passed an order on 26-11-1923 holding that the application was out of time not having been made within six months, yet directing an amendment of the Decree inserting only a half of the institution fee in the table of costs payable to the decree-holder. *Held* that the direction of the lower Court to amend the decree by inserting only half the institution fee was unsupported and must be set aside. (*Subbanna, J.*) *THE MYSORE INDUSTRIAL BANK, LTD v. LAKSHMINARASIMHA RAO.*

2 Mys. L. J. 169.

———Sch. I, Art. 1—*Appeal—Court-fee payable on.*

Where the lower appellate Court dismisses an appeal presented to it as barred by time, an appeal from that order is one from a decree and Court-fee on the second appeal memorandum is *ad velorem* under Art. I, Sch. 1 of the Court Fees Regulation on the value of the reliefs claimed (*Subbanna and Ramaswamy Iyenger JJ.*) *AYYANA v. BASAVALINGIAH.*

2 Mys. L. J. 211.

———Sch. II, Art. 11 B—*Probate—Order in contested case—Appeal—Court fee payable.*

The order passed by a District Judge in a contention proceeding under S. 81 of the Mysore Probate Regulation is a decree as defined in the C. P. Code. As the order merely relates to the right to administer the estate on principle, an *ad valorem* fee should not be levied in such cases; and in fact as it is impossible to estimate at a money value the subject matter in dispute the case necessarily falls under Sch. II Art. 11 B. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) *KALE GOWDA v. GOVT. OF MYSORE.* 2 Mys. L. J. 101.

MYSORE COURT FEES REGULATION (VIII OF 1922), Art. 11 B.

———(VIII OF 1922) ART. 11 B—*Suit for partition—Court fee payable thereon—Plaintiff in possession—Appeal as regards items of properties—Valuation.*

Suits for partition (excluding therefrom suits merely to enforce a right to the joint enjoyment of property in common with others) fall into two classes according as possession is or is not part of the relief sought. Where the plaintiff is already in possession of the property sought to be divided, and only seeks to have his share definitely ascertained and divided off, then (since the subject matter is not capable of exact money valuation) the fee payable is the fixed fee provided in Art. II, cl. (vi) of Sch. II corresponding to Art. 11B in the amending Regulation VIII of 1922. But where possession is sought as well as partition then court fee must be paid *ad valorem* on the value of the share claimed under S. 4 (v) of the Court Fees Regulation. Where the plaintiff claimed a fourth share in the properties to be divided, of all of which he was stated in the plaint to be in possession as family manager, the plaint is chargeable only with a fee of Rs. 10 under Art. 11, cl. (vi). Where an appeal from a preliminary decree for partition is preferred by the defendants claiming an extra share and also certain specific items, *Held*, that the fixed fee prescribed by Art. 11-B of Sch. II of Regn. VIII of 1922 should be paid on the claim for the extra share and *ad valorem* fee should be paid on the specific items. (*Chandrasekhara Aiyar, C. J., Plumer and Subbanna, J.J.*) THIMMEGOWDA AND SOME Gowda. 2 Mys. L. J. 25.

MYSORE CRIMINAL PROCEDURE CODE REGULATION (II OF 1904), S. 239—Offences under Ss. 380 and 411—Joint trial of—Legality.

The joint trial of one accused for receiving stolen property and of others for stealing it or receiving the same before it reached the first accused, is not illegal, provided the acts of all the accused formed one transaction. 11 Mys. C. C. R. 197; 38 A. 311; 2J B 449, Ref. Whether the offences complained of formed a single transaction or not is a question of fact in each case and acts as above referred to may form a single transaction even though they are not quite simultaneous. (*Plumer and Subbanna, J.J.*) NANJAPPA v. THE GOVT. OF MYSORE.

2 Mys. L. J. 21.

———S. 242—*Summons case—Examination of complainant's witnesses—Omission to communicate particulars of offence to accused—Irregularity—Cr. P. Code, S. 537.*

The accused were summoned in respect of an offence under S 352, I.P.C., triable as a summons case. On the day they first appeared in Court they were not informed of the particulars of the offence but the case was adjourned at their request. On the adjourned date the complainant's witnesses were examined and the accused when asked to make their statement pleaded not guilty and examined some witnesses in support of their case. They were all convicted. On revision, *Held* (1) that the trial was irregular owing to the omission of the Magistrate to follow the provisions of S. 242, Cr.P.Code and but that the illegality was cured by S. 537, Cr. P. Code. The accused could

MYSORE IN-COMETAX REGULATION (VI OF 1920), S. 3.

easily have known of the particulars of the charge against them inasmuch as before the examination of the complainant's witnesses, they had taken a copy of the complaint and their counsel had cross-examined the complainant's witnesses also. (*Ramaswami Aiyangar, J.*) JAWARE GOWDA v. KENCHE GOWDA. 2 Mys. L. J. 223.

———S. 253 (2)—*Summons case—Examination of some witnesses only for the prosecution—Discharge of accused—Revision—Cr. P. Code, S. 439.*

In a summons case the Magistrate examined some only out of several witnesses for the prosecution in attendance and passed an order discharging the accused persons under S. 253 (2), Cr.P. Code. On revision the Sessions Judge set aside the order of discharge and ordered a further enquiry. In revision *held* that in a summons case the Court was bound to examine the whole of the evidence produced in support of the prosecution where the accused did not admit the offence and it then found that the accused was not guilty, it must record an order of acquittal. The order of discharge passed in the case was illegal. An order of discharge passed in a summons case amounts really to an acquittal and cannot be set aside by a District Magistrate or Sessions Judge under S. 437; but this does not warrant the position that an order of discharge passed illegally and without jurisdiction can be maintained. Consequently though further inquiry could not be ordered by the Sessions Judge under S. 437, Cr.P. C. there was nothing to prevent the High Court exercising its power of interference under S. 439 to set the illegal order aside and direct a proper trial. (*Chandrasekhara Aiyar C. J. and Plumer, J.*) CHIKKANE GOWDA v. HETHE GOWDA.

2 Mys. L. J. 149.

———Ss. 342 and 537—*Trial of warrant case before Magistrate—Examination of accused—Stage for—Effect of omission to examine accused as required by the section.*

An accused person should be examined generally on the case after the whole of the evidence produced in support of the prosecution has been taken by the Court. Provided this is done, it is not obligatory on the Court to further examine him after any prosecution witnesses whose evidence has been already taken are re-called at his instance and cross-examined and re-examined; and an omission to do so is neither an illegality which vitiates the trial nor an error or irregularity which requires to be cured under S. 537 Cr. P. Code. (*Chandrasekhara Aiyar, C. J. and Plumer, J.*) RAHIM SAB v. GOVT. OF MYSORE. 2 Mys. L. J. 241.

MYSORE INCOME-TAX REGULATION (VI OF 1920), Ss. 3 (1) and 33—Remuneration paid to non-resident firm by Companies doing business in Mysore—Liability to tax.

The assessee was a firm of Mining Engineers carrying on business in the City of London. By agreements with several gold mining companies carrying on operations on the Kolar Gold Fields in the Mysore State, the said firm was appointed Managers and Consulting Engineers of the said Companies. For their services the said firm was

MYSORE INCOME-TAX REGULATION (VI OF 1920), S. 20.

paid by the said companies the annual remuneration provided under the said agreements. That remuneration was paid in London. The services of expert advice, management and supervision were rendered and performed in the office of the firm in London. *Held*, that the assessee was not taxable in Mysore on the income derived by the assessee. (*Plumer and Subbanna, JJ.*) *JOHN TAILOR AND SONS v. THE COMMISSIONER OF INCOME-TAX IN MYSORE.* 2 Mys. L. J. 133.

—Ss. 20, 35 and 36—*Amending Regulation V of 1923, Ss. 29, 45 and 46—Assessment to income-tax—When becomes effective charge—Notice to assessee—Adjustment or appropriation.*

An income tax officer when he has determined a sum to be payable by an assessee by way of tax is required to serve on the assessee a notice of demand in the prescribed form specifying the sum so payable and the assessee has the right to prefer an appeal within 30 days of the notice. Subject to alteration on appeal or review the amount of taxes determined must be paid; failure to do this constitutes default upon which coercive steps may be taken to recover the amount of arrear. The assessment does not become binding so as to impose a charge until after a notice of demand has been served on the assessee and the time limited in S. 35 has expired. The giving of a notice is not only made obligatory by express provision, but is also necessarily implied in the right of appeal given to the party charged so as to afford him an opportunity of challenging the correctness of the assessment by appealing against it. In the absence of a due service of such notice and a demand for payment there is no valid assessment. (*Chandrasekhara Aiyar, C. J. and Plumer, J.*) *DEVIDOSS & Co. v. THE COMMISSIONER OF INCOME-TAX IN MYSORE.*

2 Mys. L. J. 176.

—(V OF 1923)—*Companies carrying on trade in Mysore—Interest on investments made out side Mysore—Liability to tax—Extra dividends or bonuses paid to directors—Deduction.*

Where companies carrying on business at Mysore get profits by way of investments in securities outside the province and in no way connected with the business at Mysore such profits do not constitute income which accrues or arises or is received in Mysore so as to be taxable. Even though such income was received abroad by an agent and then remitted to the Companies, the income is not received *qua* income in Mysore and is not taxable.

Bonuses or extra dividends or remuneration paid to the Managing Directors of a Company out of funds set apart from net profits for purposes of dividend can in no sense be regarded as expenditure incurred for earning such profits or gains. It is just as much an allocation of profits as the dividend itself. (*Plumer and Subbanna, JJ.*) *THE COMMISSIONER OF INCOME-TAX IN MYSORE v. NANDIDROOG MINES, LTD.* 2 Mys. L. J. 41.

MYSORE INSOLVENCY REGULATION (VI OF 1911) Ss. 36 and 44—Report of Official Receiver—Whether useful as evidence.

The report of an Official Receiver in an insolvency is made evidence only for the purposes of

MYSORE LIM REGN. (IV OF 1911), Art. 74.

S. 44 of the Act and the report and statements recorded by him cannot be treated by a Court as evidence in proceedings before it under S. 36. 36 A. 649; 35 I. C. 875 Ref. (*Plumer O.C.J.*) and *Ramaswami Aiyangar, J.*) *REKUBCHAND BAPUAH v. ABDUL LATEF KHAN.* 2 Mys. L. J. 234.

MYSORE LAND REVENUE CODE, S. 53—Jodi village—Tank situated in—Supply of water from Government tanks—Right of govt. to levy water cess.

Though a tank was situated in a Jodi village it got its main supply of water from the kodihalla carrying water from Government tanks. *Held* that the water in the Jodi tank should in the circumstances be considered as government water, the right to which vests in the Government and for the use of which government were entitled to recover a water rate under S. 53, Land Revenue Code. The Jodidas are entitled to the free use of extra water only to the extent allowed under the terms of the sunnud, and for any area in excess of the extent treated as wet at the inam settlement they had no right to the free use of the water, even if such area be within the Inam village: and when the land for which the tank water was used was situate outside the Jodi village and was never intended by Government to be irrigated by the Jodi tank there could be no doubt that it was not entitled to the free supply of water from the tank. *VENKATESIYA OF KONANUR.* *In re.* 2 Mys. L. J. (M.G. D.) 3.

MYSORE LEGISLATIVE COUNCIL REGULATION (XIX OF 1923), S.6. (2) (f)—Rules under—Election of members to the Legislative Council—Order of District Judge on a disputed election—Whether open to revision by Chief Court.

A right of election as a bare right is no doubt the civil right of every one but a right of election to a given office or committee or assembly or Council created by statute of which right, the manner of user and all other consequential details are themselves created and governed by the statute is not an inherent civil right. It is a statutory right. The remedy for wrong done to that right is as much governed by the statute as the creation of the right—and no citizen has a civil grievance if he is confined for his remedy to the terms of the statute.

The Court of the District Judge as a *curia designata* for special purposes of deciding election disputes on an election to the legislative Council is not a Civil Court and as such is not subordinate to the Chief Court within the meaning of the C.P. Code. (*Plumer, O.C. J. and Ramaswami Aiyangar, J.*) *KARNICK KRISHNAMOORTHY RAO v. PARAMASWAYYA.* 2 Mys. L. J. 237.

MYSORE LIMITATION REGULATION (IV OF 1911) S. 19—Acknowledgment of debt in part—Whether saves limitation for the whole.

If a definite sum smaller than the sum claimed is acknowledged to be due, only the sum named is taken out of the statute of limitation. 13 I. C. 702; 55 I. C. 822 Rel. on. (*Subbanna and Ramaswami Aiyangar, JJ.*) *BUDAN BI. v. GUNDAJHI SANNA.* 1 Mys. L. J. 153.

—Arts. 74 and 115—Contract of service—Stipulation to discharge advance out of salary—Breach—Limitation.

MYSORE LIM. REG. (IV OF 1911), Art. 164.

Defendant received an advance of Rs. 50 from plaintiff and executed in his favour on 1-5-1919 an agreement for service, whereby he undertook to work under the petitioner on a monthly salary of Rs. 10 out of which Rs. 2 was to be deducted towards the sum advanced and remainder paid to him. He further held himself liable to the penalty under Act XIII of 1859. Defendant worked for six months and then stayed away. Plaintiff filed the present suit on 6-3-1923 to recover the undischarged balance of the sum together with a small addition by way of interest. *Held*, that the document in question was not a bond as defined in S. 2 (3) and that the article of Limitation appropriate to the suit was art. 115 and not art. 74. The breach, which was a continuing one would only cease at the expiration of the term of service contemplated in the agreement, *i.e.*, in June 1921 and time would therefore begin to run only from that date. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) **JALAL MOHIDEEN SAB v. KHALANDER SAB.** 2 Mys. L. J. 120.

—Art. 164—Limitation—Running—Knowledge of decree—Meaning of.

The expression "knowledge of the decree" in Art. 164 of the Lim. Regulation means knowledge of the particular decree but the expression does not include a knowledge of all the contents of the decree. To so extend it would be to render Art. 164 an absurdity, 11 Bom. L. R. 1296; 47 B. 485; 38 C. 384; 12 Bom. L. R. 462 Ref. (*Plumer and Subbanna, JJ.*) **SABAPATHIAH v. MARIYAMMA.** 2 Mys. L. J. 180.

MYSORE MUNICIPAL REGULATION (VII OF 1903) Ss. 151 AND 152 (3)—"Oil-boiling"—License—Necessity for—Boiling and manufacture of castor oil for purification.

The expression "Oil-boiling" in S. 151 of the Mysore Municipal Regn. is used in a technical sense. It does not include the process of refining castor-oil by adding water and then heating it so as to drive out the impurity in the oil. In the "oil-boiling" process properly so-called, no water is added but the oil is simply heated to a very high degree giving rise to dangerous and highly inflammable vapours. This is a special process employed in connection with the manufacture of paints and varnishes and consists in the addition of metallic oxides or salts to linseed oil and then heating it, so that it easily dries up. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) **GOVT. OF MYSORE v. NAGANNA.**

2 Mys. L. J. 154.

MYSORE PENAL CODE, S. 415—Cheating—Essentials of the offence.

The gist of the offence of cheating is a fraudulent or dishonest intention to deceive some person and the onus of proving it is on the prosecution. The hope of being able to deceive is always an important element in determining whether there was a dishonest or fraudulent intention. Where a man in a respectable position in life is charged with cheating in respect of a petty sum and the explanation of the accused is that he had forgotten the real facts of the situation. *Held*, that it must be held that the prosecution had failed to prove

MYSORE POTGI RULES, R. 35.

any dishonest intention in the accused. (*Subbanna, J.*) **DODDABASAPPA v. GOVT. OF MYSORE.** 2 Mys. L. J. 207.

MYSORE PENAL CODE, Ss. 465 and 417—Forgery—Cheating—Trial and conviction for smaller offence—Commitment on graver charge—Procedure illegal.

The appellant executed a pronote for Rs 400 in favour of the complainant on 19-8-1921 but after signing it he added words in Kanarese to the effect that he had pledged a golden necklace for the debt and that Rs. 10 had been withheld out of Rs 400 for interest. The complainant started criminal proceeding against him alleging that the pledge was false and that the accused had fraudulently inserted that statement in the note without the complainant's knowledge taking advantage of his ignorance of the language. The accused asserted that the pledge was true but the Magistrate found against him on facts and charged and convicted him under Ss. 465 and 417, I.P.C., for forgery and cheating. *Held*, that the conviction for forgery was proper but that for cheating was unsustainable. Even though the accused could have been committed to the Sessions on graver charge under S. 467, I. P. C., still the trial and conviction by the Magistrate under S. 465 was not illegal. (*Chandrasekhara Aiyar, C.J. and Subbanna, J.*) **NANJUNDA SETTY v. GOVT. OF MYSORE.** 2 Mys. L. J. 108.

MYSORE POLICE REGULATION (V OF 1908), Ss. 38 and 63—Offence under—Common gaming house—Persons found gaming—Search warrant by Magistrate—Application by police—No information on oath—Discovery of gaming materials—Illegality if cured.

Under S. 38 of the Mysore Police Regulation it is not necessary as under the parallel section of the British Indian Police Acts for the Magistrate's belief that building is used as a common gaming house to be based on sworn information in order to enable him to validly issue a search warrant to the police. It is sufficient if he "has reason to believe" that a building is so used and it is a matter entirely for his consideration as to what does or does not constitute sufficient reason to create that belief. The Magistrate's statement in his order for the issue of a search warrant to the effect that he has reason to believe that the building is used as a common gaming house is sufficient to validate the warrant and if as a result of the search, materials for gaming are discovered in that building, the legal presumption provided by S. 63 Expln. I of the Mysore Police Regn. that the house searched is a common gaming house at once arises. (*Chandrasekhara Aiyar, C. J. and Plumer, J.*) **KEMPE GOWDA v. GOVERNMENT OF MYSORE.** 2 Mys. L. J. 161.

MYSORE POTGI RULES, R. 35 — Inam — Service inam lands—Partition and possession—Jurisdiction of Civil Court.

The Potgi Rules lay down that official or Inamti lands form no part of the remuneration of a *shambogue* and the lands will remain in the possession of the sharers and Civil Courts are not debarred from taking cognizance of suits between members of the holder's family in respect of the

MYSORE S. C. C. REG. (VIII OF 1911), Sch. I (3).

possession of such shares. (*Plumer and Subbanna, JJ.*) RAMABHADRIAH v. SOORAYYA.

2 Mys. L. J. 13.

MYSORE SMALL CAUSE COURTS REGULATION (VIII OF 1911), Sch. I (3)—*Contract for purchase of goods—Assignment—Suit by assignee for profits—Jurisdiction of Small Cause Court.*

The petitioner who was the defendant in the lower Court purchased from the plaintiff for Rs. 1,801 a forward contract for 31 bales of piece-goods, and paid towards the same two years later a sum of Rs. 1,920. The suit was to recover a balance of Rs. 130 claimed as still due, calculating interest at 6 per cent per annum. *Held*, that the fact that the right to receive the goods was transferred to the petitioner by reason of his purchase of the forward contract was to all intents and purposes equivalent to a sale of the goods; and for the purpose of Sch. I (3) of the Small Cause Courts Regn. (VIII of 1911) the profit and interest which the opponent was to get under the transaction was undoubtedly part of the "price of the goods sold." This result was in no way affected by the fact that the greater part of the consideration had been recovered, and only a small balance in the nature of interest remained to be recovered. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) PRATAPCHAND v. PRATAPCHAND.

2 Mys. L. J. 119.

—Sch. I (13)—*Deposit—Cow and calf entrusted for safe custody—Suit for recovery of value.*

Two cows belonging to the plaintiff were left with the first defendant for safe custody. The first defendant left the cow with the second defendant under an agreement to give it to plaintiff. In a suit by plaintiff against both defendants for recovery of the value of the cow and the calf. *Held*, that the suit was cognizable by a Small Cause Court under Sch. I, cl. (13) of the Mysore Small Cause Courts Regulation. Though the calf was born subsequently to the entrustment, it is an accretion to the cow or an "increase or profit" which has accrued from the property bailed. Such increase or profit since it necessarily goes with the property bailed, may without undue stretch of language be deemed to be part of the same property for the purpose of Sch. I, cl. (13). (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) BIDARADAKRISHNAPPA v. KAVIRATNAM M. RAMA SASTRI.

2 Mys. L. J. 123.

—Sch. I (13)—*"Money deposited"—Meaning of—Security for performance of duty.*

Under the Mysore Regulation only suits of certain specified classes are cognizable by a Court of Small Causes; but the classification given in Sch. I is most general in terms and purposely intended to be an elastic one, capable, when necessary, of being even added to or varied by notification of Government. The duty of the courts in dealing with the classification as it stands is not to attach any narrow or rigid meaning to the words employed, as if they were passages in the body of a continuous enactment, but rather to take the classes to be what they really are—brief descriptive headings intended to take in a variety of suits having a common characteristic. Thus

MYSORE STAMP REG (II OF 1900), S. 12.

the expression "money deposited" in Sch. I (13) ought not to be interpreted as referring merely to deposits of money as such, by way of investment or otherwise and as excluding earnest money or security deposit or money entrusted to a person otherwise than as a loan. On the contrary the words ought to be given the widest significance of which they are reasonably capable, so as to include every case where money may have been left by one person with another, other than a case, of course, clearly coming under any of the other classes. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) P. T. I BOOK DEPOT, BANGALORE CITY v. CHANNAYYA.

2 Mys. L. J. 117.

MYSORE REGISTRATION REGULATION (I OF 1903), Ss. 2 AND 17 (D)—*Lease for indefinite term—Agreement varying conditions of lease—Necessity for registration.*

An agreement between a lessor and lessee which is not new lease but which merely provides for a different method of user of the land and the payment of rent in a different shape, does not require registration. Even if the document could be regarded as a lease; inasmuch as no definite term was fixed and the rent was only Rs. 50 per annum the document was not compulsorily registrable. (*Plumer and Subbanna, JJ.*) SUBBIAH v. CHIKKA POTHALINGA.

2 Mys. L. J. 18.

MYSORE REGULATION (IV OF 1918) Ss. 65 (c) AND 100—*Charge holder—Enforcement of charge—Personal liability—C. P. Code, O. 34, R. 15.*

O. 34, R. 15 of the C. P. Code can hardly be looked upon as making it obligatory that the plaintiff should sue for the enforcement of the charge (in the same way as in the case of mortgage) for sale of the property before he could proceed personally against those liable for the amount. 15 C. 492 Ref. (*Subbanna and Ramaswami Aiyangar, JJ.*) VENKATASWAMIAH v. KINNAJI.

2 Mys. L. J. 9.

MYSORE STAMP REGULATION (II OF 1900)—*Act I of 1879, S. 3 (11) and Sch. I, Art. 10—Partition—Award relating to—Instrument of partition—Duty—Penalty.*

An award of July 1898 effecting or directing a partition is not an instrument of partition and the stamp duty payable thereon is Rs. 5 under Sch. I, Art. 10 of the Stamp Act of 1879. An award is exempt from registration under S. 17 (j) of the Registration Regulation I of 1903, and its corresponding provision of the previous Act, and consequently the award is admissible without registration. (*Plumer and Subbanna, JJ.*) SHANIGA NANJAPPA v. SHANIGA BODAPPA.

2 Mys. L. J. 29.

—S. 12—*Stamp—Cancellation—Mode of.*

No general rule could be laid down as regards the manner in which a stamp is to be cancelled and the only test is to find out whether it is possible to use the stamp again. The drawing of diagonal lines across the stamp is sufficient cancellation. 28 B. 432; 23 M. L. J. 273; 54 I. C. 976 Ref. (*Ramaswamy Iyengar, J.*) SUBBEGOWDA v. RAMMAYYA.

2 Mys. L. J. 215.

MYSORE STAMP REG. (II OF 1900), Art. I.

— Art I—*Day books of merchants—Signature of customers below entries—Acknowledgment Stamp.*

The mere signature of a customer to a shop entry of a transaction in the shop's accounts merely shows that so far as the transaction goes the entry is correct; it cannot possibly be an acknowledgment that the amount there entered is the amount due by the customer especially when there are several such entries and several such signatures. The wording of Art. I of the Stamp Regn. is not ambiguous and clearly has reference only to a balanced account written or entered up in the books of the creditor and signed by the debtor. That amounts to an acknowledgment by the debtor that at the time the account was balanced, the balance shown as due in the book of the creditor was at that time the actual balance due by the debtor. (*Plumer, J.*) CHIKKANNA SETTI v. NANJIAH. 2 Mys. L. J. 143.

MYSORE VILLAGE OFFICERS REGULATION, S. 23—*Shanbogue—Duties of—Claim to potgi—Fine—Neglect of duty.*

A shanbogue is responsible only for the maintenance of the prescribed accounts and the issue of notices, etc. on the due dates and he cannot be held liable for the deficiency in the collection unless it is proved to have been due to any omission or neglect in the discharge of his duties. Where the arrears of potgi claimed by a Shanbogue relate to the period when the village was under government management the shanbogue has to look to government for payment of the amount to him and he cannot be asked to proceed against the inamdar for its recovery.

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2 Mys. L. J. (M. G. D.) 1.

MUSSALMAN WAQF VALIDATING ACT (VI OF 1913), S. 3 (a).—*Family—Cousins of remote degrees—If included in the expression—Omission of donor to divest himself of waqf properly—Effect of—Reservation of benefit to the poor—Implication of.*

The expression "family" in S. 3 (a) of the Mussalman Waqf Validating Act (VI of 1913) includes only those persons residing in the house of the donor for whose maintenance the donor is responsible and consequently remote cousins in the fourth and fifth degree do not come within the term. Where the author of a waqf does not divest himself of the property, the waqf is not valid. In the absence of an express reservation of any ultimate benefit to the poor in a waqf, no such final reservation can be implied on a failure of heirs of the donor. (*Dalal and Cuming, A. J. Cs.*) ABDONE MABUD KHAN v. NAWAZISH ALI KHAN. 10 O. & A. L. R. 896.

NEGLIGENCE—*Child of Seven years crossing railway line—Injury by a passing engine—Failure to look out on the part of the child—Railway Company allowing villagers to cross the line—Trespassers and licensees—Position of—Doctrines of trap and allurements—Contributory negligence on the part of children.*

The plaintiff, a little girl of seven, while crossing a railway line with a bundle of grass on her head was run over by a locomotive engine and lost her right arm and her right leg. The

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evidence showed that the engine-driver did not see the child before the accident happened and the fireman saw the child only at a distance of four or five feet from the engine. It was also in evidence that the people living in the neighbourhood were in the habit of crossing the railway line and using it as a short cut to the knowledge of the Railway authorities. In a suit for damages, held, reversing the decision of the Trial Court, the Railway Company was not liable.

Per *Spencer, O. C. J.* :—The danger of being run over by a passing engine when crossing railway line imposes a necessity for the utmost caution on all persons walking on or near the track and if they cross the line at an unrecognised crossing, they do so at their peril. The plaintiff was guilty of negligence in not keeping a sharp look out for passing engines, an obvious danger. She was only a licensee, if not a trespasser, and under the law the defendants could not be liable unless they have placed any trap. The existence of the short-cut and the failure to prevent villagers from crossing the line could not amount to a trap or an invitation to cross or an "allurement" within the meaning of the word in the reported cases. Held also, on the facts the engine could not have been brought to a standstill within the distance of four or five feet, nor were the Railway servants negligent and the accident was entirely due to the gross negligence of the plaintiff in failing to keep a proper look-out. In cases of such accidents, if both parties are negligent, it is the party who is last negligent who is made responsible for the same, English case-law referred to.

Per *Srinivasa Aiyangar, J.* :—Whether any particular act or omission constitutes negligence must be decided with reference to the person injured, the manner in which the injury was occasioned, and the time, place and circumstances of each case. On the facts, held, as the Railway Company had, without any effective objection, allowed the villagers to cross the line for a long time, they were guilty of negligence as they failed to prove a "special look-out" on the part of the engine-driver on the occasion in question. Allowing the villagers to cross the railway line does not amount to an implied license in favour of infants of tender years who are unable to take care of themselves or incapable of avoiding dangers necessarily incident to the place. The proximate cause of the accident was the contributory negligence of the plaintiff in failing to look about to see if any train was approaching and hence she could not recover damages. Even a child of seven can be guilty of contributory negligence and the law on the subject has not been in any way altered by *Cook v. Midland and Great Western Railway Co. of Ireland*, (1909) A. C. 229 or *Corporation of the City of Glasgow v. Taylor*, (1922) 1 A. C. 44. (*Spencer, O. C. J.* and *Srinivasa Aiyangar, J.*) MADRAS & SOUTHERN MAHARATTA RAILWAY CO., LTD. v. JAYAMMAL.

(1924) M. W. N. 899 : 1925 Mad. 804 : 47 M. L. J. 88.

— Railway accident—Trap—Contribution. 1924 Mad. 312.

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———Railway company—Unprotected and unlighted pit on platform—Injuries—Liability. 1924 Mad. 154.

———Railway—Duty to Safeguard passengers and their property—Extent of. See DAMAGES. 51 Cal. 661.

NEGOTIABLE INSTRUMENT—*Cheque—Forgery—Payment by banker—Loss—What to bear.*

Where a banker pays a forged cheque he cannot charge the customer with the amount unless he proves negligence on the part of the customers which was intimately connected with the drawing or encashment of the cheque which was the proximate cause of the loss. (*Held and May Oung, J.J.*) AHMED MOOLLA DAWOOD v. PERIAN-NAN CHETTY FIRM. 3 Bur. L. J. 22 : 80 I. C. 261 : 1924 Rang. 264.

———Draft—Conditional payment—Debt if can be relied on—Negligence in presenting—Liability.

The delivery of a draft is conditional payment and if the draft is not met in due course the original debt can be relied on. But if the person to whom the draft is given fails to exercise due diligence in presenting the draft with the result that loss is caused to the drawer then the loss must fall on the party in default and not on the drawer (*MacLeod, C.J. and Crump, J.*) RAMZAN & CO. v. SHARIFF MAHOMED HOSSON AYAB. 1924 Bom. 520.

NEGOTIABLE INSTRUMENTS ACT—Hundi—Substituted unstamped paper—Liability under former.

75 I. C. 827.

———S. 4—Acknowledgment of sum due—Agreement to pay interest—If a promissory note.

A document recited that the executant had a certain sum of money belonging to another and the former agreed to pay interest at a certain rate, *Held*, it was not a promissory note though there is an acknowledgment of a debt. (*Moti Sagar, J.*) FIRM NANAK CHAND KISHORI LAL v. FIRM RAM SARUP GUJAR MAL. 1924 Lah. 684.

———S. 7—Hundi—Oral acceptance—Sufficiency of.

1924 All. 129.

———Ss. 9 and 118—Cheque—Indorsee—Suit by—Presumption of consideration—Holders in due course.

Under section 9 of the Negotiable Instruments Act an indorsee of a cheque who sues as plaintiff would be a "holder in due course", if he became the possessor of the cheque without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. Under Section 118 of the Negotiable Instruments Act, the presumption is in favour of the plaintiff. Under Clause (A) of Section 118, it must be presumed that the cheque was drawn for consideration, and that the endorsement was made for consideration. Under Clause (j) of Section 118 it must also be presumed that the plaintiff is a "holder in due course." The presumption is rebuttable one, and it is open to the defendants to prove that the cheque was drawn without consideration, or, that the endorsement was made

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without consideration, but so long as the presumption is not rebutted by evidence, it must be held that the cheque was drawn for consideration, and that the plaintiff is a "holder in due course." (*Kulwant Sahay, J.*) KISHUN BAHADUR v. SASSARAM LIME, LTD. 2 Pat. L. R. 54 : 80 I. C. 572 : 1924 P. 521.

———Ss. 9 and 78—Promissory note—Minor payee—Endorsement by guardian not purporting to be by guardian on minor's behalf—Right of indorsee to sue.

In a suit on a promissory note the plaintiff claimed as an indorsee from the guardian of the minor son of the deceased payee of the note. The endorsement was made by the mother of the minor son but there was nothing either in the body of the note or appended to the signature to show that the lady signed as guardian. In the written statement defendants challenged the plaintiff's right as holder and put him to strict proof of the claim. There was no evidence in the case that the lady signed as guardian. *Held*, that the plaintiff had no *locus standi* to sue and that the suit was bound to fail. (*Wallace, J.*) SUPPAI GOUNDAN v. KANDASWAMY GOUNDAN. 19 L. W. 560 : 80 I. C. 567 : 1924 Mad. 617 (1).

———Ss. 13 and 15—Promissory note not payable to person or order—If negotiable—Signature on—Endorsement.

A promissory note payable to a particular person is, in the absence of words prohibiting transfer or indicating an intention that it shall not be transferable, a negotiable instrument. Where such an instrument is not signed on the back either by the maker or by the holder, there is no endorsement. (*Bilaram, A. J. C.*) THAKURSEY HANSRAJ v. KISHENDAS REWACHAND. 76 I. C. 282 : 1925 Sindh 9.

———S. 28—Hundi—Signing as munim.

75 I. C. 609.

———S. 29—Executor—Guardian—Pro-note by—Personal liability under—If and when excluded—Note for debt binding on estate or minor's estate if decisive—Hindu Law—Joint family property—Father—Will appointing guardian of property for minor son—Validity.

Executors are personally liable on promissory notes executed by them as such even though they may be acting for the benefit of the testator's estate in doing so unless their liability is excluded in the manner provided in S. 29 of the Negotiable Instruments Act. A person does not exclude his own personal liability under a promissory note executed by him merely by saying that he executes the pro-note as a guardian.

Held, that under a promissory note executed by the executors under the will of a deceased Hindu, the executors had made themselves personally liable for the amount of the note, though it had been executed, not for money borrowed by the executors themselves, but for money already due by the testator.

Held, likewise that under a note executed by the guardian of a minor for a debt binding on the minor's estate, the guardian had made himself personally liable. A Hindu father cannot validly appoint by will a guardian of the property

NEGOTIABLE INSTRUMENT ACT, S. 46.

for his minor son to take effect after his death where such property is joint family property. (*Krishnan, J.*) *K. SUBBARAYUDU v. K. SUBBANNA*. 47 M. L. J. 763.

—Ss. 46 and 50—*Bill of Exchange—Endorsement—Delivery—Transfer for collection—Title of endorsee.*

Endorsement alone is not sufficient to transfer the property in a negotiable instrument to the indorsee but the instrument must be followed by delivery. Under S. 46 it may be shown that the instrument was delivered conditionally or for a special purpose only and not for the purpose of transferring absolutely the property therein. (*Martineau, J.*) *PUNJAB NATIONAL BANK, LTD., LAHORE v. COTTON FACTORY*. 6 Lah. L. J. 230: 79 I. C. 461: 1924 Lah. 640.

—Ss. 64 and 76 (a)—*Loss of Hundi—Presentation—Necessity for.*

1924 Lah. 198.

—S. 87—*Material alteration.*

77 I. C. 761 (1).

—S. 118—*Holder—Consideration—Presumption—Transferee from payee*

It is a legal presumption that every negotiable instrument is made or drawn for consideration and that the holder of a negotiable instrument is a holder in due course. The onus is on the person challenging the rights of the transferee to prove facts which would show that such transferee was not a holder in due course. A transferee of a negotiable instrument would be unaffected by the want or failure of consideration as between the drawer and the payee, if he has paid consideration without notice of a defect in the title. (*Scott Smith and Fforde, J.J.*) *HINDU STAN ASSURANCE AND MUTUAL BENEFIT SOCIETY, LTD. v. GURDIT SINGH*. 6 Lah. L. J. 183: 80 I. C. 741: 1924 Lah. 462.

NUISANCE—Damages—Discomfort when actionable—Surrounding circumstances to be looked to.

What may cause inconvenience to persons with dainty or elegant modes or habits of living may not cause similar inconvenience to persons accustomed to live in the busiest portion of a town. A discomfort to be actionable should be substantial. It should be substantial not merely with reference to the plaintiff; it must be of such a degree that it would be substantial to any person, occupying the premises of the plaintiff, irrespective of his position in life, age, or state of health. There is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and brought in respect of an act producing personal discomfort. As to the latter, a person must, in the interests of the public generally, submit to the discomfort of the circumstances of the place, and the trades carried on around him. The nature of the interference has to be examined in each case in the light of the circumstances of the place, where the thing complained of actually occurs, and the degree of inconvenience caused must determine the nature of the relief to which the

OATHS ACT (X OF 1873), S. 14.

person complaining may be entitled. (*Kanharya Lal and Mukerji, J.J.*) *BEHARI LAL v. JAMES MACLEAN*. 46 A. 297: 78 I. C. 506: 22 A. L. J. 165: L. R. 5 A. 107: 1924 A. 292.

N. W. F. P. RENT ACT (1881) S. 30 (d)—Acquisition of underproprietary right—Planting grove in land—Payment of rent. 1924 A. 53.

OATHS ACT (X OF 1873), S. 1—Form of oath—Walking some steps towards the Ganges—Statement, if binding.

Where the complainant offers to be bound by the statement made by the accused, if he made the statement after walking several steps towards the Ganges and the accused made the statement under these conditions, the statement being made on oath was conclusive proof of the facts set forth in it. (*Fremantle, S. M. and Burn, J. M.*) *DILSUKH v. RAJA KAM*. L. R. 5 A. 147 (Rev.)

—S. 1—Party agreeing to abide by oath of his opponent—Power of Court to go into evidence. *MITHU LAL v. SRI LAL*.

1924 A. 12 6

—Ss. 8, 9, 10 and 11—*Form of oath—Denial before deity.*

The purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God. All that is necessary to an oath is an appeal to the Supreme Being as thinking Him the rewarder of truth and the avenger of falsehood. The form or the administration of the oath is immaterial, provided that it involves, in the mind of the witness, the bringing to bear of this apprehension of punishment and it cannot matter what words or ceremonies are used in imposing the oath provided he recognises them as binding by his belief. An offer to give up a claim if the defendant denied it before a certain deity would be accepted by the defendant bind the plainiff. The denial before the deity is an oath in the proper sense of the word. (*Neave and Kendall, A. J. C.*) *INDAR PRASAD v. LALA JAGMOHAN DAS*. 10 O. & A. L. R. 558: 11 O. L. J. 485: 1 O. W. N. 167: 1924 Oudh 442.

—S. 11—*Scope of—Decision on special oaths—Prosecution for perjury.*

S. 11 of the Oaths Act does not provide that the evidence given on oath shall be conclusive proof of the matter stated; but it provides that as against the person who offers to be bound by the special oath, it will be conclusive proof of the matter stated. S. 11 of the Oaths Act does not prevent the Court from attempting to establish that a particular statement made by the appellant on oath was false in fact and false to his knowledge. In other words it is open to the Court to establish that by making that statement the appellant gave false evidence within the meaning of S. 193, I. P. C. (*Shah, A. J. C. and Fawcett, J.*) *KAMDAS VISHNUDAS, In re*

26 Bom. L. R. 713: 82 I. C. 359: 25 Cr. L. J. 1287: 1924 Bom. 511.

—S. 14—*Child witness.*

76 I. C. 1037: 25 Cr. L. J. 317.

OCCUPANCY HOLDING.

OCCUPANCY HOLDING — Joint holding — Mortgage by one of the tenants—Rights of others.

In the case of a joint occupancy holding belonging to four brothers and mortgaged by some of them with possession in favour of another person, one of the brothers, who was not a party to the mortgage cannot get back possession of the entire holding without paying the mortgage money on the ground that such a mortgage was invalid. 37 A. 779 Ref. (*Kanhaiyalal, J.*) *SHAIKH MUDI v. MOHIB ALI.* L. R. 5 A. 36 (Rev.) : 78 I. C. 1022 : 1924 A. 746.

—Mortgage of—Rights of mortgagee.

A mortgage of both occupancy and fixed rate holding executed prior to the passing of the Agra Tenancy Act could be enforced by sale of the fixed rate holding. 15 A. L. J. 544. referred to. (*Daniels, J.*) *RAM KARAN SINGH v. RAJA RAM.* L. R. 5 A. 225 (Rev.) : 1924 A. 877.

—Mortgagee—Rights of—Suit on mortgage.

A usufructuary mortgagee of an occupancy holding alleging that he had been dispossessed, sued for recovery of the mortgage money under a covenant contained in the mortgage. Held, that the mortgage transaction being illegal, plaintiff's suit was not maintainable. 44 A 486 ; 21 A. L. J. 303 foll. (*Daniels, J.*) *DAYA RAM v. THAKURI.* 22 A. L. J. 506 : L. R. 5 A. 170 (Rev.) : 46 A. 622 : 1924 A. 668 (1).

—Mortgagee—Recognition by zamindar—Right of redemption.

The fact that the zamindar has recognised the occupancy rights of a person is no doubt conclusive so far as he is concerned but that by itself is not sufficient to give him a right of redemption in respect of a mortgage held by the third party in the absence of evidence that he acquired these rights as heirs of the mortgagor. (*Neave, J.*) *RAM JATAN TIWARI v. RADHAKISHUN TIWARI.* L. R. 5 A. 23. (Rev.) : 1925 A. 15.

—Non-transferable — Execution sale by ordinary creditor.

1924 Cal. 52.

—Non-transferable holding—Transfer by tenant to one co-sharer—Rights of other co-sharers—Ejectment.

Where the tenant of non-transferable occupancy holding transfers it to a co-sharer landlord, the other sharers can sue for joint possession on the basis of his being a trespasser. The transferee cannot in such a case plead that the plaintiffs are in possession of other occupancy holdings. (*Rankin and Mukherji, JJ.*) *JAGABANDHU KUNDU v. RAJMOHAN PAL.* 78 I. C. 599.

—Non-transferable — Transfer and sub-lease — Landlord's right of reentry—Omission to pay rent—Effect of.

The raiyat of a non-transferable occupancy holding sold it to a third person and after obtaining a sub-lease from him remained in possession of the holding. Held, that the landlord was not entitled to obtain kbas possession in the absence of repudiation by the raiyat of his relation to the landlord as such raiyat. Mere transfer apart from any other consideration does not give the

OPIUM ACT (I OF 1878), S. 9.

landlord a right to reenter when the tenant transferor remains in occupation of the land and contests the suit. Omission to pay rent is not by itself a denial of the landlord's title in the absence of any evidence that the tenant refused to pay rent. (*Newbould and Rankin, JJ.*) *MONMATHA KUMAR RAY v. JOSADA LAL.* 28 C. W. N. 300 : 77 I. C. 551 : 1924 Cal. 647.

—Transfer of—Permanent lease—Grant of Ejectment—Estoppel.

The mere fact that while an estate was under the management of the Court of Wards rent was accepted from the transferees of a perpetual but non-transferable tenure does not give them a permanent tenancy. It amounts to no more than a recognition of their status as ordinary tenants. A transfer of such a tenure by way of sale connotes an entire abandonment by the transferor of his rights in favour of another person. (*Fremantle, S. M. and Burn, J. M.*) *RAJA BISHUN NATH SARAN SINGH v. SHANKER BAHADUR SINGH.* L. R. 5 O. 126 ; 10 O. and A. L. R. 813 : 11 O. L. J. 687.

—Tenancy—Power of zamindar to confer on persons rights, similar to that of an occupancy tenant.

Where a zamindar agreed that the names of the daughter, daughter's son, and widow of a deceased occupancy tenant, should be entered in the papers as occupancy tenants and it was contended that such a grant was illegal, to a holder for life estate, Held, relying on S. D. 1 of 1921, that a zamindar can confer on persons rights similar to those enjoyed by an occupancy tenant, (2) that the daughter, and daughter's son, will be continued as occupancy tenants even after the life time of widow of the deceased. (*Fremantle, S. M. and Burn, J. M.*) *BALWANT v. MADARI LAL.* L. R. 5 All. 303 (Rev.).

OFFENCE—Aggravation of—With false story—Risk to prosecution.

When the prosecution comes to Court with a false story in order to aggravate the offence they must take the risk of failing to prove the crime which was really committed. (*Dalal, J. C.*) *HAR PRASAD v. EMPEROR.* 10 W. N. 859.

OPIUM ACT (I OF 1878), S. 9—Importing opium—Consignment by a person to himself in British India—Offence.

One Ram Chandar, which name was to be a pseudonym for Govind Ram (accused) despatched from Kotah (Native State) 111 bags of maize containing a large quantity of opium. The goods were addressed to the same name, Ram Chandar, the consignee at Cawnpore, and arrived at Cawnpore in the train by which Govind Ram and his servant travelled. He went to a dharamsala, and being suspected of traffic in opium, he was there arrested and searched, and he was taken to the railway station where the truck containing the bags of maize was, and in his presence the truck was emptied and the maize examined and opium was discovered. In his possession was the railway receipt addressed by Ram Chandar in Kotah to Ram Chandar in Cawnpore. Held, on these facts it was quite clear

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that the accused was guilty of importing opium under S. 9 of Act I of 1878.

A person who exports from outside the United Provinces opium to a warehouse inside the United Provinces of which he is really the proprietor or temporary possessor, even under a false name, is, in fact, committing an offence under the Act and importing into the United Provinces, although, he is also the person who exported from outside. (*Walsh and Ryves, JJ.*)
 EMPEROR v. GOBIND RAM. 46 All. 146 :
 L. R. 5 A. 46 (Cr.) : 81 I. C. 100 : 25 Cr. L. J. 612 :
 1924 All 558.

—S. 9—Rules under—Preparations for admixture of opium—Meaning of—Rule 57 (d).
 MT. HAMIRI v. EMPEROR. 1924 Lah. 99.

—S. 9 (c)—Adulterated opium pills—Preparation of—Offence.

The preparation of adulterated opium pills is no offence where the amount of opium found, made up into pills and manufactured, is not more than what is allowed by the rules. (*Harrison, J.*)
 JIWNA RAM v. EMPEROR.

6 Lah. L. J. 206 : 81 I. C. 154 (1) :
 25 Cr. L. J. 666 (1) : 1924 Lah. 529.

—S. 9 (c)—Possession of opium—Offence—Visitor to a house. (*Young, J.*)
 MA MI v. EMPEROR. 75 I. C. 358 (1).

ORISSA TENANCY ACT (II OF 1913), Ss. 117 & 237—Customary rights—Acquisition of—Occupancy right.

It is one thing to say that a person may by custom acquire certain rights which are incident to rights of occupancy in land but it is quite another thing to say that by custom an under-raiyat may become a raiyat. It may, of course, be that the defendants by custom may acquire certain privileges of occupancy tenants and it may be that one of these privileges is that he is not liable to be ejected merely on notice under S. 57 of the Orissa Tenancy Act. (*Das and Adami, JJ.*)
 RAGHUNATH MISRA v. RAM BEHERA.

5 Pat. L. T. 140.

—OUDH CIVIL COURTS ACT, S. 17—Value of the subject-matter of a suit—Old building replaced by new—Suit for recovery of possession.

Plaintiff sued for recovery of possession of half share of a house which he purchased at court auction for Rs. 215. The suit was valued at Rs. 300. The defendant stated that he had demolished the old structure and built a pucca building worth more than Rs. 2,000. The court returned the plaint for presentation to the proper court holding that the value of the suit was over Rs. 1,000 the limit of that court's jurisdiction. Held, that the order of the court below was erroneous and unsustainable. The new building built by the defendant was not the subject-matter of the suit within the meaning of S. 17 of the Oudh Civil Courts Act as the plaintiff claimed a share only of the original house. (*Dalal, J.*)
 ABDULLA v. MAHOMED NAZIR. 10 O. & A. L. R. 19.

80 I. C. 694 (2) : 1925 Oudh 163.

—OUDH CIVIL DIGEST, Cls. 7 & 6—Costs—Scale of—Confession of judgment—Compromise.

OUDH ESTATES ACT, S. 2.

Clause VII of the Oudh Civil Digest seems to apply only to cases which are decided on confession of judgment made at once and not to cases in which some degree of contest has been made. If a case has gone so far as the framing of issues the Vakils of the parties must have been called upon to do a certain amount of work and their fees may fairly be charged on a scale more liberal than if the plaintiff is successful on his first appearance in Court. (*Neave, A. J. C.*)
 BALDEO SINGH v. JAI SINGH. 10 O. & A. L. R. 325 :
 80 I. C. 504 : 1925 Oudh 139.

—R. 172 (2)—Meaning of—Rule in conflict with C. P. Code, if ultra vires

A rule made by the Court of the Judicial Commissioner of Oudh if it is in conflict with the provisions of a section of the Code of Civil Procedure would be *ultra vires*.

Rule 172 (a) of the Oudh Civil Digest directs the return of record to the Court which sent the decree for execution after the same has been executed either wholly or in part by the Court to which it has been sent for execution only in cases where further satisfaction of the decree in the latter Court would not be possible. A Court which does not comply with the direction of the above rule does not lose its jurisdiction on that account. (*Dalal, J.C.*)
 MOHAMMED SHAKIR v. JUGAL KISHORE. 1 O. W. N. 794.

—OUDH ESTATES ACT (I OF 1869)—Amendment Act of 1910—Estate—Transfer to a person not an immediate successor—Effect. 76 I. C. 922 :
 10 O. L. J. 513.

—Ss. 2, 3, 8, 10, 14, 15 and 12—Transfers made to talukdar between 1859 and 1869—Effect—Proprietary right—Vesting of, in talukdar—Second summary settlement—Lord Canning's Proclamation—Transfer in favour of immediate Successor—Succession to the property.

S. 15 of the Oudh Estates Act is not applicable to property which is not under transfer at the time of the passing of Act I of 1869. Whatever transfers may have been made between 1859 and 1869, that is, after the summary settlement and before the passing of the Act, if at the time of the passing of the Act the property is in the possession of the Talukdar unburdened by any trust or vested interest, the provisions of S. 15 will not apply. S. 15 was enacted to take out of the Act estates which at the time of the passing of the Act were held by persons other than Talukdars with whom summary settlement was made. The whole object of the Act would be frustrated, if in every case where an estate is in the possession of a Talukdar the Court is required to inquire how the property had fared since the Summary Settlement. Prior to the letter of 10th October 1859 a talukdar could not make a valid transfer, as he was not himself invested with any proprietary title. A talukdar possessed of the legal estates in the Talukdari property may bind himself by equitable obligations to allow beneficial interests in the same property in favour of a designated individual or in favour of a Joint Hindu family of which he himself may be a member and he does so in the exercise of his powers of alienation

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inter vivos or by making a testamentary disposition 26 I. A. 194; 25 I. A. 161; 26 I. A. 229; 30 I. A. 209; 17 I. A. 54 Ref.

The effect of the proclamation by Lord Canning of the 13th March 1858 was to divest the proprietors of Oudd of landed property and to vest it in the British Government and the effect of the letter of the 10th October 1859 was to vest in the grantee a fresh and exclusive title to the taluka.

Where there is a transfer of a taluka in favour of the next successor, the taluka does not go out of the Act and when it comes back again by compromise to the representative of the transferor, it will be governed in matters of succession by S. 22 of the Act. 31 A. 132 Ref. (*Dalat, J. C. and Wazir Hasan, A. J. C.*) *MT. INDARKUER v. MT. NAND RANIKUER*. 10 O. L. J. 637;

80 I. C. 833; 1 O. W. N. 67; 1924 Oudd 278.

—Ss. 2 (7) (11), 13, 19, 22—*Hindu widow—Taking estate—Vesting of remainder—Mahomedan law—Exclusion of female—Primogeniture sanad—Will in favour of successor—Formalities of.*

The vesting of a remainder does not find a place in the devolution of property settled under S. 22 of Act I of 1869. According to the scheme of inheritance which is defined in S. 22 there is no descent of the deceased's estate until the widow's death. The single person out of those mentioned in S. 2 (11) cannot be ascertained until the time of the widow's death. The Mahomedan law of succession which applied to the case did not recognise a life-estate in a widow and the same incapacity will follow and a Mahomedan reversioner will not succeed to a vested right on the death of the last male holder but will only have an expectation and no interest. Under the Shiah law a life estate may be created by will or gift and the remainder may be devised or gifted to another person. In such a case the remainder vests immediately on the life estate coming into existence. The same principle will not be applicable where a life estate is created by statute and no clear intention of the creation of a remainder over is disclosed by the context or other provisions of the Act. Under the scheme of the devolution of property laid down by the Act no estate devolves under S. 2 (11) until the previous clauses have exhausted themselves that is, after the death of the widow. The effect of Cl. (11) was simply to refer the parties to the law which would govern the descent when the special provisions of the Act are exhausted. So long as the widow is alive those provisions would not be exhausted and no rights of any heir under Cl. (11) would vest during the lifetime of the widow. The language of Cl. (7) leads to the same conclusion. There is no mention of a life estate such as to raise an enquiry as to what became of the remainder. The Act directs that such estate shall descend to the widow, the qualification being that it shall be for her life. She is not an heir but takes an estate of inheritance in the property. Not being an heir she is debarred from transferring property during her life because the provisions of S. 11 will not apply to her, but during that term, she is vested with the full estate. Under a sanad granted to a taluqdar, not only the female but her whole line is excluded.

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Where there is a vesting of the remainder in addition to the life estate of the widow, the sanad will control the provisions of Cl. (11). The words "according to the rule of primogeniture" mean only seniority of line not birth. They do not explain the words "the nearest male heir". In finding the meaning of words used in the sanad the courts should be guided by the known intention of the grantor and the surrounding circumstances. In making a will in favour of a privileged person as the next successor to a tahsildar under S. 22, Cl. (7) the directions of S. 13 need not be carried out. Such will must conform to the provisions of S. 50 of the Succession Act, by virtue of the provisions of S. 19 of the Succession Act. Execution under S. 50 of the Succession Act includes the testator's signature and attestation by witnesses. An acknowledgment of the will by the testator in the presence of the attesting witnesses would be sufficient. *Dalat, J. C. and Neare, A. J. C.*) *SYED MD. HASAN v. SYED ALI HUDER*. 10 O. and A. L. R. 1229; 1 O. W. N. 803.

—Ss. 8 and 10 (List II)—*Custom of a single heir succession, presumption as to, after the estate passes out of the Act.*

Held, (Per *Pullan, A. J. C.*), custom does not come into existence with the Act or cease when the estate is technically excluded from the Act.

Per *Kendall, A. J. C.*, that so long as the estate devolves, according to the Act the custom (of single heir succession) is conclusively presumed (while) if the estate is transferred or bequeathed not in accordance with the Act, so that S. 15 comes into operation, the law will not allow a conclusive presumption because one of the elements has disappeared, i. e., the estate is no longer an estate within the definition of the Act. (*Pullan, A. J. C. and Kendall, A. J. C.*) *ABADI BEGAM v. AHMAD MIRZA BEG*. 1 O. W. N. 433;

82 I. C. 691; 11 O. L. J. 757;

1925 Oudd 190.

—S. 15—*Estate passing out of the—Custom of single heir succession—Primogeniture. S. 15. if a bar to the plea of a family custom.*

Held, that a family custom may be set up in regard to a property even though it has been withdrawn from the scope of Act I of 1869, and that property of this nature may still be held to be governed by family custom of single heir succession although it is no longer an estate within the meaning of Act I of 1869. 7 O. C. 248; 20 O. C. 360, 24 O. C. 107, 38 A. 552 and 26 O. C. 133 considered. (*Pullen, and Kendall, A. J. Cs.*) *ABADI BEGAM v. AHMAD MIRZA BEG*. 1 O. W. N. 433; 82 I. C. 691;

11 O. L. J. 757; 1925 Oudd 190.

—S. 23—*Taluqdari property—Succession—Non-taluqdari property—Acquisition of—Succession—Family custom.*

It is settled law that a subject cannot make his property descendible in a manner not recognised by the ordinary law, and it follows that he cannot by express declaration, still less by mere

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volition, whether actual or presumed, subject the property acquired by him to a rule of succession applicable to the property which he had received by a grant to which certain conditions were attached. Even in cases where according to family custom, an estate descends to a single heir, there is no necessary presumption that it descends by the rule of primogeniture. Nearness of degree prevails over directness of line so long as the competing claimants are within the category of heirs under the Hindu Law. Where a taluqdar mixes up the income from his taluqdari and non-taluqdari property and purchases other property with the savings, the acquisitions do not become impressed with the character of Taluqdari property and are not descendible as such. (*Kanhaiya Lal and Mukerji, JJ*) **HARBAKSH SINGH v. DAL BAHADUR SINGH.** 22 A. L. J. 1079 : 1925 A. 155.

OUDH LAWS ACT (XVIII OF 1876), S. 5—Dower—Amount of value of assets.

The value of the assets of a deceased Mahomedan after deducting his one-third share of a mortgage debt amounted to Rs. 11,465—5—0. The amount of dower, settled at the time of the marriage, was Rs 70,000 and two *dinars*. Held, having regard to the means of the husband and the status of the wife, and the fact that they left no children, it would be desirable to award dower under S. 5 of the Oudh Laws Act (XVIII of 1876), about one third of that amount, or roughly Rs. 4,000. (*Kanhaiya Lal, J. C.*) **SYED AMJAD HUSAIN v. MT. UMMATUL ASKARI.** 10 O. L. J. 409 : 79 I.C. 644 : 1924 Oudh 232.

—Ss. 7 and 9—Heritable non-transferable leases—Pre-emption—Cosharer of a sub-division.

A right of pre-emption should be presumed to exist not only in the case of under-proprietary communities but also in the case of communities constituted as holders of heritable, non-transferable leases. The expression "non-transferable" in S. 40 of the Land Revenue Act is used in a different sense to that in which the word "transferable" is used in S. 7 (a) of the Oudh Laws Act. Under S. 9 of the Oudh Laws Act a right of pre-emption can be exercised by a cosharer of the sub-division of a tenure resulting from a heritable non-transferable lease. The sub-divisions contemplated by S. 9 appear to be units bearing the relation one to another of having been called into existence by one and the same act or event of sub division whatever the purpose of such sub-division. 1 O. L. J. 187 foll. (*Ashworth, A. J. C.*) **LACHMIPAL SINGH v. BHAGWAT SINGH.** 1 O. & A. L. R. 1294.

—S. 9—Sale of share—Property the subject matter of suit—Right of pre-emption.

The sale of a share of property which is the subject of a land suit does not give rise to a claim for pre-emption. (*Kendall, A. J. C.*) **ARUNDHIYA PRASAD v. RAM AUTAR.** 80 I. C. 83.

—S. 9—Stranger joining in suit for pre-emption—Effect.

Where certain persons who were entitled to claim pre-emption joined along with them in pre-emption suit certain strangers with whom they

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had entered into an agreement relating to the property, the right of pre-emption is lost. Even if the strangers are subsequently struck off the file, the legal position is not altered. (*Wazir Hasan and Neave, A. J. C.*) **SARABJIT SINGH v. JAIKARAN SINGH.** 10 O. & A. L. R. 239 : 11 O.L.J. 423 : 79 I.C. 950 : 27 O. C. 137 : 1924 Oudh 420.

—Ss. 14 and 15—Pre-emption—Failure to deposit amount in time—Effect—Appeal

1924 Oudh 102.

—S. 20—Explanation (a) and (b)—Land acquired by adverse possession from taluqdar whether ancestral.

Land which has been acquired by adverse possession from a taluqdar ceases to form part of an estate as contemplated in cl. (b) of Explanation to S. 20 of the Oudh Laws Act and cannot be called ancestral. Nor can it be deemed to fall under Explanation (a) of the section as land directly or indirectly inherited or owned continuously from the First Regular Settlement. (*Dalal, J. C. and Neave, A. J. C.*) **SIRAJ AHMAD v. SYED IBNU L HASAN.** 10 W. N. 697.

—S. 25—Mortgage—Foreclosure—Transfer if voluntary.

Where there has been a mortgage which is foreclosed the transfer is voluntary and no rights accrue to the mortgagor under Section 25 of the Oudh Laws Act. (*Fremantle, S. M. and Burn, J. M.*) **MATHURA PRASAD v. INDARPAL SINGH.** L. R. 5 O. 55 : 10 O. & A. L. R. 603 : 11 O. L. J. 68 : 1 O. W. N. 357.

OUDH LOCAL RATES ACT (IV OF 1878), S. 3—Mortgagee in possession as a landholder.

Mortgagee in possession, is a "Land-holder" within the meaning of the Act. (*Sir John Edge.*) **MIRZA ABID HUSAIN v. KANIZ FATIMA** 46 A. 269 : 22 A. L. J. 284 : 10 O. & A. L. R. 281 : 34 M. L. T. (P. C.) 78 : 19 L. W. 703 : (1924) M. W. N. 657 : 27 O. C. 72 : 11 O. L. J. 427 : 1 O. W. N. 33 : 80 I. C. 1019 : 29 C. W. N. 214 : 1924 P. C. 102.

OUDH RENT ACT (XXII OF 1886) AS AMENDED BY ACT IV OF 1921—Ejectment suit—Expiration of statutory period before the amendment Act coming into force—Maintainability.

A landlord cannot eject a tenant under S. 62 A, if he does not take ejectment proceedings against him, to whom cl. (e) of S. 62-A on the expiry of the statutory period. Failure to do so, will constitute admission to tenancy within the meaning of S. 37. There is nothing in S. 62 A, which is repugnant to the definition of statutory period in S. 3 (1-a) read with S. 36 of the Oudh Rent Act. (*Fremantle, S. M. and Burn, J. M.*) **SRI BHAGAVAN SINGH v. MENDUKORI.** L. R. 5 Oudh 155 (Rev) : 1 O. W. N. 800 : 10 O. & A. L. R. 1073.

—Decree for ejectment against trespasser in Revenue Court—Whether restrictions as to the ejectment of tenants apply.

A zamindar can sue a tenant as trespasser in a Civil Court and having obtained a decree can obtain possession at any time in the year. But if he chooses instead to treat him as a tenant and

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issues notice of ejectment, the restrictions as to the ejectment mentioned in S. 63 of the Oudh Rent Act will apply and he cannot be ejected except between the months of April and June. (*Fremantle, S. M.*) MD JAFAR ALI KHAN v. AFZAL HUSSAIN. L. R. 5 Oudh 168 (Rev).

— S. 3 (3)—Land—If includes "trees"—Occupancy rights—Decree of Settlement Court.

Apart from special contract or customs 'land' as defined in the Oudh Rent Act includes un-gathered produce of land, whether spontaneous or not and will therefore include trees. In view of this it is difficult to separate the trees from the land, and to make the former transferable while the latter is not. A Settlement Court passed a decree recognising occupancy rights in certain lands in favour of the ancestors of the defendant by holding that though they had no under-proprietory rights in them they had the right to replant and enjoy the trees. *Held*, that the decree did not confer an absolute title to the trees on the defendants so as to entitle them to transfer the trees to be maintained as a grove along with the land. They could only occupy the land, maintain and enjoy the trees and transfer only the right of cutting away the trees. (*Kendall, A.J.C.*) MAHOM-ED HAIYAT KHAN v. SURAJ BALI SINGH.

10 O. & A. L. R. 952.

— Ss. 3 (10) and 48 159 AS AMENDED BY ACT IV OF 1921, S. 5—Heirs of deceased tenant—Position of—Validity of notice sent to the tenant before the Amending Act.

In a suit by the plaintiffs to contest notices of ejectment served upon them, and at the time of institution they were tenants of the land, as heirs to a deceased tenants under S. 48, who died before 11th Feb. 1922, when the amendment came into force, and, it was contended that the Amending Act. had no retrospective effect.

Held: (1) That the term 'statutory tenants' as defined in S. 3 (18) of the Oudh Rent Act, and added by S. 5 of Act IV of 1921, confers statutory tenancy on the Plaintiff.

(2) That under S. 159, which declares, that a notice issued against a tenant before passing of the Amendment Act is null and void, the notice issued in Nov. 1921 was void.

Per Burn—The act as worded, confers the status of statutory tenants on the heirs of tenant dying before the Amending Act came into force who are sued under the Amended Act. The effect of the explanation to S. 3 (18) is to prevent the heir of the tenants who die after the Act comes into force from acquiring statutory rights. (*Fremantle, S. M., and Burn, J. M.*) BHAGWATI DIN v. BHAGWATI DIN.

L. R. 5 O. 153 (Rev) : 10 O. and A. L. R. 1093.

— S. 4—Notice of rejection—Suit to contest—Applicability of section—Settlement entries—Presumption.

Where there is nothing that the plaintiff in a suit to contest a notice of ejectment was ever treated as a tenant or admitted to the land by the defendant, S. 4 of the Oudh Rent Act does not apply to the case. The presumption is in favour of the correctness of the entry in the recent

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settlement as against the entry in the preceding settlement. (*Burn, J. M.*) HARDWAR PANDEY v. RANI JASWANT KUNWAR. L. R. 5 Oudh 180.

— S. 5—Acquisition of occupancy rights—Persons claiming as proprietors under Act of 1868, status of.

Occupancy rights can be acquired only in two ways, first by the tenant fulfilling the conditions of S. 5 of the Oudh Rent Act and second by those who acquire occupancy rights allowed to expropriators of land by S. 25 of the Oudh Laws. Act. S. 5 does not apply to persons who were proprietors and not tenants at the time the Oudh Rent Act of 1868 was passed. (*Fremantle, S. M. and Burn, J. M.*) GOKUL v. SHEO SHANKER LAL. L. R. 5 O. 73 : 10 O. & A. L. R. 402 : 11 O. L. J. 395.

— S. 33, Sub-Ss. (1) & (11)—Tenant holding under agreement—Rent—Enhancement—Right of land-holder.

Where a definite rent has been fixed for an occupancy tenant without any indication that permanency was intended, S. 33 of the Oudh Rent Act applies; and Cl. (2) of that section must be interpreted to mean that where there is an agreement, rent can be enhanced according to the terms of the agreement and not according to the methods laid down in Cl. (1). (*Fremantle, S. M. and Burn, J. M.*) GULAB RAI v. BALBHADDAR SINGH, L. R. 5 Oudh 84 (Rev).

— Ss. 32, 127—Suit for rent—Kabuliyat found against—Claim for use and occupation.

A suit for rent was based on a *Kabuliyat* and alternatively on the basis of rent being paid as tenant. The court found against the first contention and dismissed the suit. *Held*, an adjudication on the latter point was necessary. (*Kendall, A. J. C.*) RAJA MUHAMMAD MAHDI ALI KHAN v. TAWAKKUL KHAN. 78 I. C. 764.

— S. 37—Ejectment—Grant of new plots to tenant—Notice of ejectment.

A tenant who was already in possession of some plots received other plots from the zamindar and *putwari* lumped both sets of plots together though the rents were shown separately. In a suit by the zamindar to eject.

Held, that there had been no change in the area and rent of the original holding so as to bar the zamindar's right of ejectment and that a notice to eject the tenant from the plots originally held by him could not be objected on the ground that it related only to a portion of the holding. (*Fremantle, S. M.*) RAM PRASAD v. CHAUDRAIN MITAN KOER. L. R. 5 O. 53 : 10 O. L. J. 708 : 10 O. & A. L. R. 583.

— S. 38—Enhancement of rent—Legality of.

Equitably a Zemindar has no right to claim any enhancement when he makes an agreement for enhancement greater than that authorised by law. (*Fremantle, S. M.*) BALDEO SINGH v. BALBHADDAR SINGH. L. R. 5 O. 184.

— S. 47—Rent—Agreement to enhance—Illegal contract—If payable.

No agreement made between a landlord and tenant in contravention of the provisions of the Oudh

OUDH RENT ACT, S. 48.

Rent Act could be a valid agreement. When an agreement contrary to S. 47 was entered into to pay enhanced rent, no suit could be brought on that even after that section had been repealed by the Amending Act of 1921. (*Kennall, A.J.C.*) GUR DIN v. MT. SIRAJUNNISSA. 10 O. & A. L. R. 169: L. R. 5 O. 146 : 8 I. C. 513 (2) : 1924 Oudh 432.

—S. 48 (1) and (2)—“Heir”—Succession to tenancy—Hindu widow—Rights of sapindas.

The word “heir” in the first line of S. 48 of the Oudh Rent Act must be the heir under the personal law of the tenant which in the case was Hindu law. A widow has full statutory rights. Her heirs are the nearest sapindas of her husband under S. 48 of the Act. (*Fremantle, S. M.*) LAL NARSINGH PARTAB BAHADUR SINGH v. SHEO RAM.

L. R. 5 O. 163 : 10 O. & A. L. R. 1112.

—Ss. 55, 56 and 167—Notice of ejectment—Sufficiency of service—Omission of tenant’s name.

Where a notice of ejectment was complete in both Hindi and Urdu but the tenant’s name was not written in Hindi and it was found that though the notice was affixed owing to plaintiff’s absence in Calcutta, it actually reached him. Held that the notice was properly served. (*Burn, J. M.*) JAGDATT v. RAJA PARTAB BUT. L. R. 5 O. 199 (1).

—S. 56 (1) (e) — Notice of ejectment—Service—Right of tenant to object—Suit to contest ejectment.

Section 56 (1) (e) of the Oudh Rent Act allows a tenant to object on the ground that notice was not served on him in the manner required by this Act. The fact that the plaintiff had been able to file his suit in time is a sufficient answer to the objection. (*Fremantle, S. M. and Burn, J. M.*) MANOHAR LAL v. GAYADIN SINGH. L. R. 5 O. 45 : 10 O. & A. L. R. 362 : 11 O. L. J. 65 : 1 O. W. N. 224.

—Ss. 57 and 60 — Ejectment — Application for assistance — Dismissal — Limitation.

A landholder, applied for ejectment of tenant under S. 60 of the Oudh Rent Act but agreed to have his application struck off on the ground that the tenant’s son had been serving on the army. A later application was rejected on the ground that the notice on which it was based had lost its force. Held, that no fresh statutory term began since the date of the last application. There was no change in either area or rent and the plaintiff continued to hold on after the expiry of his previous term. (*Burn, J. M.*) RAM ACHAL v. RAMESHAR PANDEY. L. R. 5 O. 103.

—S. 60 — Co-sharers — Application for Court’s assistance by one sharer — Objection by tenants as to non-joinder.

An application for the Court’s assistance under S. 60 of the Oudh Rent Act was filed by all the co-sharers who had issued the notice of ejectment but the application had been consigned by mistake to the record room. Subsequently a fresh application was made by one of the co-sharers but it was found that all the co-sharers desired ejectment. Held that an objection by the tenants

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as to non-joinder of all the co-sharers was not sustainable. (*Fremantle, S. M. and Burn, J. M.*) SITLA BAKSH SINGH v. ATA-UL-LAH KHAN.

10 O. & A. L. R. 617 : L. R. 5 O. 116 : 11 O. L. J. 539 : 1 O. W. N. 732.

—S. 60—Ejectment—Landlord’s notice to persons other than a tenant—Right of real tenant to oppose.

If a landlord issues a notice on a person other than the actual tenant of the land, and afterwards applies to eject that person, the actual tenant is entitled to oppose the application, and should be made a party to the case. As between a landlord and the person on whom notice is served the points detailed in S. 60 are to be considered. (*Fremantle, S. M. and Burn, J. M.*) SHAH ABRAR HUSAIN v. RAMCHARAN. 5 L. R. O. 169 (Rev.).

—S. 60, Cl. 1 (c)—Ejectment—Permission to remain in possession—Writing—Necessity for.

The receipt of rent given to the tenant by the zamindar is not such written authorisation as will satisfy the requirement of S. 60 of the Oudh Rent Act. Receipt of rent by the Zamindar may in certain circumstances be proof of admission or re-admission to the tenancy. (*Fremantle, S. M. and Burn, J. M.*) MT. MAN BIBI v. RAM DHANI. L. R. 5 O. 133 (Rev) : 10 O. & A. L. R. 880.

—S. 61—Arrears of rent—Ejectment—Procedure—Amending Act IV of 1921, S. 41—Effect of.

The new procedure prescribed by S. 61 of the Amending Act IV of 1921 does not apply to the case of arrears decreed before 11—2—1922 in respect of which a landlord was entitled under S. 61 of the Act before amendment to eject by application. (*Fremantle, S. M. and Burn, J. M.*) RAJA MD. ALI KHAN v. MUNNU UPADHIA.

L. R. 5 O. 151 : 1 O. W. N. 682 : 10 O. & A. L. R. 999.

—S. 62—Amendment of—Pahikasht tenants—Amendment of the Act—Fresh statutory period.

Where the statutory period of Pahikasht tenants came to an end before the Amending Act of 1922, a second statutory period is given to the tenants before they are ejected under S. 62 (a) of the Oudh Rent Act. (*Burn, J. M.*) SABHAJIT SINGH v. JAWAHIR LAL. L. R. 5 O. 135 (Rev.) : 1 O. W. N. 653 : 10 O. & A. L. R. 922.

—S. 62 A—Suit to eject—Status of tenant—Right to Court’s assistance.

Where a Zemindar brings a suit under S. 26 A, of the Oudh Rent Act he must be deemed to have authorised the tenant to remain in possession within the meaning of S. 60 (1) (c) of the Oudh Rent Act and he is not entitled to assistance under that section to eject in virtue of an order dismissing a suit to contest a notice of ejectment. (*Fremantle, S. M., and Burn, J. M.*) NOHAR LONIA v. RAM LOTAN. L. R. 5 O. 122 : 10 O. & A. L. R. 737 : 11 O. L. J. 670.

—Ss. 62 A and 108 (4)—Ejectment—Planting of trees on holding—Cause of action.

Where land was let for the purpose of cultivation and not for the planting of trees, the planting

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of trees unfits it more or less for cultivation and gives rise to a cause of action for immediate ejectment. (*Fremantle, S. M. and Burn, J. M.*) **BHAGWAN DIN v. THE SPECIAL MANAGER, COURT OF WARDS.** L. R. 5 O. 97.

—S. 62 (a) and (c) — *Ejectment of statutory tenant—Suit filed on the expiry of statutory period.*

In the absence of proof that the statutory period of a statutory tenant expired a court cannot take cognizance of a suit to eject him by virtue of the provisions of S. 62 (a) (c) of the Oudh Rent Act (*Fremantle, S. M.*) **SHANKAR BUX SINGH v. SUKHA.** 10 O. & A. L. R. 1273.

—S. 62 A (1), (e) and (proviso 1) — *Tenant holding for over ten years without change of area or rent — Statutory period, termination of — Amending Act of 1921, effect of.*

Where a tenant has held land for more than ten years before the passing of the Act without change of area or rent, the effect of the Amending Act of 1921 for the purpose of the first proviso to section 62 A (1) is to make the statutory period end in 1329 F. and the second proviso gives a fresh period from the beginning of 1330 F. 1 O. W. N. 800. S. D. 4 of 1924 referred to. (*Fremantle, S. M. and Burn, J. M.*) **RANA UMA NATH BUX SINGH v. SHEO SAHAI.**

1 O. W. N. 894 : L. R. 5 O. 193.

—Ss. 107-H and 103, cl. (10) — *Muafidar acquiring unad-proprietary rights—Illegal ejectment—Right of such Muafidar to sue for possession in the Revenue Court—Muafi right, whether transferable—Transferee of Muafi rights, position of.*

A muafidar who has attained the position of an under-proprietor under S. 107 H, can sue his landlord for recovery of possession as an under-proprietor on his ejectment without any process of law. A muafi right being non-transferable, a transferee of such right does not acquire such a title as he can enforce in a Civil Court. 6 O. L. J. 490 referred to (*Dalal, J. C.*) **BALA DIN v. AJUDHIA** 1 O. W. N. 583 : 82 I. C. 443 :

L. R. 5 O. 193 : 10 O. & A. L. R. 978.

—S. 107 — *Notice of ejectment—Suit to contest—Favourable rent.*

Where a suit is brought to contest a notice of ejectment on the ground of favourable rent the Court must determine whether the land had been originally let at a favourable rent and not whether at the time of the suit the rent had become favourable. (*Fremantle, S. M. and Burn, J. M.*) **MANOHAR LAL v. MAHESH PATHAK.**

L. R. 5 O. 11 : 10 O. & A. L. R. 175 : 10 O. L. J. 704.

—Ss. 107, B. H and 103 — *Declaration of status of under-proprietor — Jurisdiction—Civil and Revenue Court.*

The provisions of S. 107-H of the Oudh Rent Act specifically provide for a proceeding which is neither of resumption nor of assessment, nor of enhancement of rent and for an order founded on that proceeding. It relates to a case where land is not liable to resumption under S. 107 E. and necessitates an enquiry as to whether it had been held rent free or at a favourable rate since

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13—2—1856 or for fifty years and by two successors to the original grantee and land which was acquired in perpetuity, in consideration of the loss or surrender of a right previously vested in the grantee, or by written instrument, and for valuable consideration. If on enquiry the conditions stated above are found to exist the court is enjoined to make a declaration that the holder of such land is the under-proprietor thereof. (*Wazir Hasan, J. C. and Neave, A. J. C.*) **RAJAH BISHU-NATH SARAN SINGH v. UMADAT.**

L. R. 5 O. 140 : 11 O. L. J. 255 : 78 I. C. 150 : 1924 Oudh 415.

—S. 107 H — “Successor” — *Transferee included.*

The expression “successor” in S. 107 H of the Oudh Rent Act includes not merely the heirs but also the transferee of the grantee. (*Fremantle, S. M. and Burn, J. M.*) **THE SPECIAL MANAGER COURT OF WARDS v. BADRI PRASAD**

L. R. 5 O. 101.

—Ss. 108 (2) and 427 — *Jurisdiction of Revenue Court—Defence of proprietary possession.*

Jurisdiction under the Oudh Rent Act is determined by the allegations in the plaint and it is sufficient for the plaintiff to allege that the defendant is a mere trespasser to make the suit cognisable under Ss. 108 (2) and 127 of the Oudh Rent Act. There is nothing in the Oudh Act giving the court an option to require the plaintiff to institute a suit in the civil court. (*Ashworth, A. J. C.*) **MANI RAM v. SYEDWASI ALI.**

11 O. & A. L. R. 1197.

—S. 108 (10) — *Illegal ejectment—Meaning of—Landlord and tenant—Disputes between.* 1924 Oudh 14.

—Ss. 108 (10 b) — *Civil and Revenue Courts—Jurisdiction—Occupancy holding—Suit for possession.*

S. 108 (10 b) of the Oudh Rent Act is not intended to be limited to suits against a landlord and a suit for possession of an occupancy holding must be brought under that section in a Revenue Court (*Kendall and Pullan, A. J. C.*) **BIKARAMJIT SINGH v. MT. BANSRAH.** L. R. 5 O. 173 (Rev.) : 80 I. C. 271 : 10 O. & A. L. R. 764 : 11 O. L. J. 717.

—S. 108 (15) — *Suit for profits—Lambardar—Liability to pay interest.*

In a suit for profits against a lambardar, though the latter is not under a liability to pay interest under S. 73, Contract Act, or under the Interest Act, he is in a fiduciary position and has to account to his co-sharers and where he without reasonable cause refuses to account, he may in equity be charged interest. (*Wazir Hasan, A. J. C.*) **ADITYA PRASAD v. CHHOTE LAL.**

10 O. & A. L. R. 246 : L. R. 5 O. 99 : 78 I. C. 85 : 11 O. L. J. 206 : 1924 Oudh 319.

—S. 108 (15) — *Suit for profits—Members of joint Hindu family. Mr. SOHBAI KUAR v. Mr. RAJ DEVI.* 1924 Oudh 118 (1).

—S. 119 — *Appeals under—Powers of court.* L. R. 5 A. 78 (Rev.)

OUDH RENT ACT (XII OF 1881), S. 119.

—S. 119 B—Amendment—Decrease of Dt. Judge on appeal—Revision.
T. R. 5 O. 17 :
1921 Oudh 116

—S. 126—Sir land—Co sharer realising rent separately—Rights of lambardar.

Where in respect of joint sir land one half of the rent had been collected by the lambardar and the other half by another co sharer, it is not open to the lambardar alone, in the absence of a special custom, to eject the sub-tenant. (*Fremantle, S. M.*) *RAM SARAN v. SEWA*. L. R. 5 O. 91

—S. 126 (2)—Lambardar—Rights to eject tenants.

A lambardar is appointed by Government for the purpose of paying revenue as representative of the co-sharers and his appointment does not carry with it the right to collect all rent without regard to the wishes of the co-sharers or to eject tenants. (*Burn, J. M.*) *ACHAIBAR SINGH v. RAM HARAKH PANDE*. L. R. 5 O. 199 (2).

—S. 127—Mortgagor and mortgagee—Ejectment suit—Mortgagee not performing conditions in mortgage—Effect of.

A usufructuary mortgagee agreed to pay off certain prior creditors of the mortgagor and the latter agreed to deliver possession of the property mortgaged. The mortgagee failed to pay off the creditors and sued for possession of the properties and for rent under S. 127 of the Oudh Rent Act. *Held*, that it was open to the defendant (mortgagor) to set up the defence that the plaintiff not having performed his part of the contract, was not entitled to enforce his right to possession. (*Wazir Hasan, A. J. C.*) *AVANTIKA v. RASAD SHUKUL v. GUR BAKSH*.
27 O. C. 60 : L. R. 5 O. 85 : 78 I. C. 804 :
10 O. & A. L. R. 29 : 11 O. L. J. 197 :
1924 Oudh 425 (2)

—S. 127—Possession of tenant—Against Zamindar's will—Applicability of the section.

Section 127 of the Oudh Rent Act extends to cases where possession though originally lawful is retained against the will of the zamindar. When the defendant after the loss of his proprietary rights by foreclosure continued in possession of his sir or khudkasht lands:

Held, that the section 127 of the Oudh Rent Act applied to the case. (*Fremantle, S. M. and Burn, J. M.*) *MATHURA PRASAD v. Inderpal Singh*.
L. R. 5 O. 55 : 10 O. & A. L. R. 603 : 10 O. L. J. 68 :
1 O. W. N. 357.

—S. 127—Suit for arrears of rent—Cultivated grove—Entries in regular settlement.

A suit for arrears of rent was brought by the landlord under S. 127 of the Oudh Rent Act on the ground that the defendants, some twenty years ago, brought the land under cultivation without the sanction of the landlord. It was common ground that the plot of land in question was originally grove land. The land was recorded as a cultivated grove in the record of the first regular settlement, and the finding of the Court was that there had been no change in its character and that it continued to be a grove. *Held*, that the case was not one to which S. 127 of the Oudh

OUDH RENT ACT (XII OF 1881), S. 159.

Rent Act was applicable. (*Daniels, J. C.*) *THAKUR RUDRA PARTAP SINGH v. HAUSLA PRASAD*.
10 O. L. J. 524 : L. R. 5 O. 119 : 79 I. C. 722 :
1924 Oudh 295 (1).

—S. 135—Dismissal of suit for default—Application to restore dismissed suit, itself dismissed—Application to revive—Applicability.

Under S. 135, of the Oudh Rent Act, the provisions of the Oudh Rent Act must prevail in case they conflict with the provisions of the C. P. Code. An order dismissing an application for the revival of a prior application filed to set aside the dismissal of a suit for default, is open to appeal and second appeal under Ss. 116 and 135 of the Oudh Rent Act. (*Burn, J. M.*) *TASADDUQ HUSSAIN v. BHAGWAN RAKHSH SINGH*.
L. R. 5 O. 89 : 11 O. L. J. 232 : 1 O. W. N. 109 :
10 O. & A. L. R. 1134.

—Ss. 136 and 56—Notice of ejectment—Service by affixture—Suit to contest notice—Filing of.

Notice of ejectment was served by affixation on a plaintiff who had gone to an out-station. In spite of this he instituted a suit to contest the notice in time. *Held*, thereafter the plaintiff could raise no objection about any defect in the service of the notice. (*Fremantle, S. M. and Burn, J. M.*) *RANGAI v. DEOKINANDAN PANDEY*.
L. R. 5 O. 77

—S. 136—Notice of ejectment—Service by affixture—Contest of notice.

Service of a notice of ejectment was effected by affixation on tenant who had gone to another district : *held*, that the fact that the tenant contested the notice in time was sufficient, in the absence of any special circumstances, to validate the notice. (*Fremantle, S. M.*) *RAM PRASAD v. CHAUDHRAIN MITAN KOER*. L. R. 5 O. 53 :
10 O. L. J. 708 : 10 O. & A. L. R. 588.

—S. 136—Notice—Service—Affixation validity.

Where a tenant admittedly received the notice in time, *held* the notice was bad because it had been affixed to the house instead of being served personally. The object of the rule is to ensure service. (*Fremantle, S. M. and Burn, J. M.*) *RAJA MD. MEHDI ALI KHAN v. SHYAM KISHORE*.
L. R. 5 O. 48 : L. R. 5 O. 95.

—S. 136—Service by affixture—Temporary absence.

The words "cannot be found" have been interpreted in many cases not to include cases where the person has gone to particular place and is expected to return shortly. It is the duty of the process-server to make personal service if possible and the mere temporary absence of the persons to be served does not justify the process server in affixing the summons to his door. (*Fremantle, S. M.*) *RANI SUJAN KOER v. DEBAON SINGH*.
L. R. 5 O. 50 : 10 O. & A. L. R. 510.

—S. 159—Statutory tenancy—Notice of ejectment.

A notice of ejectment was served in 1921 and plaintiff's statutory tenancy began in 1323 Fasli. A suit was filed to contest the notice of ejectment.

OUDH RENT ACT (XII OF 1881), CH. VII.

Held that the notice was void under S. 159 of the Oudh Rent Act. (*Burn, J. M.*) **RAM HARAKH v. BALDEVA.** L. R. 5 O. 115.

—Chap. VII—Guzara land—Suit for resumption—Jurisdiction—Civil and Revenue courts.

Guzara land is rent free land and under the Oudh Rent Act Revenue Courts have exclusive jurisdiction in matters relating to the same. Where in a prior resumption suit in the revenue Court, it had been decided that being given for maintenance the land was not resumable, the decision was final and could not be challenged in a Civil Court. (*Kendall, A. J. C.*) **JAI INDAR BAHADUR SINGH v. THAKUR BACHUN SINGH.**

10 O. & A. L. R. 365 : L. R. 5 O. 129 : 79 I. C. 1051 : 1 O. W. N. 18 : 1924 Oudh 390.

—Muajidur—Lease at favourable rent—Acceptance of—Effect.

A lease does not debar a subsequent claim for occupancy rights. The defendant was holding under a grant at favourable rates and the effect of the lease was not to deprive him of such rights as he may be found to possess under Chapter VII of the Act. The land in his possession could only be resumed under that Chapter and was not liable to ejectment as a statutory tenant. (*Fremantle, S. M. and Burn, J. M.*) **SHEONATH v. THAKUR GANESH BUX SINGH.** L. R. 5 O. 41 : 10 O. & A. L. R. 279 : 11 O. L. J. 72.

—Chap. 7 (a)—Jurisdiction of Revenue Courts.

Whether a muafi grant is a transferable one according to the conditions laid down therein, is a question for decision by a Revenue Court and not by a Civil Court. (*Neave, and Kendall, A. J. Cs.*) **UMAN RAWAN PARTAB BAHADUR SINGH v. MUSSAMMAT HUBRAJA.** 11 O. L. J. 481 : 1 O. W. N. 413 : 1924 Oudh 422

PART PERFORMANCE—Doctrine—Applicability
—Sale—Possession given under prior registered mortgage—Effect

In order to make the doctrine of part performance apply to a sale without registered instrument where possession is with the vendee, such possession must have been given under the contract of sale and be referable to no other title. Where possession was given under a mortgage and subsequently a sale was alleged to have been effected without a registered instrument, the doctrine of part performance will not apply, and the mortgage can be redeemed. (*Carr, J.*) **MA SHWE KIN v. KA HOE.** 3 B. L. J. 211 : 1924 Rang. 381.

—Essentials of—Completed contract—Fraud—Parol agreement—Proof of.

To apply the doctrine of Part Performance to a particular case, it must be shown that the acts of Part Performance are unequivocally referable to the alleged agreement ; in other words, Part Performance always supposes a completed agreement. There can be no Part Performance where there is no completed agreement in existence. It must be obligatory and what is done must be under the terms of the agreement and by force of

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the agreement. The acts must be done by the plaintiff and be such that it would amount to fraud in the defendant to take advantage of the contract not being in writing. Hence the Act must be acquiesced in or done with the knowledge of the other party. The parol agreement must be of such a character that the Court would be able to decree specific performance thereof if it were in writing. The parol evidence must prove the agreement. (*Wazir Hasan, J. C. and Pullan, A. J. C.*) **BANSIDHAR v. LALA AJODHIYA PRASAD.**

10 O. & A. L. R. 701 : 27 O. C. 175 : 11 O. L. J. 619 : 82 I. C. 333 : 1 O. W. N. 248 : 1925 Oudh 120.

PARTITION—Common and not joint property—Exclusion of some items—Effect. **PAKKIRI KANNI v. HAJI MAHOMED MANJOOR SAHEB.**

1924 Mad. 124

—Confirmation of—Application for correction of papers—Error in carrying out directions of Court—Remedy—Procedure.

A partition having been confirmed and come into effect an application was made for correction of the papers on the ground that the orders of the Partition Officer had not been properly complied with. It was not clear whether the partition record was or was not correct. *Held*, that the proper order was to set aside the order of the collector sanctioning the partition and to quash the partition and direct the disposal of the application according to law. (*Fremantle, S. M. and Burn, J. M.*) **JAGDAMBA PRASAD v. KANDESHRI PRASAD.** L. R. 5 A. 122 (Rev.) : 11 O. L. J. 402.

—Co-sharers—Rights after partition—Imperfect partition. 1924 A. 57.

—Proceedings for—Khetbat converted into chekbat—Effect of.

The change from Khetbat to Chekbat so entirely alters the character of the partition that the Collector is justified in quashing proceedings when only the owners of a very small portion wished to go on. (*Burn, J. M.*) **BHAGWANI SINGH v. JAIGOPAL SINGH.** L. R. 5 A. 268 (Rev.).

—Successive suits for—Maintainability. See. C. P. CODE, O. 2, R. 2. 20 N.L.R. 28.

PARTNERSHIP—Accounts—Promote by one partner in favour of another—Suit on.

In a promissory note transaction between partners, a suit can be brought by the promisee—partner on the promissory note against the promisor—partners without involving the necessity of taking partnership accounts. 31 M. 347 Ref. (*Chandrasekhara Aiyar, C. J. and Plumer, J.*) **RANGASAMAPPA v. SIDDALINGAPPA.**

2 Mys. L. J. 90.

—Account settled—Re-opening of—Share of retiring partner carried over—Effect.

In taking accounts after the retirement of some members of a trading partnership, part of their share in the profits was taken over into a new account. *Held*, it was either a mutual mistake or fraud and in either case the mistake should be rectified. Where the whole account is not impugned, it need not be re-opened in its entirety, but it

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is enough if they are allowed leave to surcharge and falsify. (*Young, J.*) **ABDOOLA v. MAHOMED** 75 I. C. 171 : 1925 Rang. 99.

——— *Accounts—Taking of—Evidence to prove entries.*

In taking-accounts of a partnership if items in the accounts are alleged to be false, the party aggrieved should be given opportunities to let in evidence regarding the same. (*Baker, O. J. C.*) **RAHIMBAK v. AKBARKHAN.** 7 N L. J. 212 : 1925 Nag. 188.

——— *Debt—Promissory note by one member of a firm—Money applied for partnership purposes—Liability of the firm. See CONTRACT ACT, Ss. 231 AND 251.* 28 C. W. N. 824.

——— *Dissolution—Agreement at, by which firm's business and liabilities are taken over by one of the partners—Creditors not parties to—Effect of agreement upon, and upon partners inter se.*

When on the dissolution of a partnership an agreement is arrived at by which one of the partners takes over the firm's assets and makes himself personally responsible for its debts and liabilities, a creditor of the firm who is not a party to the dissolution agreement is not affected by it. The direct joint liability of each of the partners to such creditor remains entirely unaffected by the execution of such agreement. But by that agreement, the partner who took over the firm's assets and liabilities, as between himself and each of his former partners, becomes solely responsible for the firm's debt to that creditor, and each of the other former partners becomes entitled to an indemnity from the partner who took over the liabilities against all liability as a former partner of his in respect of that debt. Each of the other partners is entitled to have that right of indemnity declared and enforced (by an order on the partner who took over the debts, for example, to pay off the debt) if the right were disputed or the obligation neglected. But each of the other partners is entitled to no more. He cannot recover the debt from the partners who took over the liabilities unless and until he has himself paid it. (*Lord Blanesburgh.*) **VEERAPPA CHETTY v. ARUNACHELLAM CHETTY.**

26 Bom. L. R. 661 : 20 L. W. 368 : (1924) M. W. N. 559 : 35 M. L. T. (P. C.) 161 : 47 M. L. J. 168.

——— *Dissolution — Right to — Partnership at will.*

In the case of a partnership at will, each partner is entitled to dissolution; it is a legal right under the Contract Act. The circumstances in which a court may order a dissolution of partnership during the term have no bearing in connection with a partnership at will. (*Lord Dunedin.*) **RAM SINGH v. RAM CHAND.**

22 A. L. J. 14 : (1924) M. W. N. 76 : 19 L. W. 4 : 26 Bom. L. R. 196 : 33 M. L. T. (P. C.) 465 : 2 Pat. L. R. 94 : 10 O. & A. L. R. 156 : L. R. 5 P. C. 46 : 28 C. W. N. 566 : 5 Lah. 23 : 51 I. A. 154 : 1924 P. C. 2 (P. C.) : 79 I. C. 944 : 1 O. W. N. 65 : 40 C. L. J. 276 : 46 M. L. J. 158.

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——— *Duty to disclose material facts.*

It is a duty of a managing partner to disclose to the other partners all the material facts within his knowledge which would assist them in deciding whether or not to enter into a contract dealing with the partnership. (*Schwabe, C. J. and Couitts Trotter, J.*) **BRUNTON v. BRUNTON.** 78 I. C. 299.

——— *Suit for accounts against another firm—The second firm suing for dissolution—Effect.* 1924 Bom. 263.

——— *Suit for dissolution—Various defendants impleaded as having interest at different times—Other business—Multifariousness.* 2 Pat. L. R. 132 : 76 I. C. 950 : 1924 P. 65.

——— *Suit by one member alone—Joint cause of action—Maintainability.*

A suit cannot be maintained by one only of the partners of a firm or by one of the joint promisees in respect of a cause of action which had accrued to all jointly. (*Kennedy and Bilaram, A. J. Cs.*) **RALLIRAM SHEWARAM v. BUDHURAM PARMANAND.** 79 I. C. 914.

——— *Suit—Parties—Rule—Exception—Decree in favour of plaintiff in partnership action—Appeal by defendants—Death of one of them pending—Abatement of appeal.*

The plaintiff sued the defendants who were four in number, alleging that he entered into a partnership with them, that he contributed towards capital Rs. 1,745, that the defendants by suppression of the accounts of the firm and otherwise were causing loss to him, and on these grounds he asked for a decree dissolving the partnership and directing the defendants to pay him the amount due inclusive of interest and profits. The trial Judge found that substantially the case of the plaintiff was true and that the defendants fraudulently withheld the account books. In the result he gave the plaintiff a decree for Rs. 1,445 and profits amounting to Rs. 1,100. The sum of Rs. 1,100 was decreed as profits on the ground that, as the defendants had suppressed the account books, every presumption should be made against them and the plaintiff's figure must be accepted. From the decree of the sub-judge the first three defendants preferred an appeal to the District Judge contending that there was no partnership at all and that the plaintiff was in possession of the account books and was responsible for their suppression. There was no contest between the defendants *inter se* as to the measure of the liability of each one of them, and they were prepared to pay jointly the amount likely to be decreed by the appellate Court. Pending the appeal, the 3rd defendant died, and, as his legal representative was not brought on record within the prescribed period, the appeal abated so far as he was concerned. Thereupon the District Judge dismissed the appeal as regards debts 1 and 2 also on the ground that all partners were necessary parties to a partnership action and that the appeal in the absence of the legal representative of the third defendant was incompetent. Held that the rule that the plaintiff in a partnership action was liable to have his suit dismissed if he did not

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make all the partners parties to his suit was in applicable to the case and that the appeal ought not to have been dismissed as regards 1 and 2 debts. also. (*Venkatasubba Rao and Jackson, JJ.*) *GANGULU NAIDU v. N. CHENGAMA NAIDU*
47 M. L. J. 871 : 1925 Mad. 237.

—S^{uit} by partner to recover money due in respect of partnership—Limitation—S^{uit} for accounts barred—S^{uit} on judgment—Maintainability.

A claim by a partner to recover a sum of money from the other partners in respect of a transaction of the partnership must form part of the enquiry in the action for winding up the partnership and no suit will lie thereafter after a suit for an account is barred by limitation 45 M. 378 (P. C.) referred to. (*Ramesam and Jackson, JJ.*) *RAMASWAMI v. M. P. M. MUTHAYYA CHETTI*
47 M. L. J. 829 : 21 L. W. 75 : 1925 Mad. 279.

—Surety bond for maintaining partner—Liability for loss—Onus of proving loss

77 I. C. 251.

PATNA HIGH COURT RULES, Ch. V, R. 6—*Special Bench—Authority to refer a case to—Chief Justice—Whole Court.*

It is for the court as a whole and not for the Chief Justice to decide whether a particular Full Bench decision should be considered by the High Court in a Bench specially constituted for the purpose (*Das and Macpherson, JJ.*) *JAGDISHWAR NARAYAN v. MD HAZIQ HUSSAIN.*

1924 P. H. C. C. 142 : 77 I. C. 851 :
5 Pat. L. T. 473 : 1924 P. 537.

—Ch. 9, R. 7—Paper book—Appeals in execution of decrees—Printing of decree. *NRIPENDRA NATH CHATTERJEE v. JHUMAK MANDER.*

75 I. C. 681 (1) : 1924 Pat. 181.

PATNI—S^{uit} for arrears—Plaintiff if entitled to interest on arrears.

Where a putni was sold for arrears and was purchased by a third party and the defendants amicably settled the question of mesne profits with the purchaser and the defendants had actually realised rents from the tenants for the year 1323 by means of rent suits as appeared from the rent decrees produced in the case, the plaintiff zamindar was entitled to get interest on the rent for the year 1323. (*Chatterjee and Chotzner, JJ.*) *BIJOY CHAND MOHATAB v. KHOKE SINHE.*

1924 Cal. 1059.

PATNI REGULATION (VIII OF 1819), S. 11

—Applicability—Interest of occupancy raiyat—When protected. 1924 Cal. 353 (2).

PENAL CODE—The Code must be construed in its natural meaning but differences from prior English law need not be assumed.

The criminal law of India is prescribed by and so far as it goes is contained in the Indian Penal Code; accordingly (as the Code itself shows) the criminal law of India and that of England differ in sundry respects : and the Code has first of all to be construed in accordance with its natural meaning and irrespective of any assumed intention on the part of its framers to

PENAL CODE, S. 34.

leave unaltered the law as it existed before. (*Lord Sumner.*) *BARENDRA KUMAR GHOSH v. EMPEROR.*
1 O. W. N. 935 : 1925 P. C. 1.

—S. 21—Public servant—Convict warder in a gaol—Illegal gratification—Smuggling of prohibited articles into prison—Offence. See PENAL CODE, S. 161. 26 Rom. L. R. 267.

—S. 34—Acts done in furtherance of common intention make all equally liable for the results of all the acts of others.

The doing to death of one person at the hands of several by blows or stabs under circumstances in which it can never be known which blow or blade actually extinguished life if indeed one only produced that result is common in criminal experience and the impossibility of doing justice, if the crime in such case is the crime of attempted murder only has been generally felt. It is not often that a case is found where several shots can be proved and yet there is only one wound but even in such circumstances it is obvious that the rule ought to be the same as in the wider class unless the words of the Code clearly negative it. Of course questions arise in such cases as to the extent to which the common intention and the common contemplation of gravest consequence may have gone and participation in a joint crime as distinguished from mere presence at the scene of its commission is often a matter not easy to decide in complex states of fact but the rule is one that has never left the Indian Courts in much doubt. 21 A. 263, 29 C. 426. 36 Cal. 6, 5, and 9; 35 A. 329. 41 C. 154. Appr. S. 34 deals with the doing of separate acts similar or diverse by several persons; if all are done in furtherance of a common intention each person is liable for the result of them all as if he had done them himself for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part because they refer to it. 1923 Cal. 453; 40 All. 103; 21 and 24 P. R. 1919 Cr. overruled. It is however equally true that the Code must not be assumed to have sought to introduce differences from the prior law. The Penal Code continues to employ some of the older technical terms without even defining them as in the case of abetment. It abandons others such as principal in the first or the second degree but it must not be supposed that because it ceases to use the terms it does not intend to provide for the ideas which those terms however imperfectly expressed. One object which those who framed the Code had in view, was to simplify the law; and to get rid of the terms "principal in the first degree" and "principal in the second degree" and others, was no doubt a step in that direction but to introduce a general section, S. 34 which has little, if any, content and to attach a wholly new importance to abetments and attempts was to complicate, not to simplify the administration of the law, for participation and joint action in the actual commission of crime are in substance, matters which stand in antithesis to abetments or attempts. If S. 34 was deliberately reduced to the mere simultaneous doing in concert of identical criminal acts for which separate convictions for the same offence could have been obtained no

PENAL CODE, S. 34.

small part of the cases which are brought by their circumstances within participation and joint commission would be omitted from the Code altogether.

There is a difference between object and intention for though the object of an unlawful assembly is common, the intentions of the several members may differ and indeed may be similar only in the respect that they are all unlawful while the element of participation in action which is the leading feature of S. 34 is replaced in S. 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but S. 149 cannot at any rate relegate S. 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all. (*Lord Sumner*.) *BARENDRA KUMAR GHOSH v. EMPEROR*. 10 W. N. 935; 1925 P. C. 1.

—Ss. 34, 109, 114 and 304—*Attack by five persons—Assailants armed with dangerous weapons—Death caused by a blow—No evidence as to who caused blow.*

Five persons armed with dangerous weapons attacked another and as a result of a single blow delivered by only one of them the victim died. It was not proved who actually gave the blow. Held that all the assailants could not be convicted under S. 304 read with section 34 but must be convicted under section 325 read with section 109, or rather section 114, I. P. C. because they had armed themselves with dangerous weapons and must have known that in case of opposition the weapons would be used and grievous hurt at least would be caused. (*Malan, J.*) *NIAMAT v. EMPEROR*. 6 Lah. L. J. 385; 1925 Lah. 117.

—S. 34—*Applicability—Common intention—MAUNG GYI v. EMPEROR*. 1924 Rang. 34.

—Ss. 34 and 326—*Assault—Accused armed with deadly weapon—Injury—Offence.* 1924 Lah. 216.

—Ss. 34 and 325—*Causing bodily injury—Charge—Appeal—finding that accused has not personally caused injury—Alteration of charge—Conviction.*

The accused was charged with having caused such bodily injury to the deceased as resulted in his death and thereby committed an offence punishable under S. 325, I. P. C. The additional Sessions Judge convicted the accused but on appeal the High Court found that the conviction would not be upheld in as much as the accused himself had not personally caused the injury. Held, that it was not competent to the High Court on appeal to alter the charge and convict the accused with the help of S. 34 I. P. C. on the ground that the blow was struck by some other person in pursuance of a common intention. To send the case back for retrial on an amended charge under Ss. 34 and 325, I. P. C. would mean inviting the court below to believe on the amended charge the

PENAL CODE, S. 71.

very witnesses whom the Court in effect held to have committed perjury. (*Bovs, J.*) *CHEDA SINGH v. EMPEROR*. L. R. 5 A. 133 (Cr); 1924 A 766.

—Ss. 34, 114, 149 and 307—*Charge of attempt to murder—Conviction for abetment.*

There is no reason why a person who is charged under S. 302, I. P. C. cannot be convicted, although he is not charged with it, under S. 114 read with S. 302, I. P. C. A man so charged and so convicted would not in any way be mislead in his defence; for he is punishable under S. 114 not as a mere abettor but as a principal. A man charged with the substantive offence can be rightly convicted of that offence read with S. 114, I. P. C. although not charged with it. Even though the accused have been charged with offences under Ss. 148, 149 and 307, I. P. C. it is open to the court to convict them of an offence under S. 307 read with S. 34 or S. 114, I. P. C. (*Marien and Kincaid, JJ.*) *EMPEROR v. RANCHO SURSANG*. 26 Bom. L. R. 954; 1924 Bom. 502.

—Ss. 34—*Joint acts—Offence.* 1924 Mad. 229.

—Ss. 34, 397 and 398—*Provisions of S. 34, I. P. C.—Not material in construing Ss. 397 and 398 I. P. C. See Penal Code, Ss. 397 and 398.* 51 C. 265.

—S. 65—*Maximum sentence of one year—Five months in lieu of fine—Legality.*

A sentence of 2 months rigorous imprisonment in default of payment of fine, when the maximum sentence for the offence is one year's imprisonment, is illegal. (*Kendall, A J C.*) *NUR-UD-DIN v. EMPEROR*. 25 Cr. L. J. 116 (1); 81 I. C. 985 (1); 1925 Oudh 109 (1).

—Ss. 71 and 400—*Elements of offence—Testimony of approver—Acquittal of some of the accused—Gang of dacoits—Actual Commission of dacoity if necessary—Sentence—Cr. P. Code S. 397.*

The mere fact that several men implicated by the approver as having belonged to a gang of dacoits have been acquitted does not render the evidence of the approver inadmissible. An approver's testimony by itself is not sufficient for the conviction of an accused person without corroboration. If the corroboration is wanting the accused person is acquitted, however reliable the testimony of the approver may appear to court. But to this is added a second proposition by way of an axiom that weight of the testimony of an approver is reduced by the acquittal of persons implicated by him. His testimony might as well be taken out of a record of any trial. It will be no fault of the approver if the prosecution fails to obtain corroboration of his evidence with respect to particular accused person. Having regard to the fact that no conviction could be obtained without corroboration of an approver's testimony, the acquittal of any number of persons for want of corroboration cannot weaken the weight of such testimony. The matter would be different if it is shown that even one accused person has been acquitted not for want of corroboration but in virtue of a finding that

PENAL CODE, S. 71.

that accused person was innocent of the crime. In such a case the approver would be proved to have told a falsehood with respect to at least one particular accused person and his testimony would in consequence be looked upon with the greatest suspicion.

A conviction can be had under S. 400, I. P. C. even where no actual commission of a dacoity is proved. The element of that offence is association with the knowledge that it formed * for the purpose of committing dacoities habitually. The limit of punishment prescribed by S. 71, I. P. C. does not apply here.

Where a person is proved to have taken part in a particular dacoity and also to have been a member of a gang of dacoits, separate sentences could be passed on him. It will be for the Court in its discretion to determine whether the two sentences should run concurrently or not. (*Dalal J. C. and Neave, A, J. C.*) MURLI v. EMPEROR.

10 O. & A. L. R. 988.

S. 71—House breaking and rape.

75 I. C. 17 : 6 Lah. L. J. 111.

S. 71—Offences under Ss. 147, 149 and 325—Conviction—Separate sentences—Sentences to run concurrently—Legality of.

The accused was found guilty of an offence under S. 147, I.P.C. and of an offence under S. 325 read with S. 149, I.P.C. The accused was sentenced to 2 years' rigorous imprisonment for the former offence and to a further term of 3 years for the latter, both sentences to run concurrently. Held, that separate punishments for the two offences were illegal under S. 71 para (1) I.P.C. and it did not make any difference that the sentences were directed to run concurrently. The second sentence must be set aside, 16 C. 44 foll. (*Sanderson, C. J. and Cuming, J.*) KIAMUDDI KARIKAR v. EMPEROR.

51 Cal. 79 : 28 C. W. N. 347:

81 I. C. 593 : 25 Cr. L. J. 945 : 1924 Cal. 771.

Ss. 71, 147, 149 and 342—Rioting—Wrongful confinement—Separate sentences—Legality of.

The imposition of separate sentences under S. 342, I. P. C. read with S. 149 is not legal having regard to the provisions, S. 71 I. P. C. 8 C. W. N. 483: 51 C. 79 Ref. (*Sanderson, C. J. and Walmsley J.*) AMERUDDI PRAMANIK v. EMPEROR.

40 C. L. J. 306.

S. 73—Cumulative sentences—Solitary confinement 76 I.C. 21 : 25 Cr. L. J. 85.

S. 73—Solitary confinement—Conviction under Criminal Tribes Act—Power to order solitary confinement.

Solitary confinements are imposed, under section 73 of the Penal Code and under that section there is no authority for imposing a sentence of solitary confinement when a person is convicted under some other Criminal Act. The Criminal Tribes Act (No. 3 of 1911) makes no provision for imposing a sentence of solitary confinement on persons convicted under that Act and a Magistrate has no jurisdiction to order that any part of the sentence on the accused convicted under

PENAL CODE, S. 83.

that Act should be one of solitary confinement. (*Sulaiman, J.*) BIDHA v. EMPEROR.

L R. 5 A 19 (Cr.)

S. 73—Solitary confinement—Offence under Arms Act.

Solitary confinement cannot be awarded when a person is convicted under a special or local law such as the Arms Act. (*Abdul Raoof, J.*) EMPEROR v. NAZIR SINGH.

76 I.C. 184 : 25 Cr. L. J. 120 : 1924 Lah. 667 (1).

Ss. 75, 380 and 448—Discovery of treasure—Pot containing coins—Owner of field using pressure to recover coins—Offence.

In a village of which the accused was the part owner and the second accused was the manager, certain coins were discovered while a field was being dug by a tenant. The coins were distributed among the villagers. The manager came to the village with his servants and proceeded to make a round of the houses in the village demanding the coins in the possession of various householders. They used force and conducted house searches. When he had collected a certain amount of the coins he took the discoverer of the treasure to the police station where all the facts were laid before the police. The police after enquiry reported that the conduct of the accused and their servants was oppressive and high-handed. Held that the case was one of trespass rather than of theft as there was no intention to cause wrongful loss or wrongful gain. The conviction under S. 75 I. P. C. could not be sustained as the punishment under S. 448, I. P. C. was for a term less than three years. (*Foster, J.*) THAKUR PRASAD SINGH v. EMPEROR.

2 Pat. L. R. 205 (Cr) : 1924 Oudh 665.

S. 75—Offence under S. 369.

75 I. C. 368 : 6 Lah. L. J. 110.

Ss. 76 and 342—Wrongful confinement—Arrest of a wrong person under a warrant—Mistake—Liability of police officer.

A police officer serving in an up country district came to Bombay with a view to arrest a person named Giria. After making reasonable enquiries and on reasonable suspicion he arrested the complainant believing he was Giria, while in fact he was not.

Held, that the police officer was not guilty of an offence under S. 342, I. P. C. and he could invoke the protection given by S. 76, I.P. C., (*Macleod, C. J. and Crump, J.*) EMPEROR v. GOPALIA KALLAIYA. 26 Bom. L. R. 138 : 81 I. C. 317 : 25 Cr. L. J. 797 : 1924 Bom. 333.

S. 83—Offence under S. 366 I. P. C.—Infancy of accused.

If a child commits an offence when he is unable to understand the nature of the offence, it can hardly be supposed that he will be able to understand that he must plead his own lack of understanding when placed upon his trial. He cannot be debarred from the defence allowed him by S. 83, I. P. C. merely because of his ignorance of court procedure. Where an infant is charged with an offence, it should be left to the jury to

PENAL CODE, S. 4.

say whether at the time of the offence the prisoner had a guilty knowledge that he was doing wrong. (*Pullan, A. J. C.*) *EMPEROR v. ALI RAZA*.
10 O. & A. L. R. 788.

—Ss. 84 and 302—Unsound mind—Murder—Offence—Sentence.

The accused was suffering from a type of insanity known as folie circulaire, (i.e.) a type of insanity which commences in abnormality of conduct on the part of the sufferer. The abnormality increased by degrees until a period was reached when the man was manifestly insane. That was when the disease was at its height. Gradually the man got better, the abnormality ceased and for a period again he became perfectly sane. After a time abnormality began again and so the circle continued with alternating periods of lunacy, abnormality and sanity. It was found that though the accused was of unsound mind at the time when he committed the murder he knew perfectly well he was doing a wrong thing. *Held*, that the accused cannot get the benefit of the exemption of S. 84, I. P. C. The proper course is to sentence the accused to transportation for life so that he could be kept under observation. If he is for a sufficiently long period a man of apparent sanity, it is always competent to the Local Government to pass such order as clemency may suggest upon satisfactory medical certificates. (*Mears, C. J. and Stuart, J.*) *LACHHMAN v. EMPEROR*.
46 A. 243: 22 A. L. J. 116:
81 I. C. 171: 25 Cr. L. J. 683: 1924 A. 413.

—Ss. 86 and 302—Murder—Absence of motive—Action under the influence of ganja—Mental derangement. See PENAL CODE, Ss. 302 and 86.
39 C. L. J. 34.

—S. 94—Abetment of murder—Joint trial of principal and abettor—Acquittal of principal—Effect of.

It cannot be laid down as a general proposition that in every case where an abettor and principal are tried together, the abettor if charged with having abetted the principal in the commission of the offence must be acquitted if the principal is acquitted. In the majority of cases this would necessarily follow but there may be exceptions to the rule. Where there is evidence to prove the commission of the offence as against the abettor which is not equally good evidence against the principal then the abettor might be convicted especially where there can be no doubt that the offence of murder was committed. (*Newbould and Ghose, JJ.*) *UMADASI DAS v. EMPEROR*.

28 C. W. N. 1046: 40 C. L. J. 143:
83 I. C. 491: 1924 Cal. 1031.

—Ss. 97 and 105—Removal of property—Resistance to—Shooting of wild game—Carcase falling in the land of another—Right of person shooting, to remove it—Obstruction—Offence.

If a person kills a wild animal or wild bird on the property of another person, such dead creature does not belong to the killer but to the proprietor of the property, and such proprietor either himself or by his duly authorised agent can lawfully demand and if refused seize such dead creature from the possession of the killer, and

PENAL CODE, S. 100.

such persons as help him to exercise his right are doing no wrong, but, as against any person other than the proprietor of the estate or his duly authorised agent or those lawfully helping the proprietor or his agent the killer has a right to retain possession of the dead creature and anybody else depriving him forcibly of possession commits an offence. (*Adami and Bucknill, JJ.*) *EMPEROR v. ARTU RANTRA*.
3 Pat. 549:
81 I. C. 82: 25 Cr. L. J. 94: 1924 P. 564.

—Ss. 97 and 99—Right of private defence of property—Parties in joint actual possession of property—One party collecting rent from the tenants for his own benefit to the exclusion of the other party—Use of force by the other party, whether justified—Plea of private defence.

Where two parties are in joint actual possession of property, the act of one party in excluding the other from the enjoyment of such a possession by collecting rent from the tenants for his own benefit to the exclusion of the other party is clearly wrongful and the other party is justified in using force in the exercise of the right of private defence for the purpose of preventing the wrongful act. (*Wazir Hasan, J. C.*) *MAHESH SINGH v. EMPEROR*.
1 O. W. N. 549:
10 O. & A. L. R. 947: 11 O. L. J. 743.

—S. 97—Right of private defence—Property belonging to a third person—Theft or robbery.

Under S. 97, I. P. C., every person has a right to defend the property whether moveable or immoveable of himself or of any other person against any act which is an offence falling under the definition of theft, robbery or criminal trespass or which is an attempt to commit theft robbery or criminal trespass. (*Sulaiman, J.*) *DALGANJAN v. EMPEROR*.
22 A. L. J. 81:
L. R. 5 A. 61 (Cr.): 77 I. C. 881:
25 Cr. L. J. 481: 1924 A. 696 (2).

—S. 99—Private defence—Right of—Public servant not known to be such—Defence not set up—Duty of Court.

Even where a right of private defence is not pleaded, the Court, on finding on the evidence before it, that the accused acted in the exercise of his right of private defence, is bound to take cognizance of this fact. 16 Cr. L. J. 169 Ref. There exists a right of private defence under S. 99 Explan. I in a case where the alleged offender does not know and has no reason to believe that the person doing the act was a public servant. (*Mookerji, J.*) *KISHEN LAL v. EMPEROR*.

22 A. L. J. 501: L. R. 5 A. 177 (Cr.):
1924 A. 645.

—S. 99—Right of private defence of property.

2 Pat. L. R. (Cr.) 13: 1924 P. 143.

—S. 100—Extent of right—Reasonable apprehension.

The extent to which the exercise of the right of self-defence is justified depends not on the actual danger but whether there was a reasonable apprehension of such danger. (*Scott Smith and Fforde, JJ.*) *BAGH SINGH v. EMPEROR*.

25 Cr. L. J. 625: 81 I. C. 113: 1925 Lah. 49.

PENAL CODE, S. 106.

— Ss. 106, 141 and 146—Rioting—Use of violence—Injury to property. *MARIMUTHU NAIDU, In re.* 76 I. C. 235 : 25 Cr. L. J. 139.

— Ss. 107, 108—Abetment—Instigation—What acts constitute. *See CRIMINAL LAW AMENDMENT ACT, Ss 15 AND 17.* 5 Lah. 1.

— S. 114—*Abetment is a crime in itself while along with presence it is an offence under S. 114.*

S. 114 is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved and then the presence of the accused at the commission of that crime is proved in addition. Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. The section is evidentiary not punitive. Because participation *de facto* may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence plus presence or abetment can mean nothing else but participation. The presumption raised by S. 114 brings the case within the ambit of S. 34. (*Lord Sumner.*) *BARENDRA KUMAR GHOSH v. EMPEROR.* 10 W. N. 935 : 1925 P. C. 1.

— S. 114—Scope of.

S. 114 implies that the abetment had been completed before the actual offence was committed. The section deals with a person who would be guilty of abetment independent of any act done at the time of the offence, *i. e.*, a person whose abetment is complete apart from his presence. It defines the liability of such a person if he happens to be present when the offence is committed. (*Venkatasubba Rao, J.*) *ANNAVI v. EMPEROR.*

82 I. C. 262 : 25 Cr. L. J. 1254 : 21 L. W. 19.

— Ss. 116 and 161—Attempt to bribe—Offer—Public servant—Offer of illegal gratification.

A mere offer to pay an illegal gratification to a public servant is an attempt to bribe and money or other consideration need not be proved to have been actually produced at the time. (*Adami and Bucknill, JJ.*) *RAMSHWAR SINGH v. EMPEROR.* 3 Pat. 647 : 83 I. C. 679.

1925 P. 48.

— S. 120—Conspiracy—Offence under S. 19 (1) of the Arms Act—What has to be proved by the prosecution—Overt act.

When the proof of a conspiracy depends upon proof of the participation of the accused in an overt act which itself amounts to an offence the proper course is to put the accused on their trial for that offence. Where all that is shown against a person is evidence of his association with any of the conspirators that would not be sufficient to convict him of being one of the parties to the conspiracy.

Held, that on the evidence in the case, the accused were guilty of a conspiracy to get possession of arms and ammunition by illegal means and in contravention of the Arms Act. (*Chitty and Richardson, JJ.*) *KALI DAS BASU v. EMPEROR.* 83 I. C. 513 : 39 C. L. J. 151.

— S. 120-B—Charge to jury—What it should contain.

PENAL CODE, S. 124.

In a charge to the jury in a conspiracy case it should be necessary not only that there should be a consideration of the conspiracy and a determination of its nature and proof but unless it is quite clear that if there was a conspiracy all the accused were members of it, there should be a separate statement and criticism of the proved actions of each of the members of the conspiracy. (*Kennedy, J. C. and Raymond, A. J. C.*) *TOPANDAS v. EMPEROR.* 25 Cr. L. J. 761 : 81 I. C. 249 : 1923 Sindh 116.

— Ss. 120 B and 489 A & D—Forgery of currency notes—Conspiracy—Conviction under S. 120-B—Alternative charge under S. 107, I. P. C.

The words "where no express provision is made in this Code for the punishment of such a conspiracy" in S. 120-B, I. P. C., refer entirely to the quantum of the punishment to be inflicted in the event of conviction under the section and do not lay down any limitation against a charge under this section even where the accused has actually committed an offence under some other section of the Penal Code. The mere fact that a charge under Ss. 107 and 489, I. P. C., could have been framed against the accused in respect of a conspiracy to forge currency notes does not vitiate their conviction under Ss. 120-B and 489, I. P. C. (*Watson, R. M.*) *NARAYANACHARI v. EMPEROR.* 2 Mys. L. J. (P. & C) 11.

— Ss. 120-B, 302 and 364—Murder—Conspiracy—Several charges—No verdict on one of the charges—Re-trial.

Where two persons are tried for an offence under S. 120-B read with S. 302, I. P. C., and one of them is acquitted of the charge, the other cannot be convicted as the gist of the offence under S. 120-B, I. P. C., is an agreement between the accused persons. Where an accused person was tried under Ss. 302, 120-B read with Ss. 302 and 364, I. P. C., and the verdict of the jury was silent about the charge under S. 302 but found him guilty under Ss. 120-B and 364 *held*, that the verdict of the jury did not in itself negative the charge of murder and a re-trial on that charge should be ordered. (*Sanderson, C. J. and Cumming, J.*) *EMPEROR v. OSMAN SARDAR* 39 C. L. J. 264 : 81 I. C. 824 : 26 Cr. L. J. 1048 : 1924 Cal. 809.

— Ss. 124-A and 153-A—Same article if can constitute both offences.

A writer can commit offences both under S. 124-A and S. 153-A in the same article published in a paper. (*Kennedy, J. C. and Raymond, A. J. C.*) *EMPEROR v. NABI BUX* 25 Cr. L. J. 614 : 81 I. C. 102 : 1925 Sindh 59.

— S. 124-A—Sedition—"Disaffection"—Meaning of—Object of the provision—Duty of Court—Exciting feelings of disaffection—State of the country and minds of the people—Press and Registration of Books Act, S. 7—Entry of editor's name—Presumption.

Where a person is prosecuted for an offence, under S. 124-A, I. P. C., in respect of a newspaper article written by him the Court must not look to single sentences or isolated expressions but take the article as a whole and give a full, free and generous consideration and apply deal with it, in a fair and liberal spirit, not picking out

PENAL CODE, S. 124 A.

objectionable sentences or strong words used nor should undue importance be given to inflated and turgid language. We must also look to the real intention and spirit of the article. 19 C 35, Ref. The Court has to decide whether the article constitutes an attempt to bring the British Government established in India into hatred, or contempt or attempted to excite the feelings mentioned in the section. The amount or intensity of the disaffection is absolutely immaterial, for if a man excites or attempts to excite feelings of disaffection at all, even in the smallest degree, he is guilty under S 124-A, I. P. C. The Court has to decide whether the character of the article is such as to bring it within either of the second or third explanations to S 124 A. The Court has to bear in mind the class of paper in which the article appears and the class of people among whom it will be circulated and remember also that though the ultimate object of the writer may be unobjectionable, if in explaining that object, he uses language which is likely to bring the Government into contempt or to excite disaffection S. 124-A will apply. It is true that the conditions at present in India are quite different from those which existed in 1897 and that far greater freedom is given to the press now than was given in those days and things which may now be said and written with impunity would have been treated as seditious at the end of the last century. The Court has to consider the state of the minds of the people at present and the present conditions and to decide whether the article is now likely to engender feelings of hatred, enmity or disloyalty in the minds of the readers. The Court has to consider the article as a whole and look to see whether the general tenor of the article as shown by the expression used was intended to bring the government established by law in British India into hatred or contempt or constitutes an attempt to excite disaffection against that Government. The ascription to the Government of the object, as a root principle, to divide the races of India, so as to strengthen its rule and to destroy the language, culture, trade, commerce, arts and industries by strangling regulations, as well as the description of the Government as a Government which rules by brute force in an arbitrary manner over a people who have no voice in the administration, could not fail to cause a feeling of disaffection and contempt, if not hatred, in the minds of the Indian reader. The entry of the name of the Editor as such on a newspaper is sufficient evidence that, on the day that newspaper was published, the person bearing that name was Editor of the paper. A declaration under S. 7 of Act XXIV of 1867 is sufficient evidence that a person is a printer and publisher of the article. Under S. 84 of the Act as amended by Act XIV of 1922 a person whose name appears as an Editor may make a declaration before the Dt. Magistrate within two weeks of his becoming aware of the publication, that the publication of his name as Editor is incorrect. (*Adami and Macpherson, JJ.*) NAGESWAR PRASAD SHARMA v. EMPEROR.

1924 P. H. C. C. 283 : 83 I. C. 638 :
1925 P. 99.

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PENAL CODE, S. 141.

—S. 124-A—Sedition—Essentials of the offence—Exciting disaffection—Bringing Government into hatred or contempt—Offence.

The question whether a particular article is or is not seditious within the meaning of S. 124-A of the Indian Penal Code depends upon whether the article was or was not intended to bring the Government into hatred or contempt. Intention is a state of mind which may be gathered from the surrounding circumstances and may well be presumed if the writer or the publisher uses inflammatory words which would of course include also the character of the language employed by him. Intention is an essential element in the offence of sedition although the section does not expressly say so and it is also clear that it is not necessary for the prosecution to prove the intention directly by evidence. In most cases it would be impracticable. The law will presume the intention—whether good or bad—from the language and conduct of the accused and it will be then for him to show that his words were harmless and that his motives were inoffensive. Where a newspaper article dealing with the measures taken by the Government to put down certain disorders among certain sections of the Sikh community, designated the policy of the Government as a double-faced policy and also attributed to the Government a wilful disregard of the religious scruples of the Sikhs with a view to gain certain ulterior objects and the article was written in the vernacular dialect at a time when the relations between the Government and the Sikhs were very much strained *Held*, that the article in question had the effect of bringing the Government into hatred and contempt and exciting feelings of disaffection towards the Government and that the writer of the article was guilty of an offence under S. 124-A of the Indian Penal Code. (*Moti Sagar, J.*) JIWAN SINGH v. EMPEROR.
6 Lah. L. J. 379 : 82 I. C. 574 :
25 Cr. L. J. 1342 : 1925 Lah. 16.

—S. 141—Party in possession—Right of defence—Unlawful assembly.

A party in possession is entitled to resist and repel an aggression and their action in trying to maintain their possession will not constitute them an unlawful assembly. The phrase "to enforce a right" can only apply when the party claiming the right has not possession over the subject of the right. (*Scott-Smith and Fforde, JJ.*) BAGH SINGH v. EMPEROR.

25 Cr. L. J. 625 : 81 I. C. 113 : 1925 Lah. 49.

—Ss. 141 and 147—Unlawful assembly—Easement or customary right—Person having a right—Want of actual enjoyment—Effect of.

77 I. C. 1002 : 25 Cr. L. J. 538.

—S. 141 cls. (4) and (5) S. 149 and S. 325—Unlawful assembly—Import of the expression 'To enforce any right'—Party engaged in a lawful act attacked by the opposite party—Private defence, right of—Use of force in self-defence whether material to determine—Charge under S. 149 not substantiated—Charge under S. 325, whether sustainable.

In order to constitute an unlawful assembly under cl. (5) of S. 141 I. P. C. it is not enough that

PENAL CODE, S. 147.

the common object of one party is to compel the other party by means of force to omit to do a certain thing but it must be shown that the act omitted is one which the party is legally entitled to do. The true import of the expression "to enforce any right" used in S. 141 cl (5) I. P. C. relates to an initial act when it is done in furtherance of any right and not to an act when it is done to maintain a position already achieved in the lawful exercise of that right 11 O. L. J. 40 9 O. L. J. 291 & 25 A. 259 *rel. on*.

When a party engaged in the exercise of his lawful right is attacked by the opposite party, the fact that the former had time to have recourse to the protection of the authorities cannot take away his right of self defence 10 O. C. 196, and 45 A. 250, *ref. to*.

Nor is it material in such a case to determine with any great nicety the exact amount of force necessary under the circumstances. 45 A. 250 *relied on*.

Where a charge under S 149, Indian Penal Code, breaks down, no charge under S. 325, Indian Penal Code is sustainable. (*Wazir Hasan, A. J. C.*) *BAIJ NATH v. EMPEROR.*

10 W. N. 588; 10 O. & A. L. R. 1022.

— Ss. 147, 323—Alteration of Charge.

25 Cr. L. J. 554 81 I. C. 43; 46 M. L. J. 120.

— S. 147—Common object—Looting crops of complainant—Bona fide dispute as to title—Effect.

The common object of an unlawful assembly was alleged to be to loot the crops on the complainant's land. But it was found that there was a bona fide dispute as to the title to the land. *Held* there could be no conviction under S. 147, I. P. C. (*Kulwant Sahay, J.*) *BHAGAWAT JHA v. EMPEROR.*

81 I. C. 45; 25 Cr. L. J. 557.

— S. 147—Common object—Specific finding—Charge—What to contain.

To sustain a conviction of rioting, there must be a clear finding as to the common object of the unlawful assembly and the same should have been specifically stated in the charge so that the accused may have an opportunity of meeting it. (*Zafar Ali, J.*) *ALLAH DAD v. EMPEROR.*

75 I. C. 731; 25 Cr. L. J. 43; 1924 Lah. 667 (2).

— S. 147—Death of persons concerned in rioting—Responsibility of accused.

Where the evidence in a criminal case established clearly that both the parties were guilty of rioting and neither side had been able to establish any justification for their attack upon the other and the evidence was so conflicting and unsatisfactory that individual responsibility for the death of certain members of the party could not be fixed on any one. *Held*, that there were no sufficient grounds for discriminating between the two parties. (*Campbell, J.*) *SHADULLAH v. EMPEROR.*

6 Lah. L. J. 170; 81 I. C. 631; 25 Cr. L. J. 983; 1924 Lah. 482.

— Ss. 147 and 430—Irrigation work—Mischievous—Wrongful diversion of water—Bona fide claim of right.

Under S. 430, I. P. C. the physical requisites are the doing of an act which causes, or to the

PENAL CODE, S. 147.

doer's knowledge, is likely to cause, a diminution of supply of water. He also fulfils the mental requisites when he does this with intent to cause wrongful loss and the intention is properly held to be such when he takes it without any sort of right and it matters not that he claims to set up such a right, if the facts are so clear that the claim is manifestly only an additional wrong. It is for judicial fact to distinguish where the case is sufficiently doubtful to prevent the inference of a wrong intent. Where the accused knew that by their act they were causing a diminution of the water supply of a lower village by cutting off a bund and where they have not substantiated a right to take the water on a particular day, the accused must be held to be guilty of an offence under S. 430 I. P. C. (*Adami, J.*) *BASDEO SINGH v. EMPEROR.*

2 Pat. L. R. 194 (Cr.); 1924 P. 704.

— S. 147—Joining assembly after Common object ceases to exist—If an offence.

The common object of an unlawful assembly was to assault X. After the assault X ran away, and two persons joined assembly. *Held* the latter could not be convicted under S. 147 as the common object had ceased to exist at the time they joined. (*Kulwant Sahay, J.*) *SHAFAYAT KHAN v. EMPEROR.*

81 I. C. 794; 25 Cr. L. J. 1018.

— Ss. 147 and 323—Landlord and tenant—Tenant holding over—Expiry of lease—Right of landlord to enter.

A tenant whose right is determined has no right to remain forcibly upon the land and say to his landlord that he will cultivate that land till such time as he is evicted by a Civil Court. From the moment the title of the tenant expires, the landlord is in possession in the eye of law; and provided that he does not use undue force, he is entitled to go upon the land and if necessary to use force for the purpose of asserting and maintaining his possession (*Mullick and Bucknill, JJ.*) *GITA PRASAD SINGH v. EMPEROR.*

1924 P. H. C. 29; 5 Pat. L. T. 656;

81 I. C. 535; 25 Cr. L. J. 919; 1925 P. 17.

— Ss. 147 and 366—Offences under—Separate offences.

77 I. C. 997; 25 Cr. L. J. 533.

— S. 147—Offence under—Unlawful assembly—Right to maintain by force lawful possession of property—Trespass.

Where the owner of certain lands being in lawful possession of the same collects a number of men to prevent the opposite party from trespassing upon his land and carrying away fodder and a fight ensues as a result of which the opposite party sustained injuries, *held* that the owner and his party were not guilty of an offence under S. 147, I. P. C. S. 147 does not apply where a person in lawful possession of property uses force in order to maintain his possession and prevent a wrongful trespass. 10 O. C. 196; 9 O. L. J. 291; 24 C. 686; *fol.* 20 A. 459; 24 A. 143 *not foll.* (*Simpson, A. J. C.*) *INDERJIT v. EMPEROR.*

83 I. C. 523; 11 O. L. J. 40.

— S. 147—Riot—Cutting of a bund ordered to be maintained by Civil Court—Obstruction—Collector acting in defiance of orders of Civil Court—Death—Offence.

PENAL CODE, S. 147.

Under a compromise decree to which the Secretary of State was a party defendant the plaintiffs were allowed to maintain a bund with a view to divert the flow of a stream into its old bed. The bund was erected by public subscription. One of the defendants alleged that the bund had become damaged on the eastern side and prayed for permission of the Collector for its removal. The District Magistrate (who was also the Collector) issued an order under S. 144 preventing plaintiff from interfering when the bund was cut. There was objection on the part of the plaintiff with the result that they resisted the police and the opposite party in their attempt to cut the bund and one was killed and some others wounded. *Held*, that the District Magistrate who in his capacity as Collector represented the Secretary of State in the civil suit, could not take upon himself to construe the compromise decree of the Civil Court and say that the circumstances had arisen which justified dissolving the injunction of the Civil Court and the cutting of the western bund, that the injunction in favour of the plaintiffs was still subsisting and could only be dissolved by the Court which granted it and it was for that court alone which could construe its own decree to say whether the circumstances had arisen which would justify the dissolution of the injunction and the cutting of the bund and that the order of the District Magistrate not being legal the plaintiffs in the civil suit could not be convicted of rioting. There was no question of an unlawful assembly when the object of the accused was to save the bund. (*Greaves and Panton, JJ.*) *AB UL JALIL v. EMPEROR.* 23 C. W. N. 732 1924 Cal. 996.

—Ss. 147 and 296—*Rioting and disturbing religious assembly—Separate punishments, award of.*

A riot denotes a common object and where the common object of the accused persons is expressed in the charge under S. 296 of the Indian Penal Code and the accused persons riot in prosecution of that object, they commit one offence only and not two. Doubtless they are liable to separate punishment under S. 323, I. P. C., for the injuries caused in the course of the riot but they are not liable to two consecutive sentences under Ss. 147 and 296, I. P. C. (*Pullan, A. J. C.*) *PRAG v. EMPEROR.* 1 O. W. N. 473 : 10 O. & A. L. R. 871 : 82 I. C. 33 : 25 Cr. L. J. 1169 : 11 O. L. J. 693 : 1925 Oudh 65.

—Ss. 147 and 323—*Rioting and hurt—Separate and cumulative sentences—Distinct offences.*

It is difficult to perceive how the offence of rioting punishable under Sec. 147 and the offence of causing hurt cannot form distinct offences within the meaning of Sec. 35 of the Criminal Procedure Code. The gist of the offence of rioting consists in that several persons join together and form an unlawful assembly and any of them uses force in furtherance of their common object. It is unnecessary to consider what offence the particular kind of force used would constitute by itself and it may be from the slightest touch to causing death and yet the offence of rioting under Sec. 146 would remain the same; but the offence

PENAL CODE, S. 149.

committed by the use of the particular kind of violence employed may be anything from the mere use of criminal force under Sec. 352 to causing grievous hurt or death under Sec. 302, and it stands to no reason to say that if the person who commits such acts be punished under Sec. 147 he cannot be punished under any of these other sections which his acts clearly come under or *vice versa*. There are thus quite *distinct offences* requiring to be punished separately in the ordinary acceptance of the meaning of those terms. (*Subbanna, J.*) *BANDLU LINGAPPA v. GOVERNMENT OF MYSORE.* 2 Mys. L. J. 51.

—Ss. 147 and 325—*Riot resulting in offence under S. 325, I. P. C.—Whether all accused liable under S. 149 to separate conviction and sentence under S. 325.*

In cases of rioting under S. 147, I. P. C., resulting in grievous hurt within the definition of S. 325, I. P. C., convictions and separate sentences under S. 325 are legal against all the accused who actually joined in the assault. Some of these assaults may have resulted in simple hurt, others in grievous hurt, but all the actual assailants are under S. 149, I. P. C., liable for all the results, (1892) 17 B. 260 (F. B.) followed. (*May Oung, J.*) *NGASON MIN v. EMPEROR.* 3 Bur. L. J. 49.

82 I. C. 473 : 25 Cr. L. J. 1305 : 1924 Rang. 291.

—Ss. 148, 149 and 302—*Prosecution story found false—Defence.*

In a charge for being members of an unlawful assembly and for culpable homicide, the defence set up was private defence. The Court found the prosecution story to be false. *Held* the accused need not plead and prove the right of private defence. (*Ross and Sen, JJ.*) *RADHA SAHI v. EMPEROR.* 2 Pat. L. R. 217 (Cr.)

—Ss. 149, 302 and 326—*Attacked by men armed with spears—Death caused to individual other than the intended victim—Offence*

Ordinarily if accused persons go armed with spears in superior force intending to carry out by force their object of bringing away a woman which they know the persons having custody of the woman will resist, each of the accused must be taken to have known at least that a death caused by one of his party was likely to be caused. Where however the accused in the course of the attack speared the woman and her defenders with the result that the woman died of injuries and the others got a serious wound, *held* that the accused were guilty under Ss. 147 and 326, I. P. C., inasmuch as the killing of the woman was not done in prosecution of their common object. (*Daniels and Boys, JJ.*) *BEHARI v. EMPEROR.*

L. R. 5 A. 113 (Cr.) : 83 I. C. 714 : 1924 A. 670.

—S. 149—*Offence—If includes an offence under Railways Act, or Martial Law Ordinance.*

The term 'offence' as used in S. 149, I. P. C., does not include an offence under the Railways Act or the Malabar Martial Law Ordinance. A criminal statute has to be rigidly interpreted and S. 40 in terms implies that only offences punishable under the Penal Code are meant. (*Wallace and Madhavan Nair, JJ.*) *PUVANUR ATHARNO, In re.*

20 L. W. 914 : 1925 Mad. 239.

PENAL CODE, S. 151.

—Ss. 151 and 188—*Playing music before mosque—Order to disperse by Police Sub-Inspector—Disobedience—Offence.*

The accused, two Brahmans, were charged with having deliberately disobeyed a lawful order of the Sub-Inspector in the streets of Jhansi in the presence of a large number of people and thereby committed offences under Ss. 151 and 188, I. P. C. The accused took part in a Hindu procession which went on playing music in front of a Mahomedan mosque and the Sub-Inspector of Police with a view to avert a breach of the peace between the Hindus and Mussalmans gave an oral direction to the accused and the rest of the procession to disperse and desist from music. The accused in defiance of the order continued to play the music and advanced a few steps. But when a police constable was about to take hold of the musical instruments, they laid them on the ground and dispersed without resistance. *Held*, that the accused were guilty of an offence under S. 151, I. P. C.

Per *Walsh, A. J. C.*—The accused were also guilty under S. 188, I. P. C.

Per *Sulaiman, J.*—Though the order had been promulgated by a police officer to the knowledge of the accused, yet the police officer was not lawfully empowered to promulgate the order within the meaning of S. 188, I. P. C., and therefore no offence under the section was committed (*Walsh, A. J. C. and Sulaiman, J.*) *EMPEROR v. RAGUNATH VENAİK.*

22 A. L. J. 1049
1925 A. 165 (1).

—Ss. 153-A and 505—*Offences under—Intention to incite one community against another—Complaint in a newspaper article.*

Those who suffer have a right to complain through the columns of the public press and if the complaint is made in a sober language and is free from exaggerations and incisive comments it can be lawfully published for the consideration of the public officers and others concerned with a view to their taking necessary action to prevent a repetition of what has previously taken place. Where the article complained of contains no statement, expression or comment which is likely to incite Hindus against Mahomedans or to stir up feelings of hatred and enmity between the two communities, a conviction under Ss. 153-A and 505, I. P. C., cannot be upheld. (*Zafar Ali, J.*) *DESHBANDHU GUPTA v. EMPEROR.*

6 Lah. L. J. 162.

—S. 154—*Offence under—Essentials of—Knowledge of landlord or agent.*

Knowledge of the owner or occupier of the land of the acts or intentions of the agent is not an essential element of an offence under S. 154, I. P. C.

Per *Ghose, J.*—The greatest caution is required before starting proceedings against persons under S. 154, I. P. C. (*Newbould, Ghose and Cumming, JJ.*) *NRIPENDRA BHUSAN RAY v. GOBINDA BANDHU MAJUMDAR,*

39 C. L. J. 236:
23 Cr. L. J. 1258 : 82 I. C. 266 : 1924 Cal. 1018.

—S. 161—*Essentials of offence—Karnam receiving bribe from village for getting darkhast land—Official act—If an offence.*

In a charge under S. 161, Penal Code, it must be shown that the accused took the bribe as a

PENAL CODE, S. 172.

motive for doing an official act. Where the charge against a karnam was that he received a bribe from a villager on the understanding that he would get him some *darkhast* land, it does not constitute an offence under S. 161, I. P. C., as getting *darkhast* is not official act of a karnam. There is a nice distinction between what is criminal and what is departmentally reprehensible and a public servant can only be punished under the Penal Code when his act fulfils all the conditions of an offence as therein defined. (*Jackson, J.*) *PULIPATI VENKIAH, In re*

47 M. L. J. 662 :
(1924) M. W. N. 894 : 20 L. W. 618 :
1924 Mad. 851.

—Ss. 161 and 21—*Public servant—Convict warden in gaol—Smuggling of prohibited newspapers—Illegal gratification—Prisons Act, S. 42.*

A convict warden in a gaol is a public servant within S. 21 (7), Indian Penal Code, being a person who holds an office by virtue of which he is empowered to place or keep any person in confinement. Where a convict warden in consideration of a payment of a rupee smuggled certain prohibited newspapers, he is guilty of an offence. Where a person carries a bundle of newspapers from a prisoner inside gaol to some one outside the gaol, he is guilty of an offence under Sec. 42 of the Prisons Act, 1894, read with Art. 485 of the Bombay Jail Manual. (*Macleod, C. J. and Shah, J.*) *EMPEROR v. SAIFIN RUSUL,* 26 Bom. L. R. 267 : 83 I. C. 332 : 25 Cr. L. J. 1382 : 1924 Bom. 385.

—Ss. 171 (f) and 465—*False personation—Election—Abetment—Sanction—Necessity for—General and specific provisions—Preference.*

Where it was found that the petitioner had unintentionally but recklessly abetted the offence of false personation at a municipal election, he could not be accused of an offence under S. 465, I. P. C. Where there are two provisions, one specific and the other general, the specific provision ought to be applied in preference to the general one. (*Mukerji, J.*) *RAM NATH v. EMPEROR.*

22 A. L. J. 1106.

—Ss. 171 (f) and 511—*Personating at election—Attempt—What constitutes.*

An act, to amount to an attempt, must be such that if not prevented, it would complete the offence. At a municipal election the petitioner went to the officer who had the custody of the signature slips. He did not give out his name but produced a piece of paper which bore a certain number. The officer looked at the number and then looked at the electoral roll and asked the petitioner if he was Lachoo and he said "yes," but the patwari who was there pointed out that his name was Malkhan which was the truth. Thereupon the petitioner was turned away. *Held*, that the petitioner was not guilty of attempting to commit the offence of fraudulently applying for voting paper and thereby personating at election. (*Mukerji, J.*) *MAKHAH SINGH v. EMPEROR.* 22 A. L. J. 1102.

—S. 172—*Absconding with a view to avoid service of notice—Meaning of—Substituted service effected.*

The accused was the defendant in a suit in the Village Panchayat Court and he was approached

PENAL CODE, S. 179.

by the process server with a summons for the hearing. The accused refused to accept the notice, abused the process-server and went inside his house. The process-server thereupon affixed the notice to the outer door of the house. *Held* that the conduct of the accused did not disclose an offence under S. 172, I.P.C. (*Neave, A. J. C.*)
BHUJANG v. EMPEROR. 10 O. & A. L. R. 439 :
 11 O. L. J. 332 : 1 O. W. N. 159.

—S. 179—Conviction under—Legality—Panchayat Court—Accused charged before—Declining to plead or to answer question put to him—Conviction for—Procedure before Panchayat Courts—Madras Act, II of 1920, S. 78—Rule 36 of Rules framed under.

S. 179 of the Penal Code has nothing whatever to do with the conduct of accused persons in Court.

An accused who, on being charged before a Village Panchayat Court, says he will not make any reply and remains silent is not liable to prosecution under S. 179 of the Penal Code.

Under Rule 36 of the rules framed in pursuance of S. 78 of Madras Act II of 1920, which regulates the procedure before the Panchayat Court, an accused charged before that Court is not bound to answer any question put to him at all and can if he likes, decline to plead, and, if he declines to plead, the case goes on just the same. (*Schwabe, C. J. and Waller, J.*) *TIRUMALA REDDI in re.*
 47 Mad. 396 : 46 M. L. J. 40 : (1924) M. W. N. 141 :
 19 L. W. 292 : 34 M. L. T. (H. C.) 331 :
 77 I. C. 422 : 25 Cr. L. J. 374 : 1924 Mad. 540.

—Ss. 179 and 228—Court witness—Answer to questions by Court—Irrelevant and evasive replies—Offence.

In a case involving a charge of murder the Court sent for a witness under S. 540, Cr. P. Code, as being one who was near the scene of murder immediately after the event, and on being asked as to what the other prosecution witnesses said to him, he replied irrelevantly and evasively with the result that the Court was partially frustrated in its attempt to get at the truth. *Held*, that the witness was guilty of an offence under S. 179, I.P.C., and not under S. 228, I.P.C. (*Mukerji, J.*)
HAR NARAIN v. EMPEROR. 22 A. L. J. 1100.

—S. 179—Refusal to answer question put—Not relevant to case—If an offence.

Where a witness refuses to answer a question which had absolutely no bearing on the facts of the case then being tried, it is injudicious on the part of the Court to direct a prosecution under Sec. 179, Indian Penal Code. The Court can if necessary take action under Sec. 480, Criminal Procedure Code. (*Wazir Hasan, A. J. C.*)
CHHEDDI LAL v. EMPEROR. 10 O. & A. L. R. 144 :
 81 I. C. 951 (1) : 11 O. L. J. 358 : 1924 Oudh 402.

—S. 182—Application for transfer of criminal case—Affidavit by third party handed over to pleader and filed by him in Court—If amounts to information to public servant.

In support of an application to transfer a criminal case, a person swore to an affidavit containing allegations which were subsequently found to be false and handed it over to the pleader of

PENAL CODE, S. 182.

the complainant-applicant, who filed it in Court. The deponent was prosecuted therefor under S. 182, I.P. C.

Held, the affidavit having been given to the complainant's pleader on his behalf and as it was open to the complainant to instruct his pleader not to file the same, there is no information given to a public servant within the meaning of S. 182. (Ratanlal's unreported Criminal Cases of the Bombay High Court, page, 315 foll.) (*Wallace and Madhavan Nair, JJ.*) *THE PUBLIC PROSECUTOR v. KATTA PRAKASAM.* 20 L. W. 624 :
 83 I. C. 343 : 25 Cr. L. J. 1383 :
 1925 Mad. 123 : 47 M. L. J. 658.

—Ss. 182 and 211—Complaint—Report or false charge—Prosecution of some person other than the person originally charged—Liability.

The distinction between a charge under S. 211 and a mere report under S. 182, I. P. Code may be put thus : If the complainant confines himself to reporting what he knows of the facts, stating his suspicions, and leaving the matter to be further investigated by the police or leaving the police to take such course as they might think right in the performance of their duty; he may be making a report, but he is not making a charge. But if he takes the further step, without waiting for any official investigation, of definitely alleging his belief in the guilt of a specified person, and his desire that the specified person be proceeded against in Court, that act of his, whether verbal or written, if made to an officer of the law authorised to initiate proceedings based upon the complainant's statement, whether amounting to an expression of the complainant's belief in the guilt of the specified person or his desire that Court proceedings be taken against him amounts to making a charge. Though proceedings in Court are taken against a person different from the person originally charged, that cannot affect what was done when the original charge was made, if it was a charge. (*Walsh, A. C. J. and Ryves, J.*)
KASI RAM v. EMPEROR. 22 A. L. J. 829 :
 I. R. 5 A. 137 (Cr.) : 10 O. & A. L. R. 918 :
 82 I. C. 167 : 25 Cr. L. J. 1239 :
 1924 All 779.

—Ss. 182, 211—Difference between offences under.

S. 182 deals with giving information to a public servant as opposed to lodging a complaint in Court and requires the information given by the accused should not only be false in fact but it must be false to the knowledge or belief of the informant. S. 211 however does not require that the accused should know or believe his complaint to be false. It is sufficient if he makes his complaint without any just grounds and when he acts without due care or caution he comes within the section. (*Bilaram, A. J. C.*) *X v. EMPEROR.*
 82 I. C. 718 : 25 Cr. L. J. 1358.

—S. 182—False information given to the police—Conviction—Sentence—Enhancement of.

A magistrate convicted the accused of an offence under S. 182, I. P. C. in respect of his having given false information to the police and sentenced him to a fine of Rs. 25. At the instance of the District Magistrate a revision was filed in the Sessions Court requesting a reference

PENAL CODE, S. 182.

to the High Court for getting an enhancement of sentence. The Sessions Judge referred the case to the High Court with the remark that the sentence was inadequate and that it might be enhanced. *Held* by the High Court that the sentence was inadequate and that the person against whom the false information was given was a person of some position and respectability, and that a fine of Rs. 150 would be quite sufficient to meet the ends of justice. (*Moti Sagar, J.*) **EMPEROR v. CHUNI LAL.** 6 Lah. L. J. 363.

— **S. 182—Giving false information to public servant—Public servant not entitled to take action—Liability.**

A prosecution under S. 182, I. P. C., will lie quite irrespective of whether the action which a public servant is asked to take on information given to him is a legal one or not. To take the view that if he is not legally entitled to take action a prosecution will not lie will reduce S. 182, I. P. C. to a *reductio ad absurdum*. (*Pipon, J.C.*) **SANT RAM v. DIWAN CHAND.** 75 I. C. 289 : 24 Cr. L. J. 913.

— **Ss. 186, 189—Execution of decree—Arrest—Obstruction and threat of violence to peon—Offence.**

Where a court peon seeks to execute a decree by arresting the judgment debtor and the latter obstructs him and threatens to use violence, he is guilty under S. 189, I. P. C. (*Kulwant Sahay, J.*) **JAGANNATH SINGH v. EMPEROR.** 82 I. C. 165 : 25 Cr. L. J. 1237.

— **S. 186 — Offence under — Process for attachment of moveables outside jurisdiction — Resistance.**

Where a process for the attachment of moveables situate outside the jurisdiction of a Munsif's Court is issued and the process server who executes the process is resisted, the warrant of attachment is irregular and no offence is committed under S. 186, I. P. C. (*Walmsley and Suhrawardy, JJ.*) **SARBESWAR NATH v. EMPEROR.** 39 C. L. J. 33 : 1924 Cal. 501.

— **S. 186—Offence under—Obstruction to public servant.**

A police head-constable entered the house of a person and found in a room three of the articles alleged to have been stolen. Before the constable could remove them the accused caused the door of the room to be shut. The accused also threatened to kill the constable if he removed the articles. *Held*, that the accused was guilty of an offence under S. 186, I. P. C. (*Venkatasubba Rao, J.*) **GOTTUMUKKULA NARAYANA RAJA v. EMPEROR.** (1924) M. W. N. 438 : 35 M. L. T. (H. C.) 126 : 83 I. C. 657 : 20 L. W. 717 : 1924 Mad. 760.

— **S. 186—Public servant—Obstruction to—Assault on persons helping public servant.** 1924 Lah. 238 (1).

— **S. 186 — Voluntarily—Meaning of—Public function—What is.**

The use of the word "voluntarily" in S. 186 indicates the commission of some overt act of obstruction and does not render mere passive conduct penal. Refusing to open a closed door does not amount to voluntary obstruction.

PENAL CODE, S. 213.

The public functions contemplated by S. 186 are not intended to cover any act that a public functionary may take upon himself to perform, even if he believes he is acting in the discharge of his duties. (*Moti Sagar, J.*) **JASWANT SINGH v. EMPEROR.** 25 Cr. L. J. 721 : 81 I. C. 209 : 1925 Lah. 138.

— **S. 193—Correcting a previous statement is not perjury.**

A witness is not guilty of perjury if he corrects a statement of his, previously made in the same deposition. (*Wazir Hasan, J.C.*) **CHEDI LAL v. EMPEROR.** 11 O. L. J. 309 : 81 I. C. 951 : 25 Cr. L. J. 1127 : 83 I. C. 490 : 1924 Oudh 373.

— **S. 193—Evidence—Nature of.**

25 Cr. L. J. 185 : 76 I. C. 425 : 1924 Rang. 17.

— **S. 193—Judicial proceedings—Investigation by magistrate as regards sufficiency of ground for taking action under S. 11 of the Frontier Crimes Regulations—Oath not administered—Conviction for giving false evidence.**

An application was made to the District Magistrate that action should be taken under S. 11 of the Frontier Crimes Regulations. With a view to ascertain whether there were sufficient grounds for taking action upon the application, the magistrate directed a subordinate magistrate to make a summary enquiry. In the course of the enquiry the magistrate recorded the appellants' evidence on oath. *Held*, that though the statements of the appellants were taken by the magistrate, they were not taken by him in the course of any judicial proceedings and that the magistrate had no authority to administer an oath. Consequently the appellants cannot be convicted of giving false evidence under S. 193, I. P. C. (*Scott-Smith, A. C. J. and Malan, J.*) **JAHANGIR v. EMPEROR.** 6 Lah. L. J. 375 : 82 I. C. 710 : 25 Cr. L. J. 1350 : 1924 Lah. 729 (2).

— **S. 193—Perjury—Proof of—False statement—Contradiction between two depositions.** 1924 P. 276.

— **S. 211—Complainant—Who is—Application to district authority for enquiry.**

An application to the Police not being enquired into, the applicant addressed a petition to the Deputy Commissioner for enquiry into the matter. *Held*, the petition was not a complaint and action cannot be taken under S. 211, I. P. C. (*Kotwal, A. J. C.*) **MAHADU v. EMPEROR.** 24 Cr. L. J. 959 : 75 I. C. 543 : 1924 Nag. 115 (1).

— **Ss. 213 and 214—Offences under—Elements of—Concealment or screening for a short time—Sufficiency of.**

The offences constituted by S. 213 or S. 214, I. P. C., consists in the corrupt motive which is brought into play as much as in the delay to criminal justice. It consists in the compounding of an offence by some agreement not to bring the criminal to justice, and these sections intend to punish those who make a profit out of public wrong. If the facts found in the case prove that there has been an actual compounding of an offence and there is superadded to it an acceptance

PENAL CODE, S. 215.

or attempt to obtain or agreement to accept a gratification or restitution as a consideration for the compounding, the offence is made out. Actual concealment or screening even for a short time may be sufficient, but there must be some concealment or screening actually proved. If such is proved, and there is further the acceptance of or attempt to obtain or agreement to accept the gratification or restitution as a consideration for the same, the offence is complete. The fact that the very same person subsequently did prosecute even to conviction would not purge the offence. (*Newbould and Mukerjee, JJ.*) HEM CHANDRA MUKERJEE v. EMPEROR. 40 C. L. J. 278 : 1925 Cal. 85.

—Ss. 215 and 511—Stolen property—Promise of recovery in lieu of payment of money—Theft not detected. 76 I. C. 191 : 25 Cr. L. J. 127.

—S. 215—Theft of animals—Restoration on receipt of gratification—Offence.

It cannot be a defence to a charge of accepting money for returning stolen property that the person who takes the money was himself the thief. When it was found that certain bullocks had been missing from the grazing field and the accused promised to recover the animals if he was paid a certain sum and on receiving the money the accused produced the animals in a short time, it is open to the court to infer that the accused was the thief or one among many thieves and that he was guilty of an offence under S. 215, I. P. C. (*Walsh, A. C. J and Ryves, J.*) EMPEROR v. MUKH TARA 22 A. L. J. 838 : L. R. 5 A. 145 (Cr.) : 1924 A. 783.

—S. 216—Essentials of offence.

For a conviction under S. 216, I. P. C. it must be proved that the accused knew the person harboured to be a person for whose apprehension an order had been made by competent authority. (*Campbell, J.*) HARNAM SINGH v. THE CROWN. 6 Lah. L. J. 478 : 1925 Lah. 103.

—S. 216—Giving food to proclaimed offenders—If an offence.

The mere giving of a meal to two proclaimed offenders is not an offence under S. 216, I. P. C. (*Scott-Smith, O. C. J.*) HUKAM SINGH v. THE CROWN. 6 Lah. L. J. 481.

—S. 216 A—"Harbour"—Meaning of—Loan of a pony to dacoits to carry loot.

Lending a pony to certain dacoits to enable them to carry their loot away is not "harbouring" under S. 216 A, I. P. C. (*Ryves, J.*) DAMRI v. EMPEROR. 22 A. L. J. 496 : L. R. 5 A. 90 (Cr.) : 80 I. C. 711 : 1924 A. 676 (1).

—S. 225-B—Arrest by police constable without warrant—Resistance—No offence. See CRIMINAL PROCEDURE CODE. Ss. 54 AND 55. 46 M. L. J. 447.

—S. 225 B—Proceedings under S. 109, Cr. P. C.—Escape from Police custody—Offence.

A person against whom proceedings under S. 109, Cr. P. C., are pending, if he escapes from

PENAL CODE, S. 290.

Police custody commits an offence under S. 225 B, Penal Code. (*Kin-aid, J.C. and Kennedy, A.J.C.*) EMPEROR v. KHANU KORI 77 I. C. 814 : 25 Cr. L. J. 462.

—Ss. 225 B and 353—Warrant—Name of person to be arrested not given—Obstruction to arrest—No offence.

Where a warrant does not contain the name of the person who was to be apprehended thereunder except in a heading where he was described as a party to a suit which was non-existent, the warrant is bad and obstruction to the arrest is not an offence. (*Greaves and Duwal, JJ.*) JOGENDRA NATH LASKAR v. HIRALAL CHOUDHURY. 39 C. L. J. 452 : 83 I. C. 481 (2) : 51 Cal. 902 : 1924 Cal. 959.

—S. 230—Removal of goods—Dishonesty. 76 I. C. 654 : 25 Cr. L. J. 222.

—S. 235—Goldsmith—Possession of instruments used in the trade—Incomplete dies—Counterfeiting coin—Offence.

Three incomplete dies and some instruments for the purpose counterfeiting coin were found in the possession of the accused, a goldsmith by occupation. So far as the instruments were concerned, they were such as would be usually required by goldsmiths for the purposes of their trade. The dies were so deficient that no complete counterfeit coin could be struck from them. It was not proved that the accused used those instruments or dies for the purpose of counterfeiting. Held that the accused had not committed any offence under S. 235, I. P. C. The mere possession of instruments and materials capable of counterfeiting coins is no offence. The possession of such instruments must be shown to have been with the intention of counterfeiting coins. Such intention is essential to sustain a charge under S. 235, I. P. C. The mere possession of dies incapable of striking a complete coin does not necessarily lead to the inference that the accused intended to manufacture coins. (*Zafar Ali, J.*) KHADIM HUSSAIN v. CROWN. 5 Lah. 392 : 1925 Lah. 22.

—S. 268—Necessity to prove annoyance. 25 Cr. L. J. 382 : 77 I. C. 188 : 1924 A. 194.

—S. 273—Knowing or having reason to believe—Noxious food or drink—Presumption if to be made MUKAND RAM v. EMPEROR. 25 Cr. L. J. 537 : 77 I. C. 1001 : 1922 O. C. 893.

—S. 283—Essentials of offence.

To constitute an offence under S. 283, I. P. C. it must be proved not only that the accused obstructed the road but that it caused danger or injury to persons using the road. (*Moti Sagar, J.*) EMPEROR v. GHULAM RAZA. 25 Cr. L. J. 707 : 81 I. C. 195 : 1925 Lah. 153.

—S. 283—Obstruction in public road by contractor—Liability of owner. 76 I. C. 975 (2) : 25 Cr. L. J. 303 (2).

—S. 290—Nuisance—Collection of a Crowd in front of a shop—Liability of person responsible for.

PENAL CODE, S. 294.

If a crowd collects and obstructs the traffic in front of a shop so as to cause a nuisance, the person who is directly responsible for the crowd collecting is obviously not less but more guilty than the other persons who form the crowd and this would equally be the case whether he were inside or outside his shop at the precise moment. No one is allowed to make use of his premises in such a way as to interfere with the rights of the public. (*Daniels, J.*) *HAPPOO MAL v. EMPEROR*.

L. R. 5 A. 98 (Cr.) : 83 I. C. 695 :
22 A. L. J. 662 : 10 O. & A. L. R. 773 :
1924 A. 568.

—S. 294—Offence—Trial by village headman—Conviction—Bar. *NGA E. v. EMPEROR*.
76 I. C. 697 : 25 Cr. L. J. 233 : 1924 Rang. 23.

—S. 294-A.—Unauthorised Lottery—Advertisement of—Offence.

The accused owned a cloth shop at Bijapur. To advertise his wares he issued a printed leaflet indicating a general reduction in prices. He published handbills relating to his shop and on the margin of the leaflet he advertised Goa Lottery tickets, which had not been sanctioned by the Government. *Held*, that the accused had not committed any offence under S. 294-A. I. P. C. inasmuch as all that he did was to state that the lottery tickets could be had at a particular place. It was not a publication of a proposal to pay any sum on any event or contingency relative or applicable to the drawing of any ticket in any lottery not authorised by government as provided in Para. 2 of S. 294 (A). I. P. C. (*Shah, A.C.J. and Fawcett, J.*) *EMPEROR v. RACHAPPA*.

26 Bom. L. R. 968 : 1925 Bom. 26.

—Ss. 295 and 447—Mahomedans entering a Hindu temple—Consecutive sentences—Propriety of.

When a band of Mahomedans entered a Hindu temple and damaged property therein they are guilty under Ss. 295 and 447, I. P. C. but the offence is really one and the sentences passed should be concurrent and not consecutive. (*Pullan, A.J.C.*) *BAHRA v. EMPEROR*.

25 Cr. L. J. 1173 : 82 I. C. 37 : 1925 Oudh 50.

—S. 295—Untouchable entering Hindu Shrine—Offence.

Where, by custom, an untouchable by entering an enclosure round a Hindu Shrine would pollute the temple and with that knowledge an untouchable deliberately enters and defiles it, he commits an offence under Sec. 295, Indian Penal Code. (*Prideaux, A. J. C.*) *ATMA RAM v. EMPEROR*.

25 Cr. L. J. 155 : 76 I. C. 299 :
1924 Nag. 121 (1).

—S. 297—Having sexual connection in a Mosque—Offence. *MAQSUD HUSAIN v. EMPEROR*.
1924 All. 9.

—Ss. 297, 441 and 504—Offences under—Trespass—Mosque—Entry for worship—Unlawful conduct—Finding and conviction under S. 297 altered into one under S. 504, I. P. C. *MUSTAN v. EMPEROR*.
1924 Rang. 106.

—Ss. 299 and 300—Reckless administration of dhatura—Death—Offence committed. *NANHU v. EMPEROR*.
75 I. C. 361.

PENAL CODE, S. 300.

—S. 300—Exception—Nature of—Considerations.

Provocation which is neither grave nor sudden enough to deprive even an ordinarily hot-tempered person of self-control cannot operate to create an exception to S. 300, Indian Penal Code, if the offender can show that, though not insane he has a temperament outside the normal course of human development. It is a question of fact as to whether the provocation was grave and sudden enough to prevent the offence from amounting to murder. (*Pipon, J. C.*) *BODHRAJ v. EMPEROR*.

76 I. C. 105 : 25 Cr. L. J. 105.

—S. 300—Grave and sudden provocation—Onus of proof.

The burden of proving that an accused who committed an offence acted under the influence of grave and sudden provocation which deprived him of the power of self-control is upon him. (*Scott Smith and Zafar Ali, JJ.*) *PIRTHI v. THE CROWN*.
6 Lah. L. J. 323 : 1924 Lah. 654 (2).

—Ss. 300, and 304—Husband killing wife—Discovery in the act of intercourse with stranger—Offence—Plea of exception not taken—Effect.

A husband actually saw his wife having sexual intercourse with another and killed her then and there with an axe. *Held*, the fact brought him within Exception 1 to S. 300 and even if the plea was not taken by the accused, it was the duty of the court to give him the benefit of it and convict him only under S. 304, I. P. C. (*Hallifax and Kotval, A.J.Cs.*) *MANGAL GANDA v. EMPEROR*,
25 Cr. L. J. 1077 : 81 I. C. 901 : 1925 Nag. 37.

—S. 300—Murder—Conviction for—Death of victim—Proof of.

Before a conviction of murder can be obtained the Court must be satisfied that the person alleged to have been murdered is actually dead. Where the court is unable to arrive at the conclusion that the victim of an offence is dead, though it is exceedingly unlikely that he is alive, the Court cannot uphold the conviction for murder. (*Stuart and Sulaiman, JJ.*) *BANDHU v. EMPEROR*.

22 A. L. J. 340 : L. R. 5 A. 59 (Cr.) :
10 O. & A. L. R. 456 : 81 I. C. 436 :
25 Cr. L. J. 900 : 1924 All. 662.

—S. 300—Shooting under illegal orders of superior officer, is no excuse.

A police party with six prisoners went to a village and demanded water and food and when they did not receive the attention to which they thought themselves entitled, the Head Constable lost his temper and struck one of the villagers. Other villagers also joined them; the Head Constable asked one constable to fire. He hesitated but later on fired at a man S, who died of the shot.

Held that they were both equally guilty. The command of the Head Constable cannot of itself justify the subordinate in firing, if the command was illegal, for he and the Head Constable had the same opportunity of observing what the danger was, and judging what action the necessities of the case required. The order, the second accused obeyed, was manifestly illegal, and the second accused must suffer the consequences of his illegal act, 21 M. 249 Foll.

PENAL CODE, S. 300.

Held however, that there should be a difference in the sentence awarded to the Head constable and the constable. (*Kincaid, J. C. and Raymond, A. J. C.*) ALLAHRAKHIO v. EMPEROR.

17 S. L. R. 182 : 83 I. C. 702 (2) : 1924 S. 33.

—S. 300—Exception—Burden of proof.

The burden of proving circumstances bringing the case within S. 300 Exception 1 lies on the accused and under S. 105 Evidence Act a court is bound to presume the absence of any such circumstances. (*Broadway and Campbell, JJ.*) KAKAR SINGH v. EMPEROR. 25 Cr. L. J. 1005 (2) : 81 I. C. 717 (2) : 1924 Lah. 733.

—S. 300—First exception—Mere remonstrance with the accused's father for diverting the course of old water channel—If a grave and sudden provocation.

Where the deceased remonstrated with the accused's father for diverting the course of the old water channel which led to a quarrel, and then the accused came to support his father and assaulted the deceased. *Held*, there was no grave and sudden provocation within the meaning of Exception 1. (*Martineau, J.*) GULAB SINGH v. THE CROWN. 1924 Lah. 742.

—S. 300 (Exc. I)—Murder—Culpable homicide—Provocation—Mitigation of offence.

To attract the operation of S. 300, Exception I of the Indian Penal Code there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man and so as to lead the jury to ascribe the act to the influence of that passion. The provocation must be such as will upset, not merely a hasty and hot-tempered person, but one of ordinary sense and calmness. (*Shadi Lal, C.J. and Fforde, J.*) SOHRAB v. EMPEROR. 5 Lah. 67 : 81 I. C. 826 : 25 Cr. L. J. 1050 : 1924 Lah. 450.

—Ss. 302, 304, 320 and 323—Causing death of wife—Kicking—Murder—Hurt. MARI-MUTHU, *In re*.

1924 Mad 41.

—S. 302—Circumstantial evidence—Conviction on sentence.

A conviction based on purely circumstantial evidence must be treated with the greatest caution and subjected to the closest scrutiny. The existence of a motive, an opportunity and the exclusions of any alternative motive would not be sufficient to support a conviction without at least some other evidence. In such cases a sentence which is irrevocable should not be passed. (*Pipon, J. C.*) ABDUL WAHAB v. EMPEROR. 76 I. C. 97 : 25 Cr. L. J. 97.

—Ss. 302 and 325—Culpable homicide—Intention to cause death—Blow with lathi—Rupture of the liver.

Where the accused swinging sideways struck a blow with his lathi and as a result thereof the liver of the deceased was ruptured and he died, *held* that the accused was not guilty of culpable homicide but of causing grievous hurt. Culpable homicide is not committed unless the agent either has the intention of causing such bodily injury as is likely to cause death or has the know-

PENAL CODE, S. 302.

ledge that he is likely by such act to cause death. (*Kendall, A.J.C.*) KARAN SINGH v. EMPEROR.

10 O. & A. L. R. 693 : 21 Cr. L. J. 1145 : 11 O. L. J. 563 : 81 I. C. 969 : 1925 Oudh 135.

—Ss. 302 and 304—Death due to septic poisoning—Long interval after injuries were inflicted. NGA PO CHET v. EMPEROR.

25 Cr. L. J. 489 : 77 I. C. 889 : 1924 Rang. 212.

—S. 302—Doubt as to the guilt of appellant. MT. DAULAT RAI v. EMPEROR.

77 I. C. 600 : 25 Cr. L. J. 424.

—S. 302—Identification not clear—Benefit of doubt.

25 Cr. L. J. 173 :

76 I. C. 397 : 1924 Lah. 168.

—S. 302—Information of eye-witness—Want of. NAWAB v. EMPEROR.

76 I. C. 824 : 25 Cr. L. J. 264.

—S. 302—Intention or knowledge—Nature of.

The offence of culpable homicide pre-supposes an intention or knowledge of likelihood of causing death. The intention must be directed either deliberately to putting an end to human life or to some act which to the knowledge of the accused is likely to eventuate in the putting an end to human life—The knowledge must have reference to the particular circumstances in which the accused is placed and the intention demanded by the section must stand in some relation to the person who is alive. (*Kinkhede, A.J.C.*) GANPAT v. EMPEROR. 25 Cr. L. J. 356 : 77 I. C. 292 : 1924 Nag. 281.

—S. 302—Murder—Exceptions to the section—Intention and motive—Absence of Sentence.

76 I. C. 575 : 25 Cr. L. J. 207.

—S. 302—Murder—Intention to cause death—Administration of love potion—Conviction under S. 304-A., I. P. C.

Where the intention to cause death cannot be clearly found without any other possible explanation of the act of the person giving poison, a conviction for murder cannot stand. The mere administration of a love potion or drug which a person thinks might be beneficial is not in itself an offence ; but when it is supposed to have effect on persons with whom the paramour of the accused had ill feeling, and when she administers it without due care and caution or any enquiry as to what it really is, her act falls within S. 304-A. I. P. C. (*Adami and Bucknill, JJ.*) PHULMANI MUNDAIN v. EMPEROR. 1924 Pat. 13 : 77 I. C. 801 : 25 Cr. L. J. 449 : 1924 P. 635.

—S. 302—Murder—Presence of accused—Moral support to the crime—Witnesses resisting from statements made before Magistrate—Preference of former statements to testimony in the Sessions Court.

Even though there is no evidence to suggest that the accused physically assisted the actual murderer in killing the deceased, but there is evidence that the accused went all the way from their house to the scene of murder and were present at the time when and the place where the

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murder was committed and gave moral support to the crime which was committed in their interests, the accused are guilty under S. 302, I. P. C. Where the Sessions Court is satisfied that the previous statements made by witnesses before the committing magistrate were true and their subsequent statements before the Sessions Court are false, it is open to the Court to rely on the previous statements. (*Sulaiman and Mookerjee, JJ.*) S. TULLI v. EMPEROR. 22 A. L. J. 1075.

—SS. 302 and 86—Murder—Sentence—Actions of motive—Action under influence of ganja.

Where the accused, a habitual ganja smoker while under the influence of that drug dashed a child to the ground and killed it and there was no motive for the offence, the accused must be held to have committed the act while he was under some mental derangement and that his case came within S. 86, I. P. C. (*Ghose and Cumming, JJ.*) AMRITA v. EMPEROR 39 C. L. J. 34.

—S. 302—Murder—Sentence—Female.

A Court of Sessions undoubtedly possesses a discretion in the matter of passing sentence under Sec. 302, Indian Penal Code, but this discretion must be exercised judicially. An accused person is entitled to the benefit of any reasonable doubt in the matter of sentence as in the matter of conviction. But before passing the lighter sentence a judge must satisfy himself that his reasons for so doing are adequate and covered by authority. Mere absence of pre-meditation or deliberate intent to kill, has been held to be an inadequate reason for not passing the sentence of death. That the accused is a woman is not a conclusive reason for not passing the sentence of death especially where she was armed with a dangerous weapon and did not hesitate to use it for a very slight cause. (*Young, O. C. J. and May Oung, J.*) MA SHWE YI v. EMPEROR. 1 Rang. 751.

—S. 302—Murder—Death caused by gunshot in a struggle—Benefit of doubt.

In the course of a fight between two parties one of the men in the first party was shot by a gun from the second party and died. It was not found whether the shot had been fired by any person of the second party or whether the death was due to the gun going off itself during the struggle for its possession. Held, that the accused must be given the benefit of the doubt and they were not guilty of murder. (*Scott Smith and Harrison, JJ.*) KUNDAN SINGH v. EMPEROR. 6 Lah. L. J. 271 : 1924 Lah. 720.

—S. 302—Murdering newly born illegitimate child—Sentence—Mitigating circumstances.

It has invariably been held in all the courts in India that in the murder of her newly born illegitimate child by a woman there are mitigating circumstances sufficient to redeem the appropriate penalty very much below a sentence of transportation. Most of such circumstances apply, though in a lesser degree to the case of the father of such a child. (*Baker, O. J. C. and Hallifax, A. J. C.*) DHANIA KUNBI v. EMPEROR. 75 I. C. 767 : 25 Cr. L. J. 63 : 1924 Nag. 119.

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—S. 302—Murder—Sentence—Youth of offender.

The extreme youth of the offender is an extenuating circumstance which may properly be taken into consideration in imposing the lesser penalty of transportation for life on the offender in a case of murder. (*Baker, J. C. and Kotwal, A. J. C.*) CHUNILAL v. EMPEROR. 7 N. L. J. 144 : 1924 Nag. 115 (2).

—S. 302—Sentence—Lesser penalty because of confessions—Propriety.

Where a Court held the offence of murder was committed but sentenced the accused to transportation solely on the ground that their confessions alone made the convictions possible, the reason was not sufficient for not awarding the extreme penalty of the law. (*Scott Smith and Zafar Ali, JJ.*) NEKI v. EMPEROR. 25 Cr. L. J. 116 : 76 I. C. 180 : 1924 Lah. 624.

—S. 302—Sudden and Grave Provocation. (*Broadway and Fforde, JJ.*) MALLA v. EMPEROR. 25 Cr. L. J. 519 : 77 I. C. 983 : 5 Lah. L. J. 528.

—S. 302—Youth and absence of premeditated motive—If sufficient for refusing to pass capital sentences.

Where there was no motive for a premeditated murder and the probability was that there was a violent quarrel when the accused a young man of 20 was taking his wife and child from a neighbouring village to his own village and he killed them on the way.

Held, that capital sentence in such a case should not be passed. (*Scott Smith and Zafar Ali, JJ.*) PIRTHI v. EMPEROR. 6 Lah. L. J. 323 : 1924 Lah. 654 (2).

—S. 304—Affray—Sudden and unpremeditated—Death—Private defence—Extent of.

During a sudden and unpremeditated affray, a person was killed. The evidence showed that even after he fell down incapacitated, the accused continued striking him. Held a plea of self-defence was not sustainable and they were guilty under S. 304.

When the deceased himself is the aggressor and the quarrel was sudden, it is a mitigating circumstance for purposes of sentence. (*Fforde, J.*) PHUMAN SINGH v. THE CROWN. 6 Lah. L. J. 483.

—Ss. 304 and 325—Applicability—Grievous hurt causing death owing to a single blow on the head—Conviction of all the assailants under S. 325 but not under S. 304—Person who gave the blow unknown.

Where the skull of the deceased was fractured as the result of a blow on the head in an attack upon one man by four persons who beat him with lathis but there was no other grievous hurt and it was not known which of the accused struck the blow which fractured the skull and resulted in his death.

Held, the accused did not know that death was likely to be caused but they must have known that grievous hurt was likely to be caused, and that they committed therefore the offence of causing grievous hurt. (*Scott Smith and Zafar Ali, JJ.*) DATTA RAM v. DAYA RAM. 6 Lah. L. J. 317 : 1924 Lah. 654 (1).

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—Ss. 304 and 323—Attack by several accused—Common intention—Simple hurt—Injuries likely to cause death—Offence.

1924 Lah. 61.

—Ss. 304 and 325—Attack by three men—Death caused by one blow—Offence—Liability.

Where three men armed with dangs attacked another and caused two grievous hurts, it can be presumed that they all intended to cause or knew that they were likely to cause grievous hurt. Where only one blow was struck on the head which resulted in death and there was no evidence to show which of the three accused struck that blow, none of them can be convicted of culpable homicide. (*Scott Smith, J.*) JHANDU v. EMPEROR. 6 Lah. L. J. 268 : 1924 Lah. 555.

—Ss. 304 and 325—Blow aimed at one—Cause death of another—Offence. 1924 Lah. 47.

—S. 304—Common intention—Sudden fight with deadly weapons.

76 I. C. 692 : 25 Cr. L. J. 228.

—S. 304—Conviction under. NGA Po SAW v. EMPEROR. 1924 Rang. 33.

—S. 304—Death caused—Rape—Rupture—Shock—Sentence.

Where the accused, a youth of about 18 years forcibly committed rape on a girl of 12 and the girl's vagina was ruptured and as a result of shock the girl died. Held that the accused was not guilty under S. 304, I. P. C. of culpable homicide not amounting to murder, as death was not the natural consequence of the simple sexual offence but he was guilty of rape only. (*Adami and Bucknill, JJ.*) SHAMBHUKHATRI v. EMPEROR. 3 Pat. 410 : 83 I. C. 651 : 1924 P. 553.

—S. 304—Dispute about drawing water—Sudden fight—Stab with knife resulting in death—Offence.

In a course of a dispute about drawing water from a tap, the accused drew a knife and stabbed the deceased piercing the chest wall and cutting the heart. Held, the below though struck in a sudden fight without premeditation, the accused must have known that striking in the chest with a dangerous weapon might prove fatal and was therefore guilty under S. 304 (2). (*Zafar Ali, J.*) KHAN MIR v. EMPEROR. 25 Cr. L. J. 1289 : 82 I. C. 361 : 1925 Lah. 148.

—Ss. 304 & 304-A—Murder charge—Offence under S. 304-A.

Where on a charge of murder the Sessions Judge disagrees with the verdict of the jury in favour of the accused, it is open to him to convict the accused under S. 304-A, I. P. C. (*Macleod, C. J. and Fawcett, J.*) EMPEROR v. CHARLES JOHN WALKER. 26 Bom. L. R. 610.

—S. 304—Property—Trespass—Private defence—Excessive injury—Death—Offence.

On the 23rd of March, 1923, an attempt had been made to saw the tree on behalf of the Zamindar but as after protest the carpenters came away, the accused persons, the owners of the tree, did not go to any Court. Held, that when a fresh attack on their right was intended on the

PENAL CODE, S. 323.

2nd of April, they also had a fresh right to defend their property. The police station was admittedly situated some 15 miles from the place and it is hardly conceivable that there was time to send a man to the police station and bring help before the tree could be cut or removed. Consequently the owners of the tree had a right of private defence. At the same time no right of private defence could extend to the inflicting of more harm than was necessary to inflict for the purpose of defence. Held that on the evidence the accused should be convicted under S. 304, Indian Penal Code. (*Sulainan, J.*) UMRAO v. EMPEROR. L. R. 5 A 43 (Cr.) : 83 I. C. 181 : 25 Cr. L. J. 693 : 1924 A 441.

—S. 304—Quarrel—Abuse followed by striking with stone—Offence.

In the midst of a quarrel, a man was abused by his sister-in-law and he struck her with a stone. Her skull was fractured and she died. Held he acted on the impulse of the moment and could be convicted only under S. 304, I. P. C. (*Mukerji and Daniels, JJ.*) GANESHA v. EMPEROR. L. R. 5 A 175 (Cr.) : 25 Cr. L. J. 800 : 81 I. C. 320 : 1925 A. 4.

—Ss. 307 and 326—Mutual fight—Infliction of severe bodily injury—Offence—Conviction—Self-defence.

On a certain night the two appellants fought with each other, each using a knife. There were no other witnesses to the occurrence. Each appellant was convicted under S. 307, I. P. C., on the evidence of his opponent, and the corroborative evidence of the wounds caused to the opponent and the admissions of the appellant that he was himself wounded in the occurrence. Each appellant received five or six serious wounds and would have died if he had not received early medical attendance. In each case the condition of the wounded man was so serious that his dying deposition was taken. Held, that neither of the appellants could be legally convicted under S. 307, I. P. C., but that they were both guilty under S. 326, I. P. C. Neither appellant could claim the right of self defence inasmuch as under S. 105 of the Evidence Act, the burden of proof of self defence or provocation lay on the accused in each instance. (*Lentaigne, J.*) NGA PO THAIK v. EMPEROR. 2 Rang. 558.

—Ss. 323 and 299—Accused in loco parentis continuously ill-treating an infant leading to her death—Death caused by beating—Whether to be convicted under S. 299 or 323—Effect of absence of intention.

Omission of the husband to prevent beating—Whether constitutes abetment.

Where an innocent girl by the merciless acts of brutality of her father-in-law, and continuous starvation, was one day beaten with a stick for having done some household work improperly, in the presence of a number of persons, she collapsed and died, and it was proved in medical examination that she died of shock from several blows inflicted on her ill nourished frame. The father-in-law, and husband, were committed to Sessions under S. 304, I. P. C. and the District Judge after amending the charge under S. 302

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acquitted both the accused. *Held* on appeal by the Government.

Per Ryves and Daniels, JJ. that taking into consideration the fact that the father-in-law and the husband administered blows to the deceased in the presence of a number of persons they could not be imputed with the knowledge required under S. 299 (culpable homicide of the Code) and that they were guilty of only assault (S. 323).

Per Daniels, J. omission of the husband to prevent his father from beating his wife was not sufficient to constitute an abetment of the offence of beating.

Walsh, A. C. J. dissenting. (1) A Judge should not enlarge a charge, and then acquit the accused without considering the alternative minor charge on which he may be properly committed when the facts in both the cases are the same. (2) That the accused were responsible to a continuous and severe course of ill-treatment and starvation which would have terminated in her death from natural causes, if they had not accelerated it by beating her. And that the accused should be convicted under S. 304, I. P. C. (*Walsh, A. C. J., Ryves and Daniels, JJ.*) *EMPEROR v. CHANDA*.
L. R. 5 A. 161 (Cr.): 1925 A. 123.

—S. 323—*Prosecution under—Death of complainant—Abatement.*

A criminal prosecution under S. 323, I. P. C. does not abate by reason of the death of the person injured. 44 M. 417 Ref. (*Dalal, J.*)
MUSA v. EMPEROR. 22 A. L. J. 520 :

L. R. 5 A. 96 (Cr.): 81 I. C. 719 (1):
25 Cr. L. J. 1007 (1): 1924 A. 666 (2).

—S. 325—*Grievous hurt—Right of private defence.*

Where it is proved that the deceased and his party attacked the accused who acted in the exercise of his right of private defence and it is not shown that the accused in causing grievous hurt had not exceeded the right of private defence, he ought to be acquitted of any offence under S. 325, I. P. C. (*Daniels, J. C.*) *PAHLAD v. EMPEROR*.
11 O. L. J. 50 : 83 I. C. 589 : 1924 Oudh 334.

—Ss. 326 and 149—*Charge under—Conviction under S. 326 alone—Illegality—Irregularity coming under S. 537, Cr. P. Code—S. 149, I. P. Code—Object of—If creates an offence—Conviction under section without a charge—Illegality—Irregularity—Ss. 148 and 326—Rioting—Conviction for—Legality—Injunction restraining accused from interfering with complainant's possession—Entering upon land in disobedience of—Remonstrance by complainant—Attack by accused and injuries caused thereby—Conviction in case of.*

Held by the Full Bench : When a charge has been framed under Ss. 326 and 149, I. P. Code, a conviction under S. 326, I. P. Code is not necessarily bad. Whether the conviction is bad or not depends upon whether the accused has or has not been materially prejudiced by the form of the charge.

S. 149, I. P. Code creates no offence, but is like S. 34 merely declaratory of principle of the common law, and its object is to make it clear that an accused who comes within that section cannot

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put forward as a defence that it was not his hand which inflicted the grievous hurt. A person cannot be tried and sentenced under S. 149, I. P. Code alone. The omission of Section 149 from a charge does not create an illegality by reason of S. 233, Cr. P. Code. It is only an irregularity coming under S. 537, Cr. P. Code.

Held, by the Division Bench : When in disobedience of an order of the Civil Court restraining them from interfering with possession of P. W. 6 the accused entered upon the land in his possession and began cutting the crop, and attacked and caused injuries to P. W. 6 and others who remonstrated with them and did nothing else beyond remonstrating, *held* that the use of force towards those persons in prosecution of the common object of retaining the land which was in itself an unlawful object, undoubtedly constituted the accused into an unlawful assembly guilty of rioting. (*Spencer, Krishnan and Ramesam, JJ.*)
THEETHUMALAI GOUNDAR, In re.

47 Mad. 746: 20 L. W. 261:

35 M. L. T. (H. C.) 21: 82 I. C. 465:

1925 Mad. 1: 25 Cr. L. J. 1297 : 47 M. L. J. 221.

—S. 331—“Demand” Meaning of. *MAULA BAKSH v. EMPEROR*. 1924 Lah. 167.

—Ss. 332 and 333—*Essentials of offence—Knowledge that person confined or obstructed is a public servant—Necessary.*

Both Ss. 332 and 333, I. P. C. require as an ingredient of the offence, the presence of an intention on the part of the accused persons, namely, to prevent or deter a public servant from discharging his duty. If the accused persons were unaware of the fact that the persons confined were public servants, the offence has not been committed. (*Mukerjee, J.*) *KISHEN LAL v. EMPEROR*.
22 A. L. J. 501:

L. R. 5 A. 177 (Cr.): 1924 A. 645.

—S. 353—*Attachment of property under time-expired warrant—Resistance—Offence.* *NAND LAL v. EMPEROR*. 25 Cr. L. J. 223:

76 I. C. 655 : 1924 Nag. 68.

—S. 353—*Illegal warrant—Resistance to bailiff and party—Offence.*

Where in obstructing the execution of an illegal warrant by the bailiff and his party, the obstructors did not exceed their right of private defence and no hurt was caused to the bailiff or criminal force used against him, an offence under S. 353, I. P. C. is not made out. (*Zafar Ali, J.*) *ALLAH DAD v. EMPEROR*. 25 Cr. L. J. 43 : 75 I. C. 731:
1924 Lah. 667 (2).

—S. 353—*Offence under—Revenue Inspector—Distraint for arrears of Revenue by—Resistance to—Offence committed by—Warrant of distraint addressed only to village headman, his subordinate—Effect.*

A Revenue Inspector, who was supervising the work of a village headman, as it was his duty to do, and who had been specially enjoined by his superior, the Tahsildar, to attend the work of distraint was resisted, while distraining property of the accused for arrears of revenue. *Held*, that the accused thereby committed an offence under

PENAL CODE, S. 353.

S. 353 of the Penal Code, notwithstanding that the warrant of distraint was addressed to the village headman and not to the Revenue Inspector. (*Spencer, J.*) KANDASWAMI GOUNDAN, *In re*.

25 Cr. L.J. 290:
1924 Mad. 539 : 76 I. C. 962 : 46 M. L. J. 45.

—S. 353—Public servant acting in discharge of duty—Distraint warrant authorising distraint of property of defaulter—Attempt to distraint property of lessee of defaulter—Assault of person entrusted with warrant by lessee—Conviction of lessee for—Legality.

Where, under a warrant authorising distraint of the property of a person who had defaulted to pay water-tax, the person executing the warrant attempted to distraint the property of the lessee of the defaulter and was assaulted by the lessee. *Held*, that the lessee could not be convicted for assaulting a public servant in the discharge of his duty. (*Spencer, J.*) MALLAMPATI NARASIMHAM v. SUB-INSPECTOR OF POLICE PRATTIPAD
20 L. W. 669 : 1924 Mad. 895 (2) : 47 M.L.J. 447.

—S. 353—Resistance to public-officer acting in good faith—Act illegal or irregular—If offence.

Where two bailiffs went together to the house of the petitioner who knew that they were bailiffs and had come to attach his property in execution of a warrant and where the Civil Nazir stated that his instructions to the bailiffs were that they both should work together in executing the warrant and the accused whose property was to be attached under the warrant, assaulted one of the bailiffs whose name in the warrant, was not endorsed and prevented him from attaching his property.

Held, that the bailiff was acting in good faith as a public servant and the accused was therefore guilty of an offence under S. 354, 21 M. 296 Foll. (*Zafar Ali, J.*) ABDUL GHANI v. EMPEROR.

25 Cr. L. J. 122 : 76 I. C. 186 : 1924 Lab. 632.

—S. 353—Warrant—Execution by Amin—Resistance—Expiry of time for return of warrant—Effect,
75 I. C. 768 : 25 Cr. L. J. 64.

—S. 362—Abduction when an offence.

Abduction in itself constitutes no offence and only becomes an offence when certain criminal intents are proved. (*Pipon, J.C.*) GHULAM YUSAF v. EMPEROR. 75 I. C. 297 : 24 Cr. L. J. 921.

—Ss. 363 and 366—Age of girl—Finding—Magistrate should consider what other offence was committed.

Where the Magistrate finds in a case under S. 363, I. P. C., that there is *prima facie* sufficient evidence that the girl was enticed away; the Magistrate should examine and decide whether an offence under S. 366 or some other cognate offence against a female of over 16 was committed and should not remain content with finding that the girl was not proved to be under 16. (*Campbell, J.*) GOKAL v. PHUMON SINGH.

1924 Lah. 718 (1).

—S. 366—Essentials of—Guardianship—Knowledge.
27 O. C. 32 : 81 I. C. 529 :
25 Cr. L. J. 913.

PENAL CODE, S. 379.

—S. 366—Kidnapping—If a continuing offence—Abetment of offence.

The offence of kidnapping is not a continuing offence. When it is once complete, abetment cannot be proved against persons who have taken a subsequent part in the proceedings. (*Pipon, J.C.*) GHULAM YUSAF v. EMPEROR. 75 I. C. 297 :
24 Cr. L. J. 921.

—S. 376—Conviction on uncorroborated testimony of complainant.

Conviction for the offence of rape on the uncorroborated testimony of the complainant would be most dangerous. The question being whether there was consent or not, evidence of resistance on the woman's part should be forthcoming in the form of tearing of clothes, infliction of personal injuries or even injuries on her private parts. (*Moti Sagar, J.*) MAHLA RAM v. EMPEROR. 25 Cr. L. J. 74 : 75 I. C. 986 :
1924 Lah. 669.

—S. 376—Evidence. 1924 Lah. 669.

—S. 376—Punishment—Basis of.

In cases of rape, the punishment depends on the atrocity of the crime, the conduct of the criminal, and the defenceless state of the female. If has nothing to do with her status or nationality. (*Kinkhede, A. J. C.*) SOOSALAL BANIA v. EMPEROR. 25 Cr. L. J. 1214 : 82 I. C. 142 :
1925 Nag. 74.

—S. 379—Abandoned property—Removal of—Bricks—Conviction for theft

The accused was found to have removed certain bricks from a heap that had been lying untouched for 8 years by their owner *held* that the accused might well have supposed that the bricks had been abandoned by the owner. (*Baguley, J.*) TAKIT TUNI v. EMPEROR. 3 Bur. L. J. 197 :
1925 Rang. 113 (2).

—S. 379—Crops removed by accused thinking them to be his—No offence.

Where accused removed crops on land which had passed to another under a Civil Court decree against the landlord of accused, thinking that crops had not passed under the decree.

Held, the removal of crops was not dishonest and a conviction for theft cannot be sustained. 3 L. B. R. 128 Dist. (*Heald, J.*) SIT PHIN v. EMPEROR. 25 Cr. L. J. 809 : 81 I. C. 345.
1924 Rang. 72.

—S. 379—Minor's lands in the possession of tenants—Guardian taking forcible possession of crops—Offence.

Where the lands of a minor are in the possession of tenant who have sown crops thereon, if the guardian goes and takes forcible possession of the crops he is guilty of theft as he dishonestly removes property knowing it belonged to another. (*Prideaux, A. J. C.*) TUKARAM v. EMPEROR. 25 Cr. L. J. 349 : 77 I. C. 237 :
1924 Nag. 311.

—Ss. 379 and 429—Theft of an animal and subsequent skinning—Separate convictions for theft and mischief whether legal.

PENAL CODE, S. 379.

Where accused Nos. 2 and 3, were convicted under S. 379 for theft of a cow, and for mischief under S. 429 for having killed it afterwards, and a double sentence in respect of each offence was imposed.

Held, that the killing of a cow, cannot be indicated separately as constituting mischief and that the convictions recorded cannot stand :

1. In the case of Madar Sahib 1902 1 Weir 497.
2. Bichuk Ahar v. Auchhuck, 6 W. R. A. 5.
3. Emperor v. Ram Lal Ratanji, 5 Bom. L. R. 460, followed. (*Adami and Bucknil, JJ.*) HUSSAIN BAKSHMIAN v. EMPEROR, 3 Pat. 804 : 1925 P. 34.

———S. 379—Theft—Running water—Water in the possession of cantonment authorities, 75 I. C. 159.

———S. 379—Trespass—Preparation for theft. NAURANGA v. EMPEROR. 1924 Lah. 223 (1).

———S. 380—Removal of goods by creditor to enforce payment—If theft.

When a creditor by force takes the goods of his debtor out of his possession against his will in order to compel him to discharge his debt he is guilty of theft. (*Moti Sagar, J.*) BAKHTAWAR v. EMPEROR, 25 Cr. L. J. 650 : 81 I. C. 138 : 1925 Lah. 131 (2).

———S. 381—Offence if triable by 3rd class Magistrate. 1924 Rang. 12.

———S. 381—Theft—Bona fide claim of right—Removal of property—When an offence.

The removal of property in the assertion of a bona fide claim of right though unfounded in law and fact does not constitute theft but a mere colourable pretence to obtain or keep possession of property does not avail as a defence. 41 C. 433 ; 41 C. 66 Ref. (*Moti Sagar, J.*) HARNAM SINGH v. EMPEROR, 5 Lah. 56 : 81 I. C. 185 : 25 Cr. L. J. 697 : 1924 Lah. 453.

———S. 382—Scope, 77 I. C. 434 (2) : 25 Cr. L. J. 386 (2).

———S. 383—Extortion—Nikah Khawan—Refusal to perform marriage in the absence of fee. NIZAM DIN v. EMPEROR 1924 Lah. 162.

———Ss. 383 and 44—Injury—What is—Extortion. 25 Cr. L. J. 961 : 81 I. C. 609 : 1954 A. 197.

———S. 383—Realising fine by picketing—If extortion.

Realising fines by means of picketing is extortion within the meaning of S. 383. Penal Code (*Kotval, A. J. C.*) THE LOCAL GOVERNMENT v. HANMANTRAO, 25 Cr. L. J. 60 : 75 I. C. 764 : 1924 Nag. 19.

———Ss. 395 and 149—Dacoity—Common object—Found against—Conviction for dacoity.

A conviction for dacoity, based either on a finding of a common object not charged, or on evidence which does not prove the essential ingredients of the offence cannot be sustained. Where a conviction for dacoity is based on the application of S. 34 or 149, I. P. C. and there was no charge that the assembly as a whole had

PENAL CODE, S. 397.

for its common object the committing of dacoity, the conviction is bad. (*Odgers and Wallace, JJ.*) KOTTOORA THEVEN, *In re*.

1924 M. W. N. 238 : 34 M. L. T. (H. C.) 307 : 1924 Mad. 584 : 77 I. C. 444 : 25 Cr. L. J. 396 : 19 L. W. 211 : 46 M. L. J. 311.

———S. 395—Dacoity—Proof for Conviction.

Where in a charge under S. 395, Indian Penal Code, the evidence was the accused's admission that a gang of 13 persons assembled at his hut at night, that he was aware of their purpose, that he did not give information to the Police till the next morning and after the dacoity the gang came and told him what had happened, the evidence does not prove he took part in the dacoity. (*Neave, A. J. C.*) UMRAO KHAN v. EMPEROR, 10 O. & A. L. R. 187 : 11 O. L. J. 356 : 81 I. C. 597 : 25 Cr. L. J. 949 : 1924 Oudh 367 (1).

———Ss. 395 and 397—Mode of judgment. NGA MU v. EMPEROR, 25 Cr. L. J. 205 : 76 I. C. 573 : 1924 Rang. 67.

———S. 395—Robbery—Fear caused to owner of house before loot—Offence.

In order that the offence of robbery be committed it is not necessary that fear should be caused to the owner of the house after the robbers have entered the house. If the robbers scared away the owner on account of the fear caused in his mind before they had been able to make an entry in his house the offence of robbery would be complete. If the owner of a house had been scared away by one gang of thieves and another gang looted the house, the act of the second gang would amount to theft in a dwelling house and not robbery. (*Sulaiman, J.*) YAMIN v. EMPEROR, L. R. 5 A. 81 (Cr.) : 83 I. C. 705 : 1924 A. 701.

———S. 396—Dacoity—Murder committed "in the commission of dacoity."

Murder committed by dacoits while retreating or carrying away stolen property is "committed in the commission of dacoity" within the meaning of S. 396, I. P. C. (*Shadi Lal, C. J. and Fforde, J.*) SUNDAR v. EMPEROR, 25 Cr. L. J. 700 : 81 I. C. 188 : 1925 Lah. 142 (2).

———S. 396—Scope, 76 I. C. 109 (1) : 25 Cr. L. J. 319 (1).

———S. 396—Scope.

The fact that the murder was committed in the compound of the house raided, at a time when the dacoits were making good their escape is not sufficient to take the case out of S. 396. (*Scott-Smith and Moti Sagar, JJ.*) KARIM BAKHSI v. EMPEROR, 1923 Lah. 329 (1).

———S. 397—Applicability—If exclude operation of Ss. 34 and 114—Stick—If deadly weapon.

A stick is a deadly weapon within the meaning of S. 397 and merely brandishing it without verbal threats of using it amounts to using it, as distinguished to merely carrying it. The words of S. 397 do not exclude the operation of Ss. 34 and 114, I. P. Code. (*Hallifax, A. J. C.*) GHASSA v. EMPEROR, 82 I. C. 45 : 25 Cr. L. J. 1181.

PENAL CODE, S. 397.

—Ss. 397 and 398—*Dacoity—Offender armed with deadly weapon—Grievous hurt—Liability of offender—Maximum punishment.*

The words "the offender" and "such offender" in Ss. 397 and 398, I. P. C. refer to those persons only who are proved to have actually "used" or to have been "armed with" deadly weapons and not to all persons who combine to commit the specified offences. Neither S. 397 nor S. 398, I. P. C. creates an offence. The effect of these sections is merely to limit the minimum of punishment which may be awarded if certain facts are proved. S. 34, I. P. C. has no materiality in construing the meaning of Ss. 397 and 398, I. P. C. The intention of the legislature in framing Ss. 397 and 398, I. P. C. was that while all persons who combine to commit robbery or dacoity are liable in respect of the substantive offence, any particular offender who is proved to have used or carried a deadly weapon shall receive a punishment not less than that specified in those two sections. 21 A 263 not foll; 28 A 404; 22 M. L. J. 186 foll. (*Page, J.*) *EMPEROR v. ALI MIRZA*.

51 C. 265 :
81 I. C. 800 : 25 Cr. L. J. 1024 : 1924 Cal. 643.

—Ss. 399 and 402—*If distinct offences—Sentence.*

Where a person is convicted of dacoity and also of assembling along with others for the purpose, separate sentences can be awarded for each of the offences proved. But in practice the sentences should be concurrent. (*Fforde, J.*) *GHULAM RASAL v. EMPEROR*. 25 Cr. L. J. 680
81 I. C. 168 : 1925 Lah. 119.

—S. 399—*Dacoity—Proof—Presumption—Inference from conduct.*

The accused were convicted of an offence under S. 402, I. P. C. of assembling for the purpose of committing dacoity. They were found in a village to which they were strangers and one of them had a pistol tied up round his neck and concealed under his coat. One of them was caught while three others ran away. Two were captured after a chase. It was found that the accused on entering the village had divided themselves into batches and entered the village in different directions. Different portions of a book on bayonet training were found in the possession of different batches of the accused. *Held*, that the circumstances could legitimately give rise to the inference that the object of the accused was the commission of a dacoity. (*Daniels, J.*) *BHOLA v. EMPEROR*.
L. R. 5 A 156 (Cr.) :
22 A. L. J. 1028 : 1925 A. 62.

—S. 400—*Dacoity—Membership of a gang—Proof of—Receiving stolen property—Harbouring gang of dacoits—Effect of.*

One of the chief points to establish in a case of gang dacoity is association in crime, and if it can be proved that certain persons have joined together to commit burglaries as well as dacoities the former fact is strong evidence of criminal association and is therefore relevant to show that they are members of the gang, and if that gang can also be shown to have been associated for the habitual commission of dacoities, evidence as to these burglaries may very well be relevant against

PENAL CODE, S. 403.

the accused. Generally speaking only those persons can be convicted of dacoity who have either taken an active part in the crime or been employed for the purpose of scouting or in other ways facilitating the commission of the crime. A receiver of the property stolen or a person harbouring a gang is not necessarily a member of the gang within the meaning of S. 400, I. P. C. (*Kendall and Pullan, A. J. Cs.*) *NIDHI v. EMPEROR*.
10 O. & A. L. R. 639:
11 O. L. J. 632 : 83 I. C. 683 : 1 O. W. N. 660 :
1925 Oudh 144 (2).

—S. 401—*Offence under—Prior conviction for dacoity—Admissibility of*

On a charge under S. 401, I. P. C. against an accused, a judgment in a prior Sessions case under which he was convicted of dacoity under S. 395, I. P. C. is admissible in evidence. 14 Bom. L. R. 373; 38 C. 408 foll. As regards the weight due to that evidence, if the conviction is not recent, it is useless except for showing that the accused is a person of criminal tendencies to theft. (*Marlen and Fawcett, JJ.*) *EMPEROR v. MOTIRAM HAI*.
26 Bom. L. R. 1223.

—S. 403—*Co-owners—Removal of property by one—If offence*

It is not criminal misappropriation for one of several co-owners to take property belonging to them all unless it is also found that he appropriated it to his sole use. (*Newbould and Suhrawardy, JJ.*) *KRISHNA CHANDRA BANIK v. HAR KISHORE MADAK*.
25 Cr. L. J. 669 (1) : 81 I. C. 157 (1) :
1925 Cal. 154.

—Ss. 403 and 411—*Criminal misappropriation—Receiving stolen property—Offence—Stolen articles contained in a single parcel—Single offence.*

Where jewels were contained in a single parcel which was stolen and the jewels were afterwards retained by the accused, he should be convicted of a single offence in respect of all the articles in the parcel and not of separate offences in respect of the different articles.

Though usually a Court is not justified in drawing the presumption of guilty knowledge from a possession of property such as jewelry, which is not shown to have commenced until eighteen months or nearly two years after the property had been stolen or otherwise lost to the real owner, the Court is always entitled to ask the possessor to disclose the name of the person from whom he had obtained the articles and the particulars as to the origin of the possession and the Court is entitled to draw unfavourable inferences, if the person refuses to disclose such facts or gives an explanation which can be shown to be false. The weight to be attached to such unfavourable inferences must depend on the circumstances of each particular case. Where two years after the loss of a jewel by its owner the accused is found to be retaining possession of the same knowing it to be stolen property but there is no evidence as to when he first acquired such possession he is guilty under S. 411, I. P. C. and not under S. 403, I. P. C. (*Lentaigne, J.*) *KAM PERSHAD v. EMPEROR*.
2 B. 80:
81 I. C. 443 : 25 Cr. L. J. 907 : 1924 R. 256.

PENAL CODE, S. 405.

———S. 405—Criminal breach of trust—Retention of money by pleader. 1924 Nag. 47.

———S. 405—Trust essential. 75 I. C. 79 : 6 Lah. L. J. 125.

———S. 406—Criminal Breach of Trust—Sale of goods taken from a firm for approval—Dominion over property.

The accused took from a firm of jewellers goods for approval on 31-5-'23, and 1-6-'24 on the understanding that payment would be made in full in respect of approved articles taken on the 31st of May, and part payment in cash for the lot taken on 1-6-'24. Whilst this arrangement was in force, the accused sold the articles on 2-6-'24 before any payment was made to the firm.

Held, on appeal that the trust continued until the option to take the goods was exercised and the cash payment was made and the property did not pass from the firm of jewellers to the accused until both these conditions were fulfilled. The offence under S. 406 was therefore established. (*Greaves and Pantan, JJ.*) KHITISH CHANDRADEB RAY v. EMPEROR. 51 Cal. 796 : 25 Cr. L. J. 1235 : 82 I. C. 163 : 1924 Cal. 816.

———S. 406—Forum of trial—Money received in District A—False promise to pay within District B. *See* CR. P. CODE S. 181 (3).

6 Lah. L. J. 471.

———S. 406—Offence under—Place of trial. *See* CR. P. CODE, S. 177. 77 I.C. 425.

———S. 408—Criminal Breach of trust by a servant.

Where property is entrusted to a servant and such servant fails to return the property or to account or gives an account which is shown to be false and incredible it is ordinarily a reasonable inference that he has criminally misappropriated the property so entrusted to him and dishonestly converted it to his own use. In such cases the courts are entitled to draw hostile inferences and presumptions from the action and statement of the servant. The provisions of Ss 106, and 114 of the Indian Evidence Act, can be relied upon in support of the above proportions. (*Lentaigne, J.*) SONAMEAH v. KING EMPEROR. 2 Rang. 476 : 1925 Rang. 47.

———S. 408—Essentials of.

To convict for an offence under S. 408, I. P. C., there must be a definite finding of a certain definite sum traced to the accused. Where the jury gave a qualified verdict that the amount misappropriated was much less than that mentioned in the charge, but was not able to say definitely what it was, a conviction could not be based on such verdict. (*Walmsley and Mukerjee, JJ.*) KHIRODE KUMAR MUKERJI v. EMPEROR. 29 C. W. N. 54 : 40 C. L. J. 555 : 1925 Cal. 260.

———S. 409—Offence under—Accused retaining control over property—bona fide claim of right—Benami transaction—Civil dispute.

An investigation into whether a transaction was benami or not should not ordinarily be undertaken by a Criminal Court and where a person bona fide asserts a claim to property which he had transferred but over which he had domi-

PENAL CODE, S. 415.

nion even if it turns out to be unsustainable in law, there is no offence under S. 409, I. P. C. unless the claim is a mere pretence. Usually in a case under S. 409, I. P. C. the property is no longer existent or has passed from the dominion of the accused. (*Greaves and Pantan, JJ.*) HARRY JONES v. EMPEROR. 28 C. W. N. 831 : 81 I. C. 829 : 25 Cr. L. J. 1053 : 1924 Cal. 908.

———S. 409—Offence under—Place of trial—Dispute of civil nature—Not to be tried by Criminal Court.

Accused was the commission agent at Calcutta of a limited company carrying on business at Ahmedabad and he was charged under S 409, I.P.C., with criminal breach of trust in respect of goods sent to him. The accused was arrested in Calcutta under S. 54, Cr. P. Code and produced before the Chief Presidency Magistrate, Calcutta, in order that he might be sent to Ahmedabad for trial. *Held* that the offence, if any, was committed in Calcutta and the accused was triable on charge under S. 409, I. P. C. only at Calcutta. Criminal Courts should not be invoked in respect of matters which should be investigated in a civil suit. (*Greaves and Duval, JJ.*) DWARKADAS HARIDAS v. AMBALAL GANPATRAM. 28 C. W. N. 850 : 25 Cr. L. J. 1203 : 82 I. C. 131 : 1924 Cal. 893.

———Ss. 411 and 457—Receiving stolen property—Circumstantial evidence. 1924 Lah. 241.

———S. 411—Stolen property—Presumption as to date of receipt.

Where the evidence in a case of receiving stolen properties does not show whether the properties were all received on one day or on different dates, no presumption can be drawn as to the date of receipt either way. (*Adam and Bucknill, JJ.*) EMPEROR v. BISHUN SINGH. 3 Pat. 503 : 2 Pat. L. R. 131 (Cr.) : 5 Pat. L. T. 319 : (1924) P. H. C. C. 126 : 81 I. C. 226 : 25 Cr. L. J. 738 : 1925 P. 20.

———Ss 415 and 420—Cheating—Damage or harm—Deceit—Contingent and remote consequences to be ignored—Direct and proximate result to be considered.

In a case of cheating the court as to see the intention of the accused at the time of the offence and judge of the consequences of the act or omission itself. The damage or harm caused or likely to be caused must be the necessary consequence of the act done by reason of the deceit practised or must be necessarily likely to follow therefrom and the law does not take into account remote possibilities that may flow from the act. The proximate and natural result only of the act has to be judged and not any vague and contingent injury that may possibly arise. To bring a case within S. 420, I. P. C. dishonesty in the transaction must be proved. (*Walmsley and Mukerjee, JJ.*) HARENDRA NATH DASS v. JOTISH CHANDRA DUTT. 40 C. L. J. 283 : 1925 A. 100.

———Ss. 415 and 420—Charge—Deceiving Courts and judges by institution of false cases—Decree—If a valuable security—Misdirection to jury.

PENAL CODE, S. 415.

The accused were charged under Section 420 read with Section 120-B, I. P. C., as being members of a criminal conspiracy with one another to commit offences punishable under S. 420, I. P. C., to wit, to deceive unsuspecting Judges of Civil Courts who tried the suits and also Judges who had ordered execution of the decrees therein and inducing or attempting to induce the said Judges, so deceived, to make valuable securities, to wit decrees, declaring that the accused persons were entitled to get properties or moneys from the victims of the said conspiracy and thereby deceiving such Judges to order execution of the decrees, to attach or seize properties of the victims of the conspiracy and to sell or cause to be sold properties so attached and thereby dishonestly inducing them to deliver or cause to be delivered possession of properties so sold and so on. *Held* that in order to sustain a charge under S. 420, I. P. C. ingredients required by S. 415, I. P. C. must be present. A decree does not come within the definition of a valuable security. A decree merely declares the existence of legal rights or extinguishment, extension, transfer or restriction of legal rights, etc.; the rights are there and all that the decree does is that it formally expresses the adjudication by the Court on the rights of the parties. Therefore a "decree" is not a "valuable security", but even if a "decree" did satisfy the definition of a "valuable security," there was no delivery of property within the meaning of S. 415, I. P. C. When the Court passes a decree, it does not deliver any property, because the original decree remains in Court and the term "valuable security" assuming that the term is wide enough to include a decree can only apply to the original document and not to any copy of the decree which may be supplied on application to the parties. The same arguments would apply to orders in execution. On no conceivable view of the matter could the case of the prosecution be brought within the four corners of S. 415, I. P. C. and therefore, also of S. 420 of the Indian Penal Code. (*Ghose and Cuming, JJ.*) CHARU CHANDRA GHOSE v. EMPEROR. 28 C. W. N. 414 : 39 C. L. J. 122 : 81 I. C. 810 : 1924 Cal. 502 : 25 Cr. L. J. 1034.

—Ss. 415, 417 and 420—*Cheating—Delivery of railway wagons in excess of allotted number owing to fraud of servants of the railway company—Delivery of property—Injury to reputation of the railway company.*

A corporation, such as a railway company, is an artificial person, and its acts are those of the agents who act for it and in its name. 22 C.W.N. 821 Ref.

Railway wagons are no doubt "property" of the Railway company. But they are not as property delivered to a colliery merely by being taken to the colliery siding. No doubt the colliery are entitled to load the wagons but the amount of control exercised for that purpose is of a very limited character. Consequently where a servant of the Railway Company sends more wagons than have been allotted, for loading to a colliery is not guilty of cheating within S. 415 (1), I.P.C. Nor does such unauthorised allotment of more wagons through the fraud or dishonesty of Railway servants cause or is likely to cause any ap-

PENAL CODE, S. 419

preciable damage to the reputation of the railway company within S. 415 (ii) of the I.P.C. To constitute cheating within S. 415 cl. (ii), I.P.C. it is necessary (1) that the person deceived must have acted under the influence of the deceit (2) that the facts must establish damage or likelihood of damage and (3) that the damage must not be too remote. 2 C.L.J. 524; 22 C.W.N. 1001 : 32 C. 775 : 17 C. 606 ; 9 C.W.N. 764 ; 12 C.W.N. 751 Ref. (*Richardson and Suhrawardy, JJ.*) LEGAL REMEMBRANCE v. MANMATHA BHUSAN CHATTERJEE. 51 C. 250.

—Ss. 415 and 420—*Cheating—Essentials of offence—Abetment—Saccharine—Adulteration with bicarbonate of soda.*

In order to prove the offence of cheating it is necessary to establish (1) that some one was deceived (2) fraudulently or dishonestly or intentionally; and (3) by means of such deceit he was induced to change his position either by parting with property or by doing something to his own injury. Adulteration of saccharine with a mixture of soda bicarbonate and passing off the stuff as saccharine and getting money therefor is an offence under S. 420, I. P. C. (*Macleod, C.J. and Shah, J.*) EMPEROR v. BHOLA SING AMBER SING. 26 Bom. L. R. 211 : 81 I. C. 926 : 25 Cr. L. J. 1102 : 1924 Bom. 303.

—S. 417—*Cheating—Cheque dishonoured—Jurisdiction—Power of High Court to transfer.*

A cheque issued at Gaya was dishonoured by the Bank of Calcutta and the fact of such dishonouring reached the complainant at Butan, *Held*, a prosecution could be initiated at Gaya, Butan, or Calcutta. It is open to the High Court to transfer a complaint for cheating filed at one of the places to another, if under the circumstances such a step is necessary in the interests of justice. (*Bucknill, J.*) METCALFE v. WATSON.

25 Cr. L. J. 81 : 76 I. C. 17 : 1924 P. 708.

—Ss. 417 and 420—*Offences under—Distinction between—Trial and conviction by second class Magistrate—Legality of.*

The facts as set forth in the charge against the accused constituted an offence under S. 420, I. P. C. Objection to the jurisdiction of the second class Magistrate who took cognisance of the case was taken by the accused on the ground that it was not triable by him. The objection was again pressed on appeal from the conviction by the second class Magistrate, but the appellate court did not give effect to it. On revision to the High Court. *Held* that it was not open to the Magistrate to clutch at jurisdiction by ignoring the aggravating circumstances which make the offence really cognizable by a higher tribunal. (*Venkatasubba Rao, J.*) SETTI RANGAYYA v. SOMAPPA.

25 Cr. L. J. 1193 : 82 I. C. 57 : 20 L. W. 919.

—S. 419—*Mahomedan pretending to be Hindu for getting job—Offence.*

A Mahomedan who pretends to be a Hindu in order to get a job under a Hindu who would not employ a Mahomedan is guilty under S. 418, I.P.C. (*Kennedy, A. J. C.*) SHARFAZ v. EMPEROR.

25 Cr. L. J. 789 : 81 I. C. 309 : 1925 S. 57.

PENAL CODE, S. 420.

——— Ss. 420 and 511—*Attempt at cheating—If offence.*

An attempt to commit the offence described in S. 420, Penal Code and thereby induce delivery of property is known to the law. (*Kotwal, A. J. C.*) SAMUEL ILQANAH v. EMPEROR.

25 Cr. L. J. 475 : 77 I. C. 827 : 1924 Nag. 120.

——— S. 420—Cheating — Broker — Advance secured by promote—Supply of paddy.

1924 Rang. 31 : 75 I. C. 700 : 25 Cr. L. J. 236.

——— Ss. 420 and 511—Cheating — Insurance — False claim.

Where a person whose godown had been insured against fire made a claim against the company for much more than he actually lost, he is guilty of the offence of attempting to cheat, (*May Oung, J.*) MG. PO HMYIN v. EMPEROR.

25 Cr. L. J. 1175 : 82 I. C. 39 : 1924 R. 241 : 2 R. 53 : 3 Bur. L. J. 1.

——— Ss. 420 and 464—Offence under—Elements of—Intention to deceive—Forging cheque—Cheating.

The accused having no account at a bank drew a cheque in a favour of a vendor of goods as if in payment of the price and signed the cheque with a name other than his real name. The cheque was dishonoured and it was found that the accused had drawn a cheque with a view to induce the vendor to deliver the goods. The accused was charged with offences under Ss. 420 and 464, I. P. C. Held, that the accused was not proved to have been guilty of an offence under S. 464, I. P. C. but that he was guilty under S. 420, I. P. C. To constitute an offence under S. 464, I. P. C. the intention must be proved to be to cause it to be believed that such document was made or signed or executed by, or by the authority of, a person by whom or by whose authority it was not made or signed. (*Walmsley and Mukerjee, JJ.*) MARTINDALE v. KING EMPEROR.

1925 Cal. 14 : 40 C. L. J. 256.

——— S. 426—Removal of dead tree—Mischiefs.

The cutting and removal of dead jack-fruit tree standing on the homestead of the tenant, by a servant of the landlord does not constitute the offence of mischief. (*Newbould and Ghose, JJ.*) SARAT CHANDRA SEN v. YAKUB TALUQDAR.

1924 Cal. 805 : 28 C. W. N. 736.

——— Ss. 426 and 451—House trespass—Mischief.—Party Wall—Raising height of—Demolition by neighbour—Bona fide claim of right.

There was a dispute between two neighbours over what was alleged by the accused to be a party wall belonging to himself and the complainant. The complainant in spite of a notice to the contrary had proposed to erect an addition to this wall. The accused gave notice on 11-3-1924 warning him not to erect an addition to the wall but on 12-3-'24 the complainant proceeded to add to the wall in order to support a staircase he was putting up. The same evening the accused pulled down that addition which consisted of an added or raised brickwall. The accused instituted a civil suit and obtained an interim injunction restraining the complainant from

PENAL CODE, S. 441.

proceeding with the construction of the wall. Held that the accused had pulled down the addition to the wall under a *bona fide* claim of right and that he was not guilty of the offences under Ss. 426 and 451, I. P. C. with which he was charged. (*Marien and Fawcett, JJ.*) EMPEROR v. BALAKRISHNA NARHAR.

26 Bom. L. R. 978 : 1924 Bom. 486.

——— S. 427—Charge under—Acquittal—Compounding of case by complainant—Sanction of master of complainant not obtained—Effect.

The complainant compounded a case which he had instituted against the accused and the accused were acquitted. Subsequently the complainant's master alleged that the complaint had been filed under his authority and that he had not given sanction for withdrawal of the case or for compounding it. Held, that the acquittal of the accused was quite legal and proper and so long as the order stood, it was a bar to a further trial of the accused on the same charge. (*Boys, J.*) HARBANS v. EMPEROR.

22 A. L. J. 820 : L. R. 5 A 143 (Cr.) : 1924 A. 778 : 83 I. C. 658 : 10 O. & A. L. R. 944.

——— S. 430—Mischief—No finding as to ownership of property.

1924 Oudh 132 (1).

——— S. 436—Mischief by fire—Essentials of offence—Setting fire to building—Death of child.

It is absolutely necessary in order to convict the accused under S. 436, I. P. C. to prove that the building which he destroyed came within the category of a building ordinarily used as a place of worship, as a human dwelling or as a place for the custody of property. The words "ordinarily used" in S. 436, I. P. C. do not mean that other buildings are from time to time used for such purposes, but they mean that the particular building which is the subject of the offence was itself used. It was found that the accused had set fire to a *chaupal* as a result of which a child was burnt to death. It was not proved that the accused knew that the *chaupal* had been used as a place of dwelling or that there was a child inside the *chaupal*. Held, that the accused was not guilty under S. 304, I. P. C. but under S. 426, I. P. C. (*Walsh, A. C. J. and Ryves, J.*) KHANJAN v. EMPEROR.

L. R. 5 A. 140 Cr. : 82 I. C. 54 : 1924 A. 781 : 25 Cr. L. J. 1190.

——— S. 441—Criminal trespass—Offence of—Intention essential.

The offence of criminal trespass is not complete unless there is an intent to commit an offence or to intimidate, insult or annoy some one in possession of property. It is not enough that the accused should know that his act is likely to have such effect. 41 M. 156 (F. B.) Ref. (*Spencer, J.*) NARAYANA, In re.

20 L. W. 239 : 82 I. C. 149 : 25 Cr. L. J. 1221.

——— Ss. 441, 448 and 452—Criminal trespass—Essentials of offence—Search after young girl kidnapped away.

A young girl who was about to be married disappeared from her parents' house. Shortly after she was reported to be living with the complainant in his house. The parents and their

PENAL CODE, S. 441.

relations (who were the accused) went to the house of the complainant and in his absence forcibly removed the girl to their house. The complainant alleged some sort of a marriage but there was no proof of that. *Held* that the accused had not committed any offence under S. 441, I.P.C.

The essence of an offence under S. 441, I.P.C. is the intent in committing the trespass and merely to trespass is not ordinarily an offence. It must be proved that some criminal intent was present in the mind of the accused and it does not at all follow that because an act is unlawful and is one that the civil law will restrain or for which it will compensate the injured party in damages, it is necessarily criminal. (*Motisar, J.*) *REHANA v. EMPEROR.* 5 Lah. 20 : 81 I. C. 351 : 1924 Lah. 449 : 25 Cr. L. J. 815

— S. 441—*Essentials of offence—Invitation by inmate of house—Presumption.*

The accused at the invitation of a lady in the house entered the house at night for carrying on an intrigue with her. He did not expect that his intercourse would be interrupted or that his presence would be noted by others. *Held*, he had no intention of causing annoyance and that no offence was committed. (*Martineau, J.*) *ASA RAM v. EMPEROR.* 25 Cr. L. J. 751 : 81 I. C. 239 : 1925 Lah. 23.

— S. 442—“*Building*” meaning of—*Wehra* used for custody of property.

A “wehra” used for custody of property is a building within the meaning of S. 442 of the Penal Code, 35 P. R. 1879 followed. (*Malan, J.*) *NIAMAT v. EMPEROR.*

1925 Lah. 117 : 6 Lah. L. J. 385.

— S. 442—*Courtyard bounded by walls—No door—If a building.*

A court yard bounded by walls on all the sides without a door opening out anywhere, is not a building for the purposes of S. 442, I. P. C. (*Martineau, J.*) *BUTA v. EMPEROR.* 77 I. C. 809 : 9 Lah. 623 : 25 Cr. L. J. 457.

— S. 442—*Entry, meaning of.*

77 I. C. 446 : 25 Cr. L. J. 398.

— S. 447—*Criminal trespass—Intention—Vacant land—Assertion of right.*

Where certain vacant land was in the possession of the complainant, the accused who were the headmen of the village and looking after the affairs of the village temple entered upon the land alleging that it was the property of the temple, and put up a water pandal in the place. *Held* that the accused having acted *bona fide* there was no question of criminal trespass. (*Krishnan, J.*) *JAMBULINGA CHETTY v. EMPEROR.*

1924 M. W. N. 546 : 1924 Mad. 862 : 47 M. L. J. 437.

— S. 447—*Intention to annoy—Question of inference.*

The essence of an offence for which a man may be convicted under S. 447, I. P. C. lies in the intention of the accused to commit an offence or to intimidate, insult or annoy any person in possession of the property with reference to which the trespass is made. A distinction should be made

PENAL CODE, S. 465.

between the civil wrong and the criminal offence. There may be an intent to annoy without any primary desire to annoy, as a man is in law presumed to intend the natural consequences of his act. It is a matter of inference to be drawn from the circumstances of a case. (*Wazir Hasan, A. J. C.*) *EMPEROR v. JAG MOHAN DAS.*

1924 Oudh 297 : 75 I. C. 292 : 24 Cr. L. J. 916.

— S. 448—*Criminal Trespass—Thandika property—Entry by member of the public.* *MAUNG SHEVE KU v. EMPEROR.* 75 I. C. 353 (2).

— Ss. 448 and 452—*Elements of offence—House trespass.* 76 I. C. 392 : 25 Cr. L. J. 168.

— 448—*Entry with bona fide claim of right—Offence.*

An entry into a house in assertion of a *bona fide* claim of right cannot constitute criminal trespass, which requires an intent to commit an offence or to intimidate, insult or annoy any person in possession. (*Ross, J.*) *DEBI DAYAL v. EMPEROR.* 1925 P. 167 : 61 I. C. 823 : 25 Cr. L. J. 1047.

— S. 448—*Intention—Proof of.*

In the case of a conviction for criminal trespass, there must be a clear finding as to intention. From the antecedent circumstances and conduct of the parties, if the court thinks the trespasser knows that his act would cause insult or annoyance, it can infer such an intent. (*Kinkhede, A. J. C.*) *BHAGWANTRAO v. CHAMPAT RAO.*

1925 Nag. 50 : 81 I. C. 716 : 25 Cr. L. J. 1004.

— S. 456—*Non-production of house owner.*

The mere non-production of the owner or person in actual possession of house does not vitiate conviction under S. 456 (12 A, L. J. 151 Dist.) *Boys, J.* *MANNI v. EMPEROR.*

1924 A. 764 : L. R. 5. A. 127 (Cr.).

— Ss. 457 and 497—*Essentials of.*

Before convicting a person of an offence under S. 457 when the offence charged is house trespass with intent to commit adultery, the Court has to be satisfied there is no consent or connivance by the husband. (*Greaves and Duval, JJ.*) *BALARAM KUNDU v. EMPEROR.*

25 Cr. L. J. 1186 (2) : 82 I. C. 50 (2) : 1925 Cal. 160.

— S. 458—*Scope of.*

1924 A. 78.

— Ss. 463 to 467—*Scope of.*

S. 195 (1) C. of the Criminal Procedure Code refers to an offence described in S. 463, I. P. C. and the latter is used there in a comprehensive sense so as to embrace all species of forgery and includes a case falling under S. 467, I. P. C. (*Martineau, J.*) *KHAINATH RAM v. MALAWA RAM.* 5 Lah. 550.

— S. 464—*Expert evidence—Not Corroborated—Expert not called as witness.*

77 I. C. 423 : 25 Cr. L. J. 375.

— Ss. 465 and 471—*Application for appointment—Forged certificate affixed—Offence.*

An applicant for an appointment appended to his application a forged certificate. *Held*, his object

PENAL CODE, S. 466.

was to obtain wrongful gain and he was guilty of offences under Ss. 467 and 471, I. P. C. (*Mac Cott, J. C.*) *NGA BA THEIN v. EMPEROR.*
1925 Rang. 9: 76 I. C. 225 : 25 Cr. L. J. 129

—Ss. 466 and 468—*Conviction for forgery and using as genuine a forged instrument—Legality of.*

There is nothing illegal in a person being convicted for forgery and also for using a forged instrument as a genuine one. The offences are separate and if both are committed separate convictions are legal. (*Hallifax, A. J. C.*) *GAJANAN SAKHARAM v. EMPEROR.*
1925 Nag. 162 (1) : 77 I. C. 825 : 25 Cr. L. J. 473.

—S. 467—*Forgery of document—No intention to use—Offence.*

It is an offence under S. 467, I. P. C. to forge a document, even though there is no intention to use the same. (*Wazir Hasan, J. C. and Pullan, A. J. C.*) *SURAT BAHADUR v. EMPEROR.*

11 O. L. J. 640 : 1 O. W. N. 362 :
25 Cr. L. J. 1162 : 81 I. C. 986 : 1925 Oudh 158.

—S. 467—*Forged receipt—Writer—When can be convicted.*

A person who wrote a forged receipt cannot be convicted under S. 467, I. P. C. in the absence of evidence that he was present at its execution or that he helped any person to use it. (*Graves and Duval, JJ.*) *MAZHER AHMED v. EMPEROR.*
82 I. C. 261 : 25 Cr. L. J. 1253.

—Ss. 467 and 471—*Misappropriation—Making false receipt for fine paid into Court.*

Where the bench clerk of a Sub-Divisional Magistrate's Court received a sum of money, being the amount of fine levied on the payer, and misappropriated it and with a view to screen the misappropriation made a false receipt he is guilty of offences under Ss. 467 and 471, I. P. C. (*Heald, J.*) *NGA BA SEIN v. EMPEROR.*
25 Cr. L. J. 1378 : 83 I. C. 338 : 1924 R. 331 :
3 Bur. L. J. 113.

—S. 471—*Guilty intention necessary.*

A finding that the articles were possessed by the accused dishonestly with the knowledge or with reason to believe that they were stolen property is necessary for conviction. Mere possession of stolen property is no offence. To retain valuable property which does not belong to the accused does not in itself prove that a man's possession is dishonest. (*Campbell, J.*) *ARIAN DAS v. THE CROWN.*
1923 Lah. 340.

—S. 471—*Use of a forged document—What constitutes—Court need not act upon it.*

A suit for redemption was decreed over-ruling the plea of the mortgagee that he had purchased the property by a Kobala. The mortgagee filed an appeal and along with his memorandum of appeal filed the Kobala. The appeal was decreed. It was found that the Kobala was a forged document. Held that the accused had committed an offence under S. 471, I. P. C. It is not necessary that the court should have accepted the document to constitute the offence of using a false document. Even if a man uses a false document to support a good title, he is guilty of an offence

PENAL CODE, S. 474.

under S. 471, I. P. C. (*Newbould and Ghose, JJ.*) *EMPEROR v. BANSI SHEIKH.*
1924 Cal. 718 : 83 I. C. 504 : 51 C. 469.

—S. 472—*Applicability—Taking impression of seal—When offence.*

S. 472 covers only the case of a counterfeit of an existing thing. To take the impression of an old seal on a piece of paper is not an offence unless it is proved there was an intent to use it in a dishonest manner. (*Wazir Hasan, J. C. and Pullan, A. J. C.*) *SURAT BAHADUR v. EMPEROR.*

11 O. L. J. 640 : 1 O. W. N. 362 :
81 I. C. 986 : 25 Cr. L. J. 1162 :
1925 Oudh 158.

—S. 477-A—*Charge under—Amendment of Cr. P. Code—Trial by Magistrate—Legality of*

A criminal case was commenced in the Court of First Class Magistrate and involved charges against the accused under Ss. 408 and 477-A, I. P. C. At the time the case commenced the charge under S. 477-A was exclusively triable by a Court of Sessions. Since the amended Cr. P. Code came into force charges under S. 477-A were triable by a Magistrate with first class powers. Held that the trial by the Magistrate after the amended Code came into force of the charges under Ss. 408 and 477-A, I. P. C. was quite legal and proper. The amendment of the law which enables a Magistrate with first class powers to try charges under S. 477-A, I. P. C. is a matter of procedure only and the amending Act applies notwithstanding that the case was commenced before the amending Act came into force. (*Greaves and Duval, JJ.*) *RAJIB LOCHAN SHAW v. JOGESH CHANDRA.*
1924 Cal. 983 : 28 C. W. N. 998.

—S. 482—*Mark used for 6 years—If becomes a trade mark—Actual deception—Evidence of—If necessary.*

For a conviction under S. 482, evidence of actual deception is not necessary. It is enough if the court finds on a comparison of the two trade marks that the accused was likely to deceive.

Using a mark for a period of 6 years in respect of goods sold, makes such a mark a trade mark. (*Greaves and Panton, JJ.*) *LAKHAN CHANDRA BASAK v. EMPEROR.*

1925 Cal. 149 : 81 I. C. 922 : 25 Cr. L. J. 1098.

—S. 489-B—*Using forged note as genuine—Knowledge—Proof of.*

To convict a man under S. 489 B. for using a forged note as genuine, the possession of the note does not necessitate his explaining his possession, but the prosecution must prove he knew it to be forged when he passed it. (*Kennedy, A. J. C.*) *EMPEROR v. HABU.*

81 I. C. 551 : 25 Cr. L. J. 935.

—494—*Bigamy—Anand marriage—Mona.*

A Mona Sikh can validly perform his marriage under the Anand rites, and in respect of the same, the offence of bigamy can be committed. (*Moti Sagar, J.*) *WALU RAM v. EMPEROR.*

82 I. C. 277 : 25 Cr. L. J. 1269.

PENAL CODE, S. 494.

—S. 494—Bigamy—Offence under—Trial for—Forum—Territorial. See CR. P. CODE, S. 177. 3 Pat. 417.

—S. 494—Offence under—If triable by first class Magistrate.

Under the Criminal Procedure Code as amended in 1923 a first class Magistrate can try an offence of bigamy without committing it to the Sessions. (*Dalal, J. C.*) DAL CHAND v. RAM LAL. 25 Cr. L. J. 39 : 75 I. C. 727 : 1925 Oudh 60.

—S. 498—Complaint by husband—Death of husband—Prosecution if abates. 1924 Lah. 72.

—S. 499—Defamation—Accused if must actually utter defamatory words—Use of such words by another and accused adopting them if enough—Married woman—Imputation of unchastity to—Complaint by husband—Rights of—Penal Code, S. 499—Criminal Procedure Code, S. 198—Effect.

To be guilty of the offence of defamation it is not necessary that the accused should himself have actually uttered the words complained of. Where another person uses defamatory words purporting to report what the accused himself had told him and the accused, who is present at the time, by his conduct and by a few words which he speaks, intends to give and does give the impression that he adopts the words of that other as his own, the accused is guilty of the offence of defamation. By assenting by conduct and suggestion to what he himself is reported to have said, the accused in effect utters the words imputed to him.

Where a married woman is defamed by imputation of unchastity, her husband is a person aggrieved under S. 198, Criminal Procedure Code, and has the right to prefer a complaint of defamation. (*Venkatasubba Rao, J.*) APPANNA v. AKKANNA. 20 L. W. 921 : 47 M. L. J. 746.

—S. 499—Defamation—Intention—Injury to reputation.

A person commits defamation within the meaning of S. 499, I. P. C., who publishes any imputation concerning any person intending to harm the reputation of that person whether harm is actually caused or not. A person who publishes defamatory matter against another in a case not covered by any of the exceptions cannot escape punishment on the ground that the reputation of the person attacked was so good or that of the person attacking was so bad, that serious injury to the reputation was not in fact caused. (*Daniels, J.*) RAM NARAIN v. EMPEROR. 1924 A. 566 : 22 A. L. J. 639 : L. R. 5 A. 119 (Cr.) : 83 I. C. 503

—S. 499—Good faith—Discussion of public questions.

Law does not permit a lower standard of good faith in defamatory statements in the discussion of public statements. Any criticism must be justly and reasonably deducible from the public conduct in question. (*Kennedy, J. C. and Madgavcar, A. J. C.*) HIRANAND v. EMPEROR.

17 S. L. R. 245 : 1924 S. 129 : 76 I. C. 230 : 25 Cr. L. J. 134.

PENAL CODE, S. 499.

—Ss. 499 and 500—Religious controversy—Personal character or respectability not assailed—Violent language—Defamation.

In reply to a book written by the complainant attacking Vaishnavism and its founders, the accused retorted by a similar publication and both books dealt with highly controversial religious matters. Very violent language was used in the latter about the complainant. *Held*, it did not amount to defamation, as the personal character or respectability of the complainant was not in any way assailed. (*Madavan Nair, J.*) KUMARAGURUDASA SWAMIGAL v. KRISHNASWAMY MUDALIAR. (1924) M. W. N. 768 : 1924 Mad. 698 (1) : 47 M. L. J. 664.

—S. 499—Exception—Defamatory Statement—Imputation against medical man—Want of due care and attention—Considerations of public good—Acquittal—Interference on appeal.

The accused was charged with an offence under S. 500, I. P. C., in respect of a pamphlet issued by him containing statements that the complainant, a medical practitioner, had in pursuance of conspiracy drugged a patient, made him unconscious and caused him to be removed to the cremation ground. The accused pleaded justification and that he *bona fide* believed in the truth of his statements. The Magistrate on an investigation of various medical works found that the prescription given by the complainant was not appropriate for bribery colic from which the patient was suffering and that the symptoms of the patient showed signs of arsenical poisoning. The Magistrate found that in those circumstances a prudent and reasonable man would draw the conclusion that the medicine administered to the patient caused his collapse and the conduct of the complainant suggested criminal conspiracy to a prudent mind. *Held*, (1) that the Magistrate, being untrained in medicine, was not justified in embarking on an enquiry into medicine without expert assistance and that his conclusions were unsound and valueless ; (2) that it was not shown that the accused acted with due care and attention when he published the statements in question ; (3) that the fact that certain evidence was produced at the trial could not be utilised for the purpose of establishing due care and attention attributed to the accused, unless it is also shown that the information was in his possession at the time when he published the statement ; (4) that Exc. 9 to S. 499, I. P. C., did not protect the accused inasmuch as the publication was not made in good faith ; (5) that the absence of good faith was proved by the flimsy materials on which the statement was based and the absence of any evidence that the accused made any enquiries before publication or had at his disposal or in his knowledge any of the evidence produced at the trial ; and (6) that in the absence of good faith, it was not necessary to inquire if the public good was involved in the publication.

Though the High Court hesitates to interfere when an accused has been acquitted and it does not do so unless there has been a miscarriage of justice, yet in the circumstances of the case having

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regard to the fact that there was no justification for the statements complained of, and that there was no evidence to support them, the High Court interfered in appeal and convicted the accused. (*Greaves and Panton, JJ.*) *EMPEROR v. PURNA CHANDRA GHOSE.* 28 C. W. N 579:

83 I. C. 631 : 1924 Cal. 64.

———S. 499—*Exception to—Panchayat—Statement that person was unchaste—Good faith.*

Where the accused made a statement at a caste panchayat that a child was born to a woman of adulterous intercourse, it amounts to defamation unless he proves it was true or that he made it in good faith. (*Hallifax, A. J. C.*) *BAGA MAHAR v. EMPEROR.* 1924 Nag. 172 : 76 I. C. 393 :

25 Cr. L. J. 168.

———S. 499—*Exception (9)—Defamation—Applicability.*

When the complainant charged the accused with having defamed her by certain allegations made in a letter by his vakil, such as her unchastity, and bad conduct, in reply to a notice sent by complainant charging the accused with breach of trust and misappropriation, of her husband's properties, and the Magistrate discharged the accused. *Held* on revision that the accused is protected by exception 9 to S. 499, and that the statements made in the letter were matters affecting the common interest of the complainant and the accused, and that in the present case, where the accused, being the brother's son of the complainant's husband, had a direct interest in making the allegations of unchastity against his uncle's widow, to deprive her life interest, and was within his rights in causing the letter to be written and the offence of defamation cannot be made out. (*Odgers, J.*) *SANKAMMA v. GOVINDA CHETTY.* 20 L. W. 779 : 1925 Mad. 246.

———S. 499, Exception 9 — *Defamation — Sectarian disputes—Excommunication of a member of a community — Publication in course of duty—Good faith.*

The accused were the executive members of a caste association known as the Sourashtra Sabha. On a representation made to the Sabha that the complainant, one of the members of the community subject to the jurisdiction of the Sabha was liable to be excommunicated for a caste offence, notice was given to him to appear and answer the charge and on his refusal to do so an order of excommunication was passed against him. A report was drawn up of the Sabha's proceedings and was published by the caste head (one of the accused) in accordance with the usual practice, to the heads of the community, in other places. The accused were charged with defamation. It was found that according to the usual procedure of the Sabha in question and other similar institutions a delinquent who refused to appear and answer the charge against him was liable to be excommunicated without further in-

PENAL CODE, S. 504.

quiry. *Held*, (1) that the accused having followed the usual procedure of the Sabha in the proceedings taken by them against the complainant could not be said to have been actuated by malice, however defective that procedure might appear to more judicial minds ; (2) that the accused were acting in good faith and in the interests of the community ; (3) that the publication of the report was made in the usual course of the accused's duty to those who had a right to be acquainted with the matter in question ; and (4) that the accused were fully protected by the ninth exception to S. 499, I. P. C. (*Wallace, J.*) *AYYASWAMI AIYAR v. ANNAN THIRUMALA AIYAR.* 19 L. W. 639 : 1924 M. W. N. 541 :

1924 Mad 670 : 47 M. L. J. 8.

———S. 499, Exc. 10 — *Defamation — Caste ex-communication—Communication of information as to—Privilege.*

The complainant was put out of caste at a meeting of his caste fellows for having taken water from an untouchable man. The accused told some of the members of the caste not to take water from the hands of the complainant, as in that event they would incur the penalty of excommunication. *Held* that the accused was not guilty of any offence and his case fell within exception (10) to S. 499, I. P. C. (*Stuart, J.*) *UMED SINGH v. EMPEROR.* 22 A. L. J. 79 :

L. R. 5 A. 55 (Cr.) 77 I. C. 824 :

25 Cr. L. J. 472 : 1924

———S. 500—*Report to police.*

Statements made in the course of judicial proceedings are absolutely privileged. Information or a report made to the Police does not come within this principle. A report made at a police station though not within the rule of absolute privilege which covers Judicial proceedings, is *prima facie* privileged, that is to say, the person making it has a right to make it if he honestly believes it, and the person receiving it has a duty to receive it. But qualified privilege as the term indicates, provides only a qualified protection and the person charged with the defamation must prove that he used the privilege honestly, and the onus of establishing that lies upon him. (*Walsh, J.*) *LALA LACHMAN PRASAD v. NAJJU.* 1923 All. 167.

———S. 504—*Offence under—Essentials of—Intentional insult—Breach of the peace.*

An insult is no less intentional because it is "incidental" to another insult or even to another statement or proceedings which is not insulting. But to insult another intentionally is not an offence punishable under S. 504, I. P. C. unless the offender intends by that insult to provoke the other person into breaking the peace by assaulting him or getting him assaulted or reviling him in loud and angry tones or in any other way or at least knows that such a disturbance is a probable result of his insult. (*Hallifax, A. J. C.*) *SIFFLES v. DIXIT.* 7 N. L. J. 124.

81 I. C. 903 : 25 Cr. L. J. 1079 : 1924 Nag. 121 (2).

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PENSIONS ACT Ss. 4 and 6—*Jagir—Right to share—Suit for—Necessity for certificate of collector—Omission to obtain certificate—Effect of.*

Where the plaintiff sues for a declaration that he is the sole owner of a certain share in a Jagir, the suit could not proceed in the absence of a certificate granted by the Collector under S. 6 of the Pensions Act but the absence of a certificate is not a ground for a summary rejection of the plaintiff's suit or appeal. The appeal was adjourned for three months to enable the plaintiff to obtain a certificate from the Collector under S. 6 of the Pensions Act. 25 All. 73; 27 I. C. 927 followed. (*Scott-Smith, A. J. C.*) MAHAMMAD BARKAT ULLAH v. FAZIULLAH. 6 Lah. L. J. 343.

—S. 4—*Kulkarni services—Commutation into cash allowance—Received by one co-sharer—Suit by other co-sharer—Certificate of Collector—Necessity for.*

Three brothers forming a Hindu family owned among other things certain inam, mirasi, patil kis and vatani lands and also certain cash allowances. At a partition made in the year 1869 between the three brothers, the aforesaid properties were kept, joint and left under the management of eldest brother with a view to collect the income and to divide it in equal shares among all the brothers. Subsequently in 1897 the brothers confirmed the aforesaid arrangement. The eldest brother died in 1889 and was succeeded by his adopted son who died in November 1918. On the death of the adopted son his widow assumed the management of the property. In 1914 a suit was brought for recovery of his share in the income of the properties by the plaintiff's father, who was one of the three brothers, and the suit was compromised. The plaintiff brought a suit for recovery of his share in 1921 in respect of the commuted payments of the kulkarni villages. Held that the plaintiff's claim referred to grants of money made by the British Government within the meaning of S. 4 of the Pensions Act and that so far as those items were concerned a certificate of the Collector was necessary before the plaintiff could obtain a decree. (*Shah, A. C. J. and Fawcett, J.*) GIRJABAI SHIVDEORAO v. NARAYAN RAO. 26 Bom. L. R. 1165.

—S. 4—*Motives of party—If can be looked into—Construction of Act.*

In determining the application of S. 4, Pensions Act, the Court should not enquire into the motives of the plaintiff. The provisions of the Act being in derogation of the ordinary rights of a citizen must be considered strictly. (*Wazir Hasan, J. C.*) NAQI HUSAIN v. MT. CHHAJI BEGAM. 80 I. C. 606; 10 O. & A. L. R. 908.

PLEADER—Rejection of brief—Partisanship for one of the parties—Not a proper ground for rejecting brief, if fee paid. See PRACTICE, PLEADER. 10 O. & A. L. R. 459.

PLEADER AND CLIENT—*Appearance for opposite sides—Different stages of the same proceeding.*

The judgment-debtor engaged a vakil to object to the execution of a decree under S. 47 of the C. P. Code. The execution application was finally

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disposed of. Subsequently the same vakil was engaged by the decree-holder for making an application under O. 34, R. 6 of the C. P. Code. Held, that there was nothing improper in the vakil appearing for the decree-holder in the application under O. 34, R. 6. (*Mookerjee and Dalal, JJ.*) SANTI LAL v. RAJ NARAIN.

L. R. 5 A. 565; 82 I. C. 65; 1924 A. 804.

—*Compromise of case—Authority of Counsel—Practice.*

In a suit for recovery of the price of goods sold and delivered and for damages in respect of goods not taken delivery of, the plaintiffs valued their claim at Rs. 25,508. Defendants admitted liability to the extent of Rs. 12,611 but had claimed Rs. 58,000 on account of various other transactions between the parties. When the suit came on for hearing defendant's counsel in the absence of his client and without his authority consented to a decree in plaintiff's favour for Rs. 22,177 reserving the defendants' right to proceed with their claim in their own suit. The counsel was neither asked to settle the suit nor was any restriction placed on his discretion in the matter of compromise of the suit. Held that the compromise was within the apparent authority of counsel and was binding on his clients, the defendants.

Per *Richardson, J.*—A counsel has in the usual course full authority in the exercise of his judgment and discretion to settle or compromise a case on behalf of the client for whom he appears. The client by retaining counsel has clothed the latter with authority to act for him in the usual course and it would rather appear to be unjust to the opposing party that the compromise should be set aside and that proceedings reopened. There must be some limitation of counsel's authority to compromise, express or otherwise, to enable the client to impeach the compromise as beyond counsel's authority. (*Sanderson, C. J. and Richardson, J.*) B. N. SEN & BROS. v. CHUNI LAL DUTT & Co. 51 Cal. 385; 83 I. C. 611; 1924 Cal. 651.

—*Negligence—Liability for—Claims allowed to become barred.*

Where the pleader was retained generally for all the cases of a Raj and was also paid a monthly salary for conducting all cases, his duty is to conduct the cases entrusted to him by the agents of the Raj. In the absence of any special term in the contract to that effect the pleader is not bound to instruct the plaintiff or his servants that they ought to take certain proceedings. The pleader could not be held responsible for allowing decrees to become time-barred provided he did not neglect to present the application for execution when sent to him for that purpose. (*Dawson Miller, C. J. and Foster, J.*) MAHARAJADHIRAJA SIR RAMESHWAR SINGH v. NARENDRA NATH DAS. 5 Pat. L. T. 355; 2 Pat. L. R. 205.

—*Relationship between—General authority—Standing Vakil—Agency.*

There is no such thing as a standing relation of pleader to a person. A person is a pleader for another only when that other has occasion to employ him as such. That employment may be either to conduct a suit or advise him about some

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matter in which legal advice is required : but there is no such general relationship as that of pleader and client of a standing and permanent character upon all occasions and for all purposes. An appointment as a standing vakil does not create an agency for a particular case until a vakalat is given. (*Phillips, J.*) MAHBOOB SIR FRAJVANTU SREE RAJA PARTHASARATHY APPA RAO *v.* SUBBA RAO. 35 M. L. T. (B.C.) 84 : 1924 Mad. 840 : (1924) M. W. N. 517 : 47. M. L. J. 483.

——— *Right of audience—Engagement of pleader—Right of client to be heard in support of his case—Default of pleader—Effect.*

When a vakil represents his client the right of audience is, for the time being, vested in him. For the purpose of continuing the hearing or commencing the hearing, he is the appellant. If he is absent there is default. Even if the client was physically present in Court, in the eye of law he was not present in such a sense as to prevent the absence of the vakil from being a default. But a Court should not dismiss a case for default owing to the temporary absence of the pleader in a different Court but should give some time for the party to bring his pleader or adjourn it for a short time on terms as to costs. (*Walsh, A. C. J. and Ryves, J.*) SAKALRAI DALU *v.* MT JADU RANI. L. R. 5 A. 615 : 80 I. C. 950 : 1925 A. 58.

PLEADINGS—Admissions in—Construction of—To be read as a whole. See ADMISSION.

78 I. C. 542.

——— *Alternative reliefs—Grant of one—If Plaintiff can claim both in appeal.* MT. SARJO KUAR *v.* ENAIT. 1924 A. 271.

——— *Case not specific in plaint—Prejudice.* 1924 Mad. 174.

——— *Case set up in plaint not proved—Effect.* 1924 A. 150.

——— *Plaint—False averments—Effect of—Relief awarded.*

A suit cannot be dismissed on account of a false averment in the plaint. Courts must apply the law to the facts actually proved, even though they showed the allegations of both parties to be untrue, incorrect or incapable of proof and judicial recognition, and give such relief as the facts warrant. (*Raker, O. J. C.*) FAIZ MAHOMED *v.* SHEIKH WAJID. 1924 Nag. 189.

——— *Presentation out of office hour—Whether proper.* See C. P. CODE, O. 4, R. 1.

20 L. W. 655.

——— *Proof—Misrepresentation that sale was a mortgage—Evidence—Attestation—Statement by vendor—Inference.*

On an issue as to whether the signature of a vendor to two sale-deeds had been obtained under a misrepresentation that they were really mortgage deeds the vendor gave no evidence as to any misrepresentation of that sort. In the attestation which had to be appended at registration the vendor in respect of the said sale-deeds made a statement that he had signed the documents in question not as sale but as mortgage

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deeds. The trial Judge held that that statement showed the impression that the vendor was under and that it must be inferred that that impression had been induced by the action of the other party, *Held*, that it was impossible to draw such inference and that the case set up was not made out. (*Lord Dunedin.*) MAHARU WALAD LOTU *v.* KHANDU WALAD. 20 L. W. 107 :

L. R. 5 P. C. 132 : 80 I. C. 822 :

26 Bom. L. R. 742 : 10 O. & A. L. R. 928 :

1924 M. W. N. 645 : 35 M. L. T. (H.C.) 139 :

1 O. W. N. 530 : 47 M. L. J. 128 (P.C.).

——— *Title acquired after filing of suit—Decree if can be given.*

Even if a plaintiff had no title at the time of filing the suit, a Court can proceed to give a decree on the basis of a title acquired during the pendency of the suit. (*Krishnan and Ramesam, JJ.*) PENDEKKALLU THIMMAYYA *v.* SIDDAPPA. 75 I. C. 112 : 1925 Mad. 63.

——— *Title based on ownership—Adverse possession—Decree if can be awarded on—Prejudice.*

Where a suit brought for possession is based on ownership, but the Court finds the plaintiff has acquired title by adverse possession and decrees the suit and it is not claimed that the defendant has been prejudiced or taken by surprise, there is nothing illegal in the procedure adopted. (*Odgers and Hughes, JJ.*) MUKAMBIKA SHETTITHI *v.* SHID-DAYA SHETTI. 75 I. C. 613.

POSSESSION—*Animus Possidendi—Absence of title—Physical control—Effect.*

In the absence of title, law will raise from definite physical control of land a presumption of possession of that which the possessor has shown a clear and unambiguous intention to possess. (*Dass and Ross, JJ.*) TIKAIT THAKUR NARAYAN SINGH *v.* DILDAR ALI KHAN. 80 I. C. 544 : 3 Pat. 915.

——— *Suit for—Absence of title in plaintiff—Ejection by defendant.*

A person in possession without title can maintain his possession as against another person without title and if forcibly ejected by the latter can sue for possession. (*Miller, C. J. and Mullick, J.*) AKAL AHIR *v.* BAIJNATH DAS. 1924 P. 709.

POSSESSORY TITLE—*Evidence of payment of revenue and receipt of rent is prima facie evidence of hereditary title to Zemindari but does not prove heirship to the last holder.*

The proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *prima facie* evidence of an estate of inheritance in the case of an ordinary Zemindari. The evidence is still stronger if it be proved that the estate has passed on one or more occasions from ancestor to heir. 1 I. A. 268. But the mere fact that the plff. is in possession and pays Government revenue for the estate will not prove that he is the nearest heir of the last holder and if the property is not an accretion to the Raj, he cannot succeed only upon his possessory title. (*Dawson Miller, C. J. Mullick and Foster, JJ.*) HARIHAR PRASAD SINGH *v.* MAHARAJA KESHO PRASAD SINGH. (1925) Pat. 68 : 5 Pat. L. T. Supp. 1.

POST OFFICE ACT (XIV OF 1866) S. 6.

POST OFFICE ACT (XIV OF 1866) Ss. 6 and 34—Goods sent by value payable parcel—Destruction of label—Sale by dead letter office—Liability of Post Office.

A parcel sent by plaintiff by value payable parcel never reached the consignee. The label had become torn and in due time the parcel reached the Dead Letter Office. Eventually as it was impossible to trace the parcel to its owner it was sold for Rs. 15. Plaintiff claimed the value of the goods Rs. 85-8-0 from the Secretary of State. *Held*, that the defendant was liable and that he could not escape liability under Ss. 6 and 34 of the Post Office Act (*Lindsay, J.*) SECRETARY OF STATE *v.* RADEY LAL. L. R. 5 A. 384 : 79 I. C. 334 : 46 A. 455 : 1924 A. 692 (1).

PRACTICE—Adjournment—Pending case—Not to be expected as a matter of course—Court entitled to exercise reasonable discretion. See C.P. CODE, O. 47, R. 1. 51 C. 70.

Appeal—New case when open.

The general rule as to grounds of appeal is that a party is not entitled to relief upon facts or documents not referred to or stated in the pleadings, nor on any ground which has never been considered, taken or tried in the Courts below, unless it is a pure point of law going to the question of jurisdiction of the Court below and capable of being determined without the consideration of any other evidence than that on the record. (*Baker, J.C.*) MT GOWRA *v.* CHAITRAM.

1924 Nag. 372.

Appeal—New point of law—When allowed.

Although a point of law may be taken in appeal for the first time, yet it is subject to the well-recognised rule that the evidence on the record is complete and no further evidence is necessary to substantiate the point. (*Jwala Prasad and Foster, J.J.*) NAGESHWAR BUX RAI *v.* BISESWAR DAYAL SINGH. 3 Pat. 236 :

2 Pat. L. R. 58 : 78 I. C. 889 :

5 Pat. L. T. 576 : 1924 P. 446.

Appeal—Notice of, to be given before party can be adversely affected.

The Commissioner is certainly not entitled to decide an appeal against a respondent who had never been summoned or heard. (*Fremantle, S. M. and Burn, J. M.*) THAKUR RUDRA PRATAP NARAIN SINGH *v.* MT. RATAN DEI.

L. R. 5 O. 46 : 11 O.L.J. 376.

Appeal—Presentation to wrong Court—Disposal by that Court—Appeal to High Court

A decree was passed originally for Rs. 9,000 and odd. A sum of Rs. 8,000 and odd had been paid under the decree and the balance due under the decree together with interest thereon was about Rs. 2,033 for which execution was taken. An objection by the judgment-debtor to the execution of the decree was allowed. The decree-holder preferred an appeal to the District Judge who dismissed it on the ground that no appeal lay to him inasmuch as the order fell within the provisions of O. 21, R. 58, C. P. Code. On second appeal to the High Court *Held* that the appeal to the District Court was incompetent and

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that the appeal lay to the High Court. Under the circumstances the High Court discharged the order of the District Judge and directed him to record on the memorandum of appeal presented to that Court an order of return for presentation to the proper Court to be signed by the Registrar in the High Court on the day the case was heard in the High Court. (*Chatterjee and Panlon, J.J.*) NAGENDRA LAL CHAUDHURI *v.* ASHRAF ALI CHOWDHURY. 40 C. L. J. 288 : 1925 Cal. 212.

Change of case—Suit for possession—Redemption if can be awarded.

In a suit for possession by the mortgagee the mortgagor has no right to elect whether possession shall be delivered or the mortgage redeemed. (*Kendall, A. J. C.*) THAKUR PRASAD SINGH *v.* CHANDRIKA PRASAD. 10 O & A. L. E. 212 :

11 O, L. J. 436 : 81 I. C. 742 : 1925 Oudh 150 (2).

Commitment—Procedure to be followed when High Court orders Commitment to Sessions.

Where the appellant was convicted under S. 379, I. P.C., and on a reference by the Sessions Judge for enhancement of sentences, the High Court set aside the conviction and ordered commitment of the accused to Sessions under S. 397, and the committing magistrate took the evidence afresh, and wrote a long order, *Held* the Magistrate should have reopened the original proceedings, frame a fresh charge, and explain to the accused, require him to give in his list of witnesses for Sessions, and then write a short formal order of commitment as under the orders of the High Court. (*Carr, J.*) NGAMYANG *v.* EMPEROR. 2 Rang. 447 : 1925 Rang. 82.

Consent order—Party disclaiming consent—Absence of prejudice—Procedure.

A consent order was passed by Court, and thereafter one of the parties stated he did not consent to the order or authorise his pleader to do the same. It appeared that he did not suffer any prejudice by such order. *Held*, it could be allowed to stand, 47 M.L.J. 164 F. 11. (*Madhavan Nair, J.*) VEPARI DALEPPADU *v.* THOTTADI SURANNA. 20 L.W. 900.

Costs—"Costs to be costs in the cause"—Order as to costs in an interlocutory application—Power of Court deciding main case to deal with costs. See COSTS. 26 Bom. L. R. 282.

Costs—Preparation of paper book—Appeal and Memorandum of Objections—Calcutta High Court Rules, Appellate Side, Chap 9, R. 25.

Where there are papers common to the appellant's list and the special list of the respondent with reference to his cross-objection the obvious course to pursue is that the costs of translation and printing of such common papers must to that extent, be apportioned. (*Mookerjee and Chatterner, J.J.*) GOBIND DAS NATH *v.* NRITYA KALI DAS. 39 C.L.J. 342 :

80 I.C. 790 : 1924 Cal. 874.

Counsel—Admissions by—Effect.

An erroneous admission by a Counsel on a point of law is of no effect and does not preclude a

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party from claiming his legal rights in the appellate Court. (*Kendall, A. J. C.*) THAKUR PRASAD SINGH *v.* CHANDRIKA PRASAD.

10 O. & A. L. R. 212 :
11 O.L.J. 436 : 81 I.C. 742: 1925 Oudh 150 (2).

—Counsel—Admission on a point of law—Effect.

An admission of Counsel on a point of law will not bind the party and if the opposite party has not in any way been prejudiced by such admission the point can be raised in subsequent proceedings. (*Moti Sagar and Martineau, JJ.*) NANAK CHAND *v.* MUHAMMAD KHAN.

1924 Lah. 702.

—Courts—Duty of — Application under wrong provision of law—Not ground to refuse justice

A court in the administration of justice should not refuse an application which on the merits it ought to grant and in law can grant, simply because the applicant asks the Court to exercise its admitted powers under a wrong section. Regard should be had to the substance rather than to the form of proceedings. (*Baker, A. J. C.*) IBRAHIM *v.* MR. SUGRABAI.

7 N. L. J. 4 :
20 N. L. R. 158: 75 I. C. 664: 1924 Nag. 77.

—Decree holder whether bound by way of res Judicata or dispendens in previous proceedings where he is not a party. Whether he can rely on favourable findings.

Where the decree holder in attaching the properties of judgment-debtor contended that he was not bound by previous proceedings in which he was not a party which declared judgment-debtor was not the owner but relied on a favourable finding in the previous litigation. Held, a party who is not a party to any of the previous proceedings is not bound by the adverse findings against him nor can he take advantage of findings in his favour in the previous litigation. (*Krishnan, J.*) ATMAKUR CHINNA CHENCHIAH *v.* K. KONDAYYA.

20 L. W. 798.

—Decree in futuro—If to be passed.

It is one of the principles of law that a court should not pass a decree which cannot be given effect to. (*Suhrawardy and Chotzner, JJ.*) NEAJUDDIN *v.* AKAMAT ALI.

79 I. C. 365 :
1925 Cal. 411 (2).

—District Magistrate must give explanation when ordered by High Court to do so.

Where the High Court issued a rule calling upon the District Magistrate to show cause why an appeal summarily dismissed should not be re-heard.

Held, the Magistrate is bound to give reasons and should not merely say "I should not be justified in taking up their Lordships' time over this trumpery case." (*Sanderson, C. J. and Pantou, J.*) RAM HARI CHAKRAVARTHY *v.* SANTOSH KUMAR MANNA.

1924 Cal. 642.

—Estoppel—Party accepting benefit under decree cannot appeal but can appeal if benefit is his even if appeal failed.

A party who has adopted an order of the Court and acted under it, cannot, after he has enjoyed a benefit under the order, contend that it is valid

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for one purpose and invalid for another. But the principle does not apply where the benefit accepted would in any case be his whether the appeal succeeded or failed. Where in a suit on a money bond payable with compound interest the Court awards simple interest only, an appeal against the decree is not rendered incompetent though the decree-holder accepts the costs deposited by the judgment-debtor on the basis of simple interest, subsequent to the filing of the appeal. (*Chatterjee and Cuming, JJ.*) JOGENDRA NATH BANERJEE *v.* KHODA BUKSHA BISWAS.

1924 Cal. 380.

—Examination of witnesses — Duty of Court—Commission, when to be ordered. See C. P. CODE, O. 26, R. 4.

39 G. L. J. 595.

—Full Bench—Reference to—When to be made.

Where a case was referred to a Full Bench because "It is advisable that the rights of decree-holders against the property of a deceased person in the hands of his legal representative should be clearly defined," Held that the reference was one which ought not to have been made. (*Schwabe, C. J., Coutts Trotter and Ramesam, JJ.*) KADIRVELU SAMI NAYAKER *v.* THE EASTERN DEVELOPMENT CORPORATION, LTD.

47 Mad. 411 : 34 M. L. T. (H. C.) 17 :

(1924) M. W. N. 346 : 80 I. C. 163 :

1924 Mad. 530 : 46 M.L.J. 61 .

—Government case—Government not entitled to greater indulgence than ordinary private litigants. (See C.P. CODE, O. 47, R. 1) 51 C. 70.

—High Court—Finality of order—Appeal from final order—Company—Winding up—Enforcement of payment of disputed debt—Abuse of process of Court.

With respect to all courts, more especially Courts of record such as the Original Side of the High Court the order of Court is the order that comes to be embodied in the formal order drawn up and issued by the Court. When the first order of the Court is in the nature of a preliminary order, an appeal against the final order would be held to include any points decided for the purpose of the preliminary order. (*Spencer, O. C. J. and Srinivasa Aiyangar, JJ.*) SATYARAZU *v.* GUNTUR COTTON JUTE AND PAPER MILLS CO., LTD.

1925 Mad. 199 : 47 M. L. J. 710.

—High Court—Judge of, absent on other service—If ceases to be a Judge of the Court—Full Bench judgment—Validity—One of Judges absent on other duty when judgment was pronounced—Effect.

A Judge of the High Court who does not resign his appointment does not cease to be a Judge of that Court during his temporary absence on other service. A Full Bench judgment of the High Court is not invalid merely because it was pronounced at a time when one of the Judges constituting the Full Bench was absent on other duty. (*Spencer and Devadoss, JJ.*) MEYYAPPA CHETTIAR *v.* CHIDAMBARAM CHETTIAR.

(1924) M. W. N. 692 : 1925 Mad. 58 :

21 L. W. 112 : 47 M. L. J. 397.

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———*High Court—Letters Patent appeal—New point—Not to be allowed.*

In a second appeal the Judge of the High Court is required by law to express his opinion on the question of law submitted to him, and if counsel chooses to submit to him questions of law based upon a statement of facts which they do not challenge, they cannot afterwards be heard to question it in a Letters Patent appeal. (*Walsh, A.C.J. and Ryves, J.*) *BIJADHAR BHAGAT v. JEAT CHAMAR.* 22 A. L. J. 647; L. R. 5 A. 404. 80 I. C. 601; 1924 A. 518.

———*Inconsistent pleas—Party when estopped from putting forward—Plaint—Appeal—Different case set up.*

In a suit for possession of property the plaintiff specifically set up her title and her right to possession of certain property on the allegation that under an award the person through whom the defendant claimed was a trustee for herself. On appeal she urged that under the award the defendant had only a life interest. *Held*, that the plaintiff had not really so changed her case that it would be just and proper to estop her from urging what were the positions of the respective parties under the award. (*Mukerjee, J.*) *MT. DURGA KUNWAR v. MT. CHUNNA KUNWAR.* L. R. 5 A. 276; 78 I. C. 633; 1924 A. 362.

———*Issues—Possession and dispossession—Form of the issue.*

An omnibus issue framed by the trial Court, "whether the plaintiff was illegally dispossessed" includes the issue whether the plaintiff was legally in possession and evidence on this point could have been produced. (*Fremantle, S. M.*) *HAZARI v. RAGHUNATH SINGH.* L. R. 5 O. 42; 10 O. & A. L. R. 317.

———*Issue—Vagueness of—No prejudice.*

Where the vagueness of an issue has in no way misled or injured the parties, the objection as to the vagueness cannot be entertained in appeal. (*Burn, J. M.*) *RAM HAKH v. UMADAT.* L. R. 5 O. 47.

———*Legal representative—Application to bring on record put in under wrong provision of law—Power of Court to apply proper provision of law to the cases.* See C. P. CODE, O. 22, Rr. 3 AND 10. 46 M. L. J. 341.

———*Local investigation—Commissioner—Report of—Weight due to—Duty of Court to accept report of Commissioner unless based on bias or obvious mistake.* See C. P. CODE, O. 26, R. 9. 28 C. W. N. 318.

———*New pleas.*

It is not legitimate to raise in the Privy Council subsidiary points which were apparently neither raised nor canvassed in the Courts below. (*Lord Shaw.*) *SAHU RAM KUMAR v. MAHOMED YAKUB.* L. R. 5 P. C. 89;

(1924) M. W. N. 431; 1924 P. C. 123; 34 M. L. T. (P.C.) 102; 26 Bom. L. R. 631; 20 L. W. 82; 80 I. C. 203; 47 M. L. J. 180.

———*New plea—Question of law for first time in appeal.*

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Per Ramesan, J. (Jackson, J. doubting):— Plaintiffs suing to set aside adoption by widow and defendants supporting it on the ground of consent of agnatic kinsmen, question of law as to necessity of consent of daughter's sons can be raised for the first time in appeal provided opportunity is given to defendant to prove daughter's sons did consent. (*Ramesan and Jackson, JJ.*) *ANNE BRAHMAYYA v. C. RATTAYYA.*

47 Mad. 716; (1924) M. W. N. 844; 20 L. W. 503; 1925 Mad. 67.

———*Parties—Unnecessary party—Right to contest suit.*

A defendant who is not a necessary party to the suit and who has no interest in the subject matter of the suit is not entitled to contest it. (*Moti Sagar, J.*) *SHAMSUDDIN v. ALLAH DADKHAN.* 6 Lah. L. J. 351; 1925 Lah. 65.

———*Pleader—Rejection of brief—Partisanship with one of the parties.*

A lawyer has no right to reject a brief when offered to him on payment of fee agreed upon between the parties, on grounds of partisanship for a party to the litigation. (*Wazir Hasan, J. C.*) *ALLAHABAD BANK, LTD. v. BAKHSH SINGH.*

10 O. & A. L. R. 459; 11 O. L. J. 337; 80 I. C. 826 (2); 1 O. W. N. 279; 1924 Oudh 372.

———*Pleadings—Decree on entirely new case—Procedure.*

If a Court is of opinion that a plaintiff has not proved his case as made in the plaint, the suit should be dismissed or if it be of opinion that the plaintiff should be given an opportunity for amending his plaint, the Court should give such leave and give the defendant an opportunity of taking objections in respect of the amendments. (*Sukrawardy, J.*) *GOLAK CHANDRA NANDY v. NISHI CHANDRA SIL.* 78 I. C. 162.

———*Pleadings—Issues—Issue of fact raised during late stage of the argument.*

Where in a suit for damages for breach of contract all the evidence had been taken and during the stage of argument a plea was taken that the plaintiff had not applied for performance of the contract under S. 48 of the Contract Act, *Held*, that it would be highly unsafe to allow such a plea to be raised during the stage of arguments. (*Venkatasubba Rao, J.*) *KANDASAMI NAIDU v. GOKULDAS MADHOUJI & Co.* 20 L. W. 564.

———*Pleadings—Only where a right that could be decreed exists and is taken away by Act of State, the plea of Act of state need be put.*

Where there existed a right either admitted or that could be established by decree of Court, and that right, it was alleged, was taken away by and Act of State, *Held*, it would be necessary so specifically to plead but the moment that cession is admitted, the subjects necessarily become petitioners and have the onus cast on them of showing the acts of acknowledgment, which give them the right they wish to be declared. (*Lord Dunedin.*) *NAYAK VAJESINGJI v. SECRETARY OF STATE FOR INDIA.* (1924) M. W. N. 694; 1924 P. C. 216;

26 Bom. L. R. 1143; 22 A. L. J. 951; L. R. 5 P. C. 199; 40 C. L. J. 473; 82 I. C. 779; 21 L. W. 28; 51 I. A. 357; 48 Bom. 613; 47 M. L. J. 574.

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—Pleading—Variation between pleading and proof is not always fatal to suit or defence.

It is not every variation between pleading and proof which is fatal to a suit or a defence. Where a custom was alleged in defence but not proved and it was not framed as a distinct issue.

Held, that it did not prejudice the defence. (Daniels, J.) SULTAN HUSSAIN v. JWALA.

1924 All. 831.

—Police recording evidence in investigation must attach papers to diary.

The paper upon which the statement of a person examined by a Police Officer in investigation is written should be attached to the Police diary proper which should contain a narrative of events. (Kotwal and Prideaux, A. J. C.) LAXMAN v. EMPEROR.

25 Cr. L. J. 141 : 76 I. C. 237.

1924 Nag. 33.

—Precedents—Subordinate Courts—Duty to follow rulings of superior Court.

A Court subordinate to a High Court is bound to follow the rulings of the High Court on any particular question and is not entitled to rely up on the decisions of other High Courts which take a different view of the law.

An appellate Court cannot set up for the first time a case of fraud which has not been referred to in the pleadings. (Devadoss and Jackson, JJ.) PERI RAMASWAMI v. CHENDRA KOTTAYYA.

47 M. L. J. 840.

—Precedents—Value of—Ratio decidendi alone to be considered—Judicial Committee of the Privy Council—Decisions of—Weight due to. See MAHOMEDAN LAW, DOWER.

40 C. L. J. 171.

—Privy Council—Appeal pending before—Death of parties—Representatives not impleaded.

Where pending an appeal to the Privy Council some of the respondents died and their legal representatives were not impleaded. *Held* that the decree of the Privy Council was binding on the respondents' representatives. (Phillips and Odgers, JJ.) KALYANI PILLAI v. TIRUVENKATA-SWAMI AIYANGAR.

47 Mad. 618 :

35 M. L. T. (H. C.) 50 : 20 L. W. 99 :

(1924) M. W. N. 439 : 1924 Mad. 695 :

47 M. L. J. 154.

—Privy Council—Concurrent findings on questions of fact—Reasons different.

On an issue as to the fact or validity of an alleged adoption under Hindu Law, concurrent findings of the Trial Judge and the Appeal Court in India, even though based on apparently different and distinct reasons, will not be interferred with. 42 P. R. 147 Ref. (Sir John Edge.) MT.

DURGA DEVI v. SHAMBHUNATH. L. R. 5 P. C. 83 :

(1924) M. W. N. 434 (P. C.) : 20 L. W. 216 :

1 O. W. N. 569 : 46 M. L. J. 661.

—Privy Council—Concurrent findings of fact.

Under the practice of Privy Council concurrent findings of the lower courts on issues of fact are not open to review by the Board. (Lord Shaw.) CHAUDHURI NUSRAT ALI v. GHULAM SARWAR.

(1924) M. W. N. 429 : 11 O. L. J. 433 :

81 I. C. 1056 : 1 O. W. N. 336 :

10 O. & A. L. R. 885 : 17 L. W. 710 :

1924 P. C. 232.

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—Privy Council—Criminal Appeal—Interference when justified.

The responsibility for the administration of criminal justice in India is one the Privy Council will neither accept nor share unless there has been some violation of the principles of justice or some disregard of legal principles. (Viscount Haldane Lord Dunedin, Lord Carson, Sir John Edge and Sir Lawrence Jenkins.) EMPEROR v. RUSTAM. 48 Bom. 515 : 26 Bom. L. R. 693 (P. C.).

—Privy Council—Issue of fact—Finding of fact of Trial Judge reversed—Practice of the Privy Council in deciding questions of fact.

In a suit for recovery of possession of certain ancestral property, the defendant contended that he was the adopted son of the last male owner. The trial Judge, on the issue of adoption, upon a review of the evidence, found for the plaintiff, but these findings were reversed by the Court of the Judicial Commissioner on appeal. *Held*, by the Privy Council that the Court of the Judicial Commissioner was substantially correct in its review of the evidence upon the question of the fact of adoption and that the judgment of that Court ought to be affirmed. In such questions of fact, their Lordships simply announced the decision of the Board, without discussing in detail the views of the inferior Courts. (Lord Shaw.) JUDAWAN PRASAD v. SHATRUHAN PRASAD.

26 Bom. L. R. 568 : 1924 P. C. 208 :

46 M. L. J. 625 (P. C.)

—Privy Council—Objection to jurisdiction must be allowed at any stage if the defect is manifest.

An objection to the jurisdiction, however late in the day it may be raised, must be entertained, if it be that on the facts admitted or proved it is manifest that there is a defect of jurisdiction. (Lord Phillimore.) RAM LAL HARGOPAL v. KISANCHANDRA.

51 Cal. 361 :

7 N. L. J. 62 : 20 N. L. R. 23 :

34 M. L. T. (P. C.) 62 : 19 L. W. 549 :

1924 P. C. 95 : 22 A. L. J. 386 :

26 Bom. L. R. 586 : 51 I. A. 72 :

83 I. C. 531 : L. R. 5 P. C. 216 : 28 C. W. N. 977 :

(1924) M. W. N. 79 : 46 M. J. 628.

—Procedure—Partition—Suit for—Preliminary decree declaring plaintiff's share—Defendant's death subsequent to, and before final decree—Plaintiff becoming entitled to whole of suit property by survivorship—Procedure on—Application to bring deceased's daughter on record as legal representative—Application for amendment of plaint to include share of deceased also—Maintainability.

1924 Mad. 309.

—Relief claimable in prior suit.—Omission—Effect.

It is not permissible to a party to a suit to bring a separate suit to obtain the reliefs which were available to him in the previous suit itself or in execution of the decree in that suit. (Greaves and Chakravarty, JJ.) SAROJ BANDHU BHADURI v. MANIK SHEIKH. 80 I. C. 917 : 1925 Cal. 305.

—Remand by Appellate Court—Note of date for hearing.

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When a case is remanded by an Appellate Court, the proper procedure is to inform the pleaders of both parties of the date fixed for hearing. (*Pearson and Graham, JJ.*) DEBENDRA NARAIN SINGH v. NARENDRA NARAIN SINGH.

80 I. C. 678 : 1925 Cal 360.

—Security for costs—Decision of single Judge of the High Court—Appeal—Power of High Court to demand security for costs. See C. P. CODE, O. 41, R. 10. 28 C.W.N. 676.

—Sind Court will respect Bombay decisions—The Court of the Judicial Commissioner, Sind, has always paid great deference to the decisions of the Bombay High Court. (*Kincaid, J. C., Aston and Madgavkar, A. J. C.*) GUNNIS AND CO. LTD. v. AMANMAL TULSIDAS. 1924 Sind. 75

—Subsequent events—Court if can take note of.

A Court of first instance or an Appellate Court can, under proper circumstances, take note of subsequent events and give relief to parties on the basis of such altered conditions. (*Kinkhede, A. J. C.*) NARAYAN v. MT. TULSHI.

80 I. C. 607 : 1925 Nag. 104.

—Subsequent events—Court if can take notice of.

Generally a Court should adjudicate on the rights of the parties as on the date of plaint, but in exceptional circumstances such as to shorten litigation and to meet the ends of justice a court can and must take notice of subsequent events. (*Kinkhede, A. J. C.*) LALA ANANTARAM v. MURLIDHAR. 1924 Nag. 204.

—Subsequent events—Partition suit—If can be basis of decree.

If in a partition suit there is a devolution of interest after the institution of the suit that can be considered in passing the decree and finally adjusting the rights of parties. (*Baker, O. J. C. and Hallifax, A. J. C.*) MT. RADHABAI v. MT. SONI BAI. 1924 Nag. 188.

—Suspicion if ground for decision.

A Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony. (*Kendall, A. J. C.*) ZAMIN HUSAIN KHAN v. TASADDUQ ALI KHAN.

80 I. C. 692 : 1925 Oudh 171.

—Trial—Evidence of witnesses—How taken—Consent of parties—Effect.

It is clearly undesirable that where a matter has to be decided on trial the Court should not hold the trial itself and retain the advantage of seeing the witnesses give evidence following the course of the proceedings. But where the parties consent to evidence taken by another tribunal being evidence in the case, the procedure is validated. (*Oldfield and Devadoss, JJ.*) KRISHNA AIYAR v. THE OFFICIAL RECEIVER, TRICHINOPOLY. 75 I. C. 445.

—Trial of suit—Advancement of hearing—Notice to parties essential.

Where a court fixes a particular date for the hearing of a case but takes it up two days before the date fixed without notice to one of the parties

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and passes a decree against him, the decree is liable to be set aside on that ground. (*Campbell and Broadway, JJ.*) ZULFIKAR ALI v. NABI BAKHSI. 80 I. C. 324 : 1924 Lah. 459 : 6 Lah L. J. 155.

—Trial of suit—Connected cases—Agreement between counsel that one suit should be tried first and the other should follow the result of the first case—Binding nature of.

There were two cross-suits between two parties and counsel for both of them agreed that the first suit should be tried and that the second suit the subject-matter of which was essentially the same, should not be tried except to ascertain the amount due in case the first suit was decided against the plaintiff. The two cases were put down for hearing on the same day and the presiding Judge stated that there was but one issue for trial in the suit and counsel for plaintiff agreed. After decision of the first suit counsel for the defendant in the second suit (who was plaintiff in the first suit) stated that the agreement made prior to the trial was not binding on the defendant in the second suit which should be tried on all the issues. Held, that the parties could not resile from the agreement already come to and that the defendant in the second suit must abide by it. (*McKerjee and Rankin, JJ.*) WILLIAM ROWE RAE v. LEWIS PUGH. 1924 Cal. 940 39 C. L. J. 537.

—Valuation of a suit—Discretion of plaintiff—Purposely exaggerated valuation—Not to be allowed.

It is necessary in the interests of the litigant public that a fair valuation should be put upon every suit. Fees on the higher scale are usually given and they are graduated according to the valuation fixed by the plaintiff. Obviously if a plaintiff is permitted to place any fanciful figure of the value of the suit, he subjects the defendant to an unfair burden as regards the costs which he is *prima facie* liable to pay his counsel and also subjects him to a continuing possible liability to pay the plaintiff an amount by way of costs far in excess of the real value of the case. It is as much the duty of the counsel to protect his client from the liability to pay excessive fees as to protect him from an adverse decree. It is not sufficient for the written statement to allege that the valuation was excessive and to leave it at that. The counsel for the defendant, when first the excessive valuation came to their notice should at once before drafting any written statement, have applied to the court for an order on the plaintiff to deliver particulars in writing of the valuation. (*Mears, C. J. and Piggott, J.*) RAJA UDAIRAJ SINGH v. SECY. OF STATE. 46 A. 553 : 1924 A. 652 : 22 A. L. J. 446.

PRECEDENTS—Value of.

In appreciating decisions of Court, it is necessary to remember that a case is only an authority for the *ratio decidendi*. But this principle is difficult of application in the case of decisions of the Judicial Committee which in giving its reasons, has always a very scrupulous regard to the inconvenience that may be caused by *obiter dicta*. (*Rankin and Ghose, JJ.*) SABUR BIBI v. ISMILE SHEIKH. 40 C. L. J. 171.

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PRE-EMPTION—Acquiescence—Effect—Presence at the time of registration.

A claim for pre-emption will not be defeated by the mere fact claimant was present at the time of the registration of the sale deed, as it does not amount to acquiescence. But if he took an active part in the negotiations leading to the sale, in collecting money, etc., it amounts to acquiescence. (*Harrison and Zafar Ali, JJ.*) **BHAGAT RAM v. RAGHBAR DIAL,** 79 I. C. 132: 1925 Lah. 57.

—Acquiescence—Taking a lease from vendee—Presence during partition proceedings by vendee—Effect.

Taking a lease from the vendee of the suit premises or presence at partition proceedings instituted by the vendee does not amount to an acquiescence in the sale and does not bar a suit for pre-emption. (*Broadway and Zafar Ali, JJ.*) **VIR SINGH v. NIHAL CHAND,** 79 I. C. 140.

—Acquisition of title by vendees during suit—Effect

Where at the time a pre-emption suit is filed the vendee defendant is not entitled to pre-empt he cannot by becoming a co-sharer during suit defeat plaintiff's claim. (*Lindsay and Sulaiman, JJ.*) **SHANKAR LAL v. KIRARI MAL,**

1924 All. 81.

—Basis of—Custom in the village.

1924 A. 86.

—Burden of proof—Custom—Nature of.

The burden of proving the custom lies on the plff. The plaintiff pre-emptor cannot succeed by merely proving that a custom of pre-emption exists in the village. He has to show that that particular custom exists which would entitle him to a decree against the defendant vendee. (*Sulaiman and Kanhaiya Lal, JJ.*) **LAL CHAND v. RAM CHAND,** 46 A. 674: L. R. 5 A. 469: 82 I. C. 526: 1924 All. 753.

—Clause in wajib-ul-arz prescribing order of persons to whom vendor is to offer property and clause giving order of classes entitled to pre-empt in case of sale—Difference.

There is no difference in principle between a clause which casts a duty on co-sharer to sell the property to the different classes of persons mentioned in their order, and a clause which defines the classes of persons among whom the right of pre-emption would be enforceable whenever a sale was effected by a co-sharer in respect of his share. (*Sulaiman and Kanhaiya Lal, JJ.*) **LAL CHAND v. RAMCHAND,** 46 A. 674:

82 I. C. 526: L. R. 5 A. 469: 1924 All. 753.

—Compromise decree—Failure to deposit money in time—Power to extend time.

Where the plaintiff in a suit for pre-emption fails to deposit in time the full amount of money fixed by a compromise decree therein, the Court has no power to extend the time.—In this respect, there is no difference between a compromise decree and one passed after contest. (*Martineau, J.*) **RAHMAT KHAN v. NAWAB KHAN,**

80 I. C. 1012: 1925 Lah. 91.

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—Contract—Custom—Wajib-ul-arz—Record of custom in a village—Period within which right is to be enforced.

The *wajib-ul-arz* of the "Zemima Khewat" of a village does not embody the contract of pre-emption itself but is merely *prima facie* evidence that such a contract was entered into by the co-sharers at the time of the settlement. In the absence of anything to the contrary such a contract must be presumed to have been intended to hold good for the whole period of the settlement and not longer. In cases of districts which are not permanently settled such settlements are ordinarily for fixed periods of 30 years. It cannot, therefore, be said that the contract of pre-emption was for such an unknown or indefinite period as to make it void for uncertainty. The intention of the co-sharers obviously was to enter into a contract for the period of the settlement. There is no uncertainty as to their intention.

So far as United Provinces are concerned, it is not possible to contend that a contract of pre-emption is against public policy. It is well-known that for a large number of years suits for pre-emption on the basis of contracts have been decreed by this Court. (*Lindsay and Sulaiman, JJ.*) **BASDEO RAI v. JHAGRU RAI,**

L. R. 5 A. 161: 22 A. L. J. 265: 46 A. 333: 1924 A. 400.

—Contract—If enforceable against representatives of parties—No time fixed for performance—Effect.

A compromise decree was passed in a partition suit under which a pre-emption right was reserved in favour of one party in case of sale by the other. The latter died and his heir sold the estate, whereupon a right of pre-emption was claimed. *Held*, by *Lindsay, J.* the contract was enforceable against purchasers with notice.

Sulaiman, J.—The contract was purely personal and being unlimited in time it is too vague and indefinite to be enforced against anybody except the actual parties to it. (*Lindsay and Sulaiman, JJ.*) **MIRZA MAHOMED JAN v. SHAIKH FAZAL UDDIN,** 22 A. L. J. 400: 1924 A. 657.

—Costs awarded to pre-emptor—If can be deducted.

Where a pre-emption suit is decreed with costs the pre-emptor can claim to deduct the costs payable to him out of the amount he is directed to pay as pre-emption price. If he does not do so, he must deposit the entire pre-emption amount within the time fixed, failing which the decree cannot be executed. (*Broadway, J.*) **WALI MAHOMED v. KAPURIA MAL,** 80 I. C. 416.

—Custom—City of Delhi—Bhojpura Mohalla.

The custom of pre-emption prevails generally in the City of Delhi. Where a house has been the subject of sales and mortgages, this militates against the theory of its being a dharmasala. The Mohalla Bhojpura is not a defined sub-division of Delhi City and the custom of pre-emption prevails there also. (*Abdul Raoof and Campbell, JJ.*) **GOKALCHAND v. SANWAL DAS,**

5 Lah. 109: 1924 Lah. 495.

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———*Custom—Division of village—Effect—wajib-ul-arz.*

According to the *wajib-ul-arz* of a village, there was a right of pre-emption in a village in favour of kinsmen and in default to co-sharers. The village was later divided and the *wajib-ul-arz* provided for a similar right. *Held*, as it was competent to the parties to abrogate the old custom or maintain it at the time of partition, a suit for pre-emption would still lie. (*Lindsay and Kanhaiya Lal, JJ.*) BENI PRASAD *v.* SHEODIN.

22 A. L. J. 289 : 78 I. C. 586 :
L.R. 5 A. 233 : 46 A. 361 : 1924 A. 425.

———*Custom—Entry in Wajib-ul-arz—Status of Mohtamims.*

There were in a village a class of persons known as Mohtamims who collected rents from tenants, paid Government revenue and were in the habit of selling and partitioning their shares. According to the Settlement Report there were several kinds of proprietary tenure and of these were two classes one of which comprised pattidari Mahals in the possession of these Mohtamims. Reg. VIII of 1793 recognised the liability of the Mohtamims to pay the Government revenue. The *wajib-ul-arz* of the village recorded a custom of pre-emption and was verified by all the Mohtamims and some of the superior proprietors. *Held*, that the Mohtamims had some kind of proprietary interest in the village and that the custom of pre-emption recorded in the *Wajib-ul-arz* applied to them. (*Lindsay and Kanhaiya Lal, JJ.*) MAHABIR SINGH *v.* MATABADAL SINGH.

22 A. L. J. 441 : 79 I. C. 327 : L. R. 5 A. 301 :
46 A. 549 : 1924 A. 735.

———*Custom—Existence of—Proof wajib-ul-arz—Entries in—Proof of actual instances.*

In the absence of any contract proved to the contrary, the presumption would be that the entry in a *wajib-ul-arz* as regards pre-emption was an entry of a local usage and not of contract to the other co-sharers. From the fact that the entire village had been free from sale or mortgage (*i.e.*) no sale or mortgage had ever taken place in the village, it could not be contended that no custom of pre-emption could possibly have grown up. It has never been laid down that in order to prove the existence of a custom, it is necessary to establish that sale or transfer had taken place prior to the establishment of that custom. It may well have been that the custom was so strong and so invariably complied with that no co-sharer had the courage of selling the property to a stranger.

In a case where the particulars of a custom are fully set forth and any of these particulars are contrary to or inconsistent with the Mahomedan law, it is apparent that that custom cannot be co-extensive with Mahomedan law. Where there is mention of the existence of a right of pre-emption without specifying how that right is to be enforced or exercised or without laying down the full particulars of that custom, the presumption is that the right of pre-emption is in accordance with the rights allowed by the Mahomedan law. 2 A. L. J. 482 : 13 A. L. J. 704 Ref. *Held*, on the *wajib-ul-arz* that a custom of pre-emption existed in the village and that it was part of that

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custom that two demands would have to be made in order that the plaintiffs should succeed. (*Sulaiman and Kanhaiya Lal, JJ.*) JAGMOHAN PRASAD BRIJENDRA BAHADUR SINGH.

22 A. L. J. 572 : L.R. 5 A. 369 : 81 I. C. 10 :
46 A. 627 : 1924 A. 523.

———*Custom—Partition—Effect of.*

A partition does not abrogate a custom of pre-emption. It persists after partition and is applicable to all, who notwithstanding the partition, continue in the same relation or relations as formerly entitled them to pre-emption, 13 A. L. J. 236 foll. (*Lindsay and Kanhaiya Lal, JJ.*) MD. NAZEER *v.* SHEIKH MD. SULAI MAN.

78 I. C. 659 : L. R. 5 A. 273 :
46 A. 424 : 1924 A. 603.

———*Custom—Proof—Entry in Wajib-ul-arz—Interpretation.* 1924 All. 123.

———*Custom of—Proof of—wajib-ul-arz—Clause furnishing internal evidence against custom—Presumption.*

In a suit for pre-emption plaintiff produced a *wajib-ul-arz* which contained a clause furnishing internal evidence negating the existence of a custom. *Held*, that no custom of pre-emption had been proved to exist 22 A. L. J. 561 foll. In the year 1796 A. D. the villages in question were owned by one proprietor. At the time of the plaintiff's suit for pre-emption it was found that all the co-shares were the descendants of the original proprietor. The *wajib-ul-arz* relating to the village contained a clear entry of a record of custom. Two sales were proved to have taken place, one in favour of a co-sharer and the other in favour of a stranger but a portion of the property had been re-sold eventually to the vendors. *Held*, that the presumption arising from the entry in this *wajib-ul-arz* had not been rebutted. (*Sulaiman and Kanhaiya Lal, JJ.*) BENI MADHO TEWARI *v.* RAM SUNDAR TEWARI.

22 A. L. J. 785 : L. R. 5 A. 561 :
80 I. C. 902 : 1924 All. 859.

———*Custom—Proof of—wajib-ul-arz—Entries in—Value of—Consent of co-shares—Evidence of.*

The *wajib-ul-arz* of a village in Oudh prepared at the first regular settlement provided that a co-sharer was at liberty to transfer his share to any one whom pleased. At a partition of the village in 1886 another *wajib-ul-arz* was prepared expressly providing for pre-emption. In a suit for pre-emption in respect of sale in the village. *Held*, that the original *wajib-ul-arz* impliedly negated the existence of any custom of pre-emption and its terms were inconsistent with the existence of any custom of pre-emption. The custom of excluding the right of pre-emption could be validly superseded by the agreement of the proprietors of the village and such an agreement would bind their successors in title. 22 O. C. 20 foll. An agreement to supersede the custom is one in relation to the right of transfer of the proprietary interest in the soil of the village and such an agreement must therefore run with the land. (*Syed Wazir Hasan and Neave, JJ.*) MAQBUL UN-NISSA *v.* BANSIDHAR.

82 I. C. 92 : 11 O. L. J. 319 : 1924 Oudh 382.

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——— *Custom — Town expanding — Rule applicable.*

An accretion to or overgrowth of an old sub-division of a town is not to be regarded as a new sub-division. If the custom of pre-emption prevails in the old sub-division, it must be deemed to prevail in the overgrowth or accretion also. (*Harrison and Zafar Ali, JJ.*) FIAZ AHMAD SHAH v. THE CHURCH MISSIONARY TRUST ASSOCIATION, LONDON. 75 I. C. 910.

——— *Custom in U. P.*

Per *Sulaiman, J.*—In U. P. two kinds of custom of pre-emption generally prevail. The first is of a kind where it is the duty of every co-sharer before he sells his property to offer it to the other co-shares in a certain prescribed order. The other kind of custom is that when property has gone out of the hands of the co-proprietary body by a sale to a stranger certain classes of pre-emptors have a right to pre-empt the sale in a certain order of priority. Under the second kind there is no right *inter se* that is to say, no right of pre-emption when a sale takes place in favour of any of the co-sharers but there is a priority of claim when rival suits of pre-emption are instituted against a stranger transferee. (*Sulaiman and Kanhaiya Lal, JJ.*) LAL CHAND v. RAM CHAND. 46 A. 674 : 82 I. C. 526 : L. R. 5 A. 469 : 1924 All. 753.

——— *Custom—Urban area—Business quarter—Extension of the town*

Even if a custom of pre-emption exists generally in an old town it cannot on that account be presumed to exist in an out growth or extension of the town. *Held*, that the plaintiffs in the case had failed to prove the existence of a custom of pre-emption in a business quarter of recent growth outside the city of Gujranwala. (*Abdul Rahim and Martineau, JJ.*) GOPAL SINGH v. MOOL RAJ. 5 Lab. 312 : 1924 Lah. 557.

——— *Custom—Wajib-ul-arz—Entries—Record of custom—Other proof if necessary.*

In the Gorakhpur and Basti Settlements rules relating to the Settlements which were made about the year 1885 the Board of Revenue issued special instructions regarding the preparation of a record of custom of pre-emption. Settlement Officers were directed to record a custom of pre-emption when the proprietors expressly demanded that a note of the custom should be made and further proved conclusively that the custom exists. Where therefore in a *Wajib-ul-arz* prepared under these instructions a statement is found that a custom exists it must be assumed that the necessary proof was forthcoming before the Settlement Officer before that record was made, in other words, that there was proof which conclusively satisfied the Settlement Officer of the existence of the custom. In dealing with the question of existence of custom the Court ought to begin with the last record which was prepared in the present case in 1885. It is not proper to start with the *wajib-ul-arz* of 1833 to consider whether it was possible that a custom could have grown up by that time and then to proceed to consider subsequent *wajib-ul-arz*. It is not correct to say that if it is shown that certain property

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in the course of time becomes the exclusive property of an entire family, any custom relating to pre-emption must necessarily lapse. (*Lindsay and Sulaiman, JJ.*) BABBAN PANDAY v. LACHAMAN CHAUDHRI. 46 A. 205 : 79 I. C. 584 : L. R. 5 A. 33 : 22 A. L.J. 62 : 1924 A. 371.

——— *Custom of—Wajib-ul-arz—Entry in—Rebuttal—Entries to a different effect in other wajib-ul-arzes.*

The presumption arising from the entry relating to pre-emption in the *wajib-ul-arz* of 1870 which was admittedly settlement period is not negatived by different entry in another *wajib-ul-arz* not forming a record of settlement. A comparison of the directions then issued to the Settlement Officer with the previous directions makes it clear that no specific authority was given to settlement officers to make an entry of custom like pre-emption prevailing in the village, other than those covered by certain specified clauses. Accordingly under the new rules no entry was ordinarily to be made by the settlement officers as regards a custom of pre-emption and it is on this account that in the *wajib-ul-arzes* prepared subsequent to 1897 there is no mention of any such rights either way. If a custom of pre-emption as regards mortgages existed in 1860 there was nothing to prevent the co-shares in 1870 from abrogating that part of the custom. (*Sulaiman and Kanhaiya Lal, JJ.*) CHAUDHRI KHAZAN SINGH v. CHAUDHRI UMRAO SINGH. L. R. 5 A. 609.

——— *Custom — Wajib-ul-arz — Value of — Gorakhpur and Basti District—Contract—Right based—Pleadings.*

With reference to entries in the records of rights which were prepared in the Basti and Gorakhpur settlements in the year 1885 it has been observed that a peculiar weight must be assigned to entries of custom made in the settlement records of that time because special instructions had been issued by the Board of Revenue to Settlement Officers. Among other directions given was one regarding the record of a right of pre-emption. Such a record was to be made when the proprietors expressly demanded that it should be noticed and proved conclusively that a custom exists.

There can be no doubt that when an entry of this kind is found there is a very strong presumption in favour of the existence of the custom.

Where plaintiffs rely upon a contract in order to succeed in a suit for pre-emption the contract ought to be pleaded, for in such a case it would be necessary for the plaintiff to show that the person through whom he claimed was one of the contracting parties. Assuming that the record in the *wajib-ul-arz* is a record of contract, the plaintiffs or their predecessors were no parties to the contract, and they ought not to be allowed to enforce it. (*Lindsay and Sulaiman, JJ.*) SHEO PRASAD DUBE v. SARJU MAHTO. 78 I. C. 519 : 46 All. 35 : 1924 A. 449.

——— *Decree holder—Transfer to another—Right of execution.*

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The holder of a decree for pre-emption who subsequently sells the property to a stranger does not by such conduct debar himself from obtaining possession in execution of the decree. The only right of the judgment-debtor is to receive the money before handing over possession. (*Campbell, J.*) **FAQIR MAHAMMAD KHAN v. PIRDAK KHAN.**

1924 Lah. 615.

— *Deposit—Full amount not deposited—Effect.*

Where the full amount directed to be deposited within a fixed date is not deposited, the pre-emption suit has to be dismissed. (*Wazir Hasan, J. C.*) **BHAGWANDIN TIWARI v. RAMADHAR TIWARI.**

80 I. C. 540 : 1925 Oudh 98

— *Evidence of custom — Ambiguity in Wajib-ul-arz—Burden of proof.*

Where the language of a *Wajib-ul-arz* was ambiguous the Court decided upon the principle that the onus lay upon the plaintiff to establish his right of pre-emption by evidence which would satisfy the Court that the custom was certain. (*Lindsay and Kanhaiya Lal, JJ.*) **NAGESHAR PRASAD v. RAM HARAKH PONDE.**

L. R. 5 A. 189 : 22 A. L. J. 342 : 79 I. C. 417 : 46 A. 370 : 1924 A. 541.

— *Evidence should not be ambiguous.*

If the only evidence which the plaintiff can produce is ambiguous that is to say is capable of two interpretations and if on one such interpretation the suit cannot succeed then the suit must fail and it is not the duty of the Court to give it necessarily the other interpretation which would entitle the plaintiff to a decree. (*Sulaiman and Kanhaiya Lal, JJ.*) **LALCHAND v. RAM CHAND.**

46 A. 674 : L. R. 5 A. 469 : 82 I. C. 526 : 1923 All. 753.

— *Exchange—If gives rise to.*

When property is exchanged for another, the transaction cannot give rise to a right of pre-emption. (*Lindsay and Kanhaiya Lal, JJ.*) **SAMAR BAHADUR SINGH v. JIT LAL.**

46 A. 359 : 79 I. C. 495 : 1924 A. 390 : L. R. 5 A. 254 : 22 A. L. J. 292.

— *Existence of common khata—Effect.*

Where all the lands belonging to the parent *kkatas* are held in severalty, the mere existence of a common *khata* containing certain barren uncultivated or abadi lands which usually remain the property of all the co-sharers of the village till a partition is formally effected, cannot make a person who belongs in other respects to one class or category a joint co-sharer with another who belongs to another class or category as regards any separate interest the latter may sell. No account is taken of the appurtenances in the *shamlat khatas* for the determination of his right of pre-emption. (*Sulaiman and Kanhaiya Lal, JJ.*) **LAL CHAND v. RAM CHAND.**

46 A. 674 : L. R. 5 A. 569 : 82 I. C. 526 : 1924 All. 753.

— *Incidents of.*

A claim to a right of pre-emption does not necessarily connote a suit. It may be enforced either by private treaty or by suit.

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It implies an assertion of a right which may be asserted before a transfer is effected or after it is effected. It may be asserted out of Court or, if the vendee refuses to reconvey the property, by a suit. The right arises from a sale if the order of preference laid down by the *wajib-ul-arz* is disregarded by the vendor. (*Sulaiman and Kanhaiya Lal, JJ.*) **LAL CHAND v. RAM CHAND.**

46 A. 674 : L. R. 5 A. 469 : 82 I. C. 526 : 1924 All. 753.

— *Joint pre-emptor's claim decreed — Appeal by the vendee—Decreed in ignorance of the death of one co-plaintiff—Whether Appellate decree a nullity—Joint payment of consideration money by pre-emptors—Effect of.*

Where the appellant in a pre-emption suit failed to implead the legal representative of one of the respondents, and it was contended that the entire appeal is a nullity on account of abatement, against all the plaintiffs (2) and that payment was made by the pre-emptors jointly without specification in terms of the decree in the trial Court before the appeal was heard and it must be presumed to have been paid in equal shares. *Held on reference.*

Per *Daniels, J.*—That the whole appeal abated, and the appellate decree was a nullity in its entirety (2) the fact that the consideration money was paid jointly did not affect the rights of the parties and the rights of the parties in pre-emption suits are not affected by their joint payment. 17 All. 478, 16 A. L. J. 327 ; 21 A. L. J. 291 ; 1 Lah. 225 ; 1 Pat. 699, referred. (*Daniels, J.*) **WAJID ALI KHAN v. PURAN SINGH.**

22 A. L. J. 994 : 1925 A. 108.

— *Limitation—Vendee already in possession.*

76 I. C. 202.

— *Mahomedan law—Demand—Subsequent sale of property by vendee—Fresh demand if necessary.*

Where on a sale of property subject to a right of pre-emption under the Mahomedan law, the pre-emptor has made a demand and subsequently the vendee transfers the property to a third person, the pre-emptor is not bound to make a fresh demand. The right to claim pre-emption is not affected by any intermediate dealings with the property. The proceedings must, in any case, be taken against the original purchaser, but when a decree has been obtained against him, it can be enforced against any person deriving title from him by purchase, gift or otherwise. 32 A. 45, 11 A. L. J. 527 *kel.* (*Sulaiman and Kanhaiya Lal, JJ.*) **MAHOMED ABDUL RAHMAN KHAN v. MAHOMED AYYUB KHAN.**

22 A. L. J. 817 : 79 I. C. 1053 : L. R. 5 A. 593 : 1924 A. 806.

— *Mortgage in possession—Rights of.*

PADAM SINGH v. UMRAO SINGH.

1924 A. 48.

— *Nature of right—When takes effect.*

A pre-emption sale must be held to take effect from the date of the sale to the vendee. The right of pre-emption is not a mere right of purchase either from the vendor or the vendee involving a new contract of sale but it is simply a right of

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substitution. (*Kendall, A. J. C.*) COLLECTOR SINGH *v.* MADARI LAL. 78 I. C. 738 : 1925 Oudh 132 (2).

———*No time limited or fixed in the contract—Enforceability against the representatives of the original covenantor—The Transfer of Property Act (Act IV of 1882), S. 40—Contract Act, (Act IX of 1872), Ss. 29, 31 and 32.*

Held, by Lindsay, J. (Sulaiman, J. dissenting.) A contract for pre-emption in which no time is limited for performance is not void and is enforceable. 46 All. 333 followed. 45 All. 478 and 492 dissented from. Per Suliman, J. contra. A contract for pre-emption which is unlimited in point of time is so vague and indefinite that it cannot be enforced against the heir of the deceased party. (*Lindsay and Sulaiman, JJ.*) MUHAMMAD JAN *v.* FAZALUDDIN. 46 All. 514.

———*Option to purchase—If subject to.*

A mere option to re-purchase cannot be said to be immovable property and as such not subject to pre-emption. (*Lindsay and Sulaiman, JJ.*) MT. FATIMA BIBI *v.* ABDUL GHAFUR KHAN. 1924 All. 743.

———*Qualification of pre-emptor at date of suit.*

To sustain a claim for pre-emption the plaintiff must prove not only that at the time of the sale he possessed the qualifications which conferred upon him the right to pre-empt the property, but also that those qualifications subsisted at the time when the suit was brought. (*Shadilal, C. J. and Le Rossignol, J.*) SEWARAM *v.* AZIMKHAN. 1924 Lah. 613.

———*Right to—Acquiescence—Waiver—Acceptance of mortgage money from vendee.*

1924 Lah. 159.

———*Right to—Co-widows and co-sharers—Hissedar karibi—Preference.*

The plaintiff and the vendor in a pre-emption case were co-sharers and they admittedly were co-sharers in the plot described as grove which had been sold. The Courts below decreed the suit holding that there was a custom under which a *hissedar karibi* was entitled to preference as against other co-sharers and that the present plaintiff came within the definition of the expression *hissedar karibi* of the vendor. The defendant-transferee was also a co-sharer in the same grove but not in any way related to the vendor. *Held*, that the plaintiff was entitled to succeed in the suit for pre-emption. 14 A.L.J. 449; 33 I. C. 801; 11 A. 41; 5 I. C. 669 Rel. (*Lindsay and Sulaiman, JJ.*) MANNI LAL *v.* RANI. 46 A. 327; 22 A. L. J. 247 : 1924 A. 534 : 78 I. C. 382 : L. R. 5 A. 184

———*Right to—Custom—Proof of—Variation of custom.*

A right of pre-emption must, in the absence of statute, be based either on contract or custom. Presumably the right must be deemed to be based on customary law where no contract is suggested. In the absence of any statutory enactment or any entry in a public record of right, the custom may be deduced from a long

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series of decisions. When a rule of custom is deduced from previous judgments, the rule deduced therefrom should in no way be departed from merely on the ground that it is now thought more equitable or convenient that a new rule should prevail. Where the Asl village and the Laga village are held under one revenue engagement the Hissedar of the Laga village is not entitled to pre-empt against the Hissedar of the Asl village. (*Lindsay and Sulaiman, JJ.*) AMLA NAND *v.* NANDU. L. R. 5 A. 50 : 22 A. L. J. 126 : 78 I. C. 145 : 1924 A. 318.

———*Right to—Custom—Wajib-ul-arz—Entries in—Value of—instances of sale.*

In a suit by plaintiff for pre-emption he relied in support of his right on a *Wajib-ul-arz*. It was found as a fact that out of a number of sales which had taken place in the past some were auction-sales, some were cases of sales to co-sharers and others were sales to strangers. *Held*, that the three instances of sales to strangers would not necessarily negative the existence of the custom of pre-emption. It might well be that these sales were not objectionable to the co-sharers or that the purchaser had offered prices so high as to make it impossible for the co-sharers to outbid them (*Sulaiman and Kanhaiya Lal, JJ.*) BHAWANI SINGH *v.* MAKHAN LAL. 22 A. L. J. 766 : L. R. 5 A. 577 : 1924 A. 791.

———*Right to—Plaintiff losing his status as co-sharer subsequent to first Court's decree—Effect on right of pre-emption.*

In dealing with suits for pre-emption three dates have to be looked to, namely, the date of the sale sought to be pre-empted, the date of the suit and the date of the first Court's decree.

It is not competent to Courts of appeal to pay regard to any events which may happen subsequent to the date of the first Court's decree; if, on that later date, the plaintiff has a subsisting right to pre-empt, he is entitled to succeed and his suit cannot be defeated because by reason of some event which has happened subsequent to the date of the first Court's decree he has lost the status of a co-sharer. (*Lindsay and Sulaiman, JJ.*) UMRAO *v.* LACHMAN. 46 A. 321 : 22 A. L. J. 234 : 79 I. C. 217 : L. R. 5 A. 219 : 1924 A. 448.

———*Right to—Position at date of sale—Test.*

In deciding on a person's right to pre-empt the situation at the time of the sale is to be the test. (*Le Rossignol, J.*) AMAR CHAND *v.* SATYA PAL. 79 I. C. 43 : 1925 Lah. 56.

———*Rights privately given effect to—Effect of.*

Pre-emption can be enforced without the intervention of the Courts such as when a vendee in recognition of a pre-emptor's right conveys his bargain to the pre-emptor. Such a transaction does not give rise to fresh rights of pre-emption. (*Le Rossignol, J.*) FAIZ MUHAMMAD *v.* MUHAMMAD ISMAIL. 1924 Lah. 651.

———*Right to—Wajib-ul-arz—Existence of custom—Abrogation of—Fresh custom.*

In a suit for pre-emption the plaintiff relied on the entries of the *wajib-ul-arzes* of the years 1833

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and 1860. At the last settlement of 1885 the word "nil" was noted against paragraph 4 of the *wajib-ul-arz* relating to the custom of pre-emption. After reciting a number of the practices and customs prevailing in the village the *wajib-ul-arz* went on to remark. "With the exception of the aforementioned practices, there are, for the present no other practices or customs; it is, therefore, ordered that the ancient customs shall be "maintained." Held, that even if there was a custom of pre-emption prior to 1885 it must be deemed to have been abrogated on that date. There was no evidence of a fresh growth of a custom of pre-emption since that date. (*Sulaiman and Kanhaiya Lal, JJ.*) DEBI PRASAD v. KAMTA PRASAD. 22 All. L. J. 810 : L. R. 5 A 639 : 1924 All. 798.

——— *Right to—Sale or lease—Construction—Device to defeat the right of pre-emption.*

The terms entered in a document were that the lessees shall have heritable and transferable rights under the perpetual lease on payment of Rs 53 as rent, out of which Rs. 52 would be payable to the superior proprietor. The premium paid by the lessees was Rs. 5,000. Provision was made for the recovery of the rent of Re. 1 reserved for himself by the lessor, but in no case were the lessees to be ejected from its terms; there was no evidence to prove that the parties had really agreed upon a sale or that no rent was really payable to the lessor and the payment of Re 1 per annum was fictitiously entered in the deed. Held, the transaction was one of lease and not a sale so as to give rise to pre-emption. It is not forbidden to a person to circumvent the law of pre-emption by taking a transfer which falls short of a sale, but which may eventually have the same effect as a sale.

Where the transfer of under-proprietary interest is made by the superior proprietor in the form of a lease, but the rent reserved for payment to the superior proprietor is equal to or slightly more than the revenue, such a transfer is held to be a sale giving rise to a right of pre-emption.

Where in a lease by a superior proprietor, the rent reserved is equal to or only nominally in excess of the revenue the transfer will be considered to be one of an under-proprietary interest, while in the case where the rent reserved is considerably in excess of the revenue, the transfer would be a lease as it purports to be. (*Dalal and Simpson, A. J., Cs.*) THAKUR RAM NARAYAN v. RAM SUKH. 10 O. L. J. 399.

——— *Right to—Sale or lease—Rent reserved in excess of Government revenue—Oudh Sub-Settlement Act (XXVI of 1866), S. 7 (3).*

The payment of rent in excess of the Government revenue is an essential incident of under-proprietary right and the mere existence of a condition for such payment is in no way inconsistent with the sale of such right. A deed of sale of under-proprietary right in which the rent reserved to the superior proprietor is greater than the amount of the Government revenue would be a perfectly possible and legal document. It is impossible to make the existence of such a clause the sole test. In every instance the question

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whether a document is a sale or permanent lease will depend on a construction of all its terms. (*Neave and Kendall, A. J. Cs.*) SANT BUX SINGH v. BHAWANI PRASAD. 11 O. L. J. 477 :

1 O. W. N. 133 : 10 O. & A. L. R. 390 : 1924 Oudh 426.

——— *Right of—Sale of properties by mother left by her deceased husband—Right of Sons to pre-empt.*

Where a younger son tried to set aside a sale made by his mother, on the ground that she had no power to sell, and that he had a right of pre-emption,

Held, relying on *Te Nano v. Aung Myat Son*, 8 L. B. R. 501, overruling *Molih v. Thakwe* 8 L. B. R. 466. that the right of pre-emption can be enforced only against the persons who inherit the land jointly with the claimants. The right of pre-emption can exist only as amongst co-heirs and not as between son and mother. (*Duckworth, J.*) MANUG BA CHO AND TWO v. MANUG SAN TIN AND TWO. 2 Rang 437 : 1925 Rang. 63.

——— *Right to—Sir lands—Sale of plots within Zamindari of co-parceners—Proprietary interest.*

The interest of an owner in *sir* plots is a proprietary interest and the transfer of *sir* plots is in fact a transfer of this proprietary interest. Certain *sir* plots were sold and from the evidence it was found they were within the Zamindari of the co-parceners. Under the *wajib-ul-arz* a right of pre-emption arose in respect of a sale by a co-sharer of his "haqiat". Held, that there was a right of pre-emption in respect of the *sir* lands sold. 7 A. 633 ; 12 A. 426 Rel. (*Lindsay and Sulaiman, JJ.*) PURAN SINGH v. DAT RAM.

46 A. 165 : 22 A. L. J. 5 : 79 I. C. 645 : L. R. 5 A. 5 : 1924 A. 447.

——— *Right to—Wajib-ul-arz—Construction of.*

In a case of pre-emption, the *Wajib-ul-arz* relied upon stated that on the occasion of a transfer the first right to take the property was given to a class defined in the *Wajib-ul-arz* as "Shurkayan Shikni". It was provided that in case the members of the first class declined to accept the offer of the property then the offer is to be made to the second class of persons who are described as "Digar Mahkan Thok O Mahal Ke." Held, on a construction of the *Wajib-ul-arz* that the persons described as *Shurkayan Shikni* were persons who being proprietors in the Thok were nearer in relationship than the other proprietors of the Thok by being included in a sub-division of the Thok with the vendor. (*Lindsay and Sulaiman, JJ.*) MAULVI SHARIF AHMAD ALVEE v. MAHOMED. 76 I. C. 612 : L. R. 5 A. 536 : 1924 A. 375.

——— *Right to—Wajib-ul-arz—Construction of—Mortgage by conditional sale—Foreclosure decree—Effect of.*

A mortgage by conditional sale was executed in 1861 and a foreclosure decree was made in 1919. The plaintiff subsequently filed a suit for pre-emption and relied in support of his claim on an entry in a *Wajib-ul-arz* as follows : "If one of the co-sharers desires to make a mortgage or a mortgage

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by conditional sale, he must do so on the same adequate price as may be offered by other parties in the first instance to a near co-sharer in the same patti, next to the other co-sharer in the patti; if they will not take, then to a near co-sharer in another patti; next to any co-sharer in the mahal, and finally to a stranger." *Held*, that the plaintiff's cause of action accrued to him on the date of the mortgage and the subsequent foreclosure of the mortgage was not transfer by a co-sharer by way of sale and that the plaintiff's suit was barred. 3 A. 610 dist.; 24 A. 17; 16 A. L. J. 561; 14 A. 405 Ref. (*Piggott, Lindsay and Sulaiman, JJ.*) AL KHU RAI v. LACHMAN UPADHYA 46 A. 274; I. R. 5 A. 145; 80 I. C. 550; 22 A. L. J. 137; 1924 A. 324 (F. B.).

——— *Right to—Wajib-ul-arz—Custom—Provision for giving right of pre-emption to strangers—Pre-emption at fixed rate—Effect of entries.*

Where a *Wajib-ul-arz* relied on in a pre-emption suit, in the very same clause in which reference to pre-emption was made, contained reference to other matters which could not possibly be matters of custom, it ought to be held that the record is not one of custom at all.

A provision in a *Wajib-ul-arz* which confers a right of redemption upon a person who is stranger to a mortgage cannot, in any sense, be treated as being a record of custom.

Where the *Wajib-ul-arz* professed to lay down the rates at which sales and mortgages were to be made, it is hardly necessary to say that an entry of this nature could not possibly be a record of custom.

It is true that when there is any entry of a right of redemption in a *Wajib-ul-arz* there is a *prima facie* presumption that it is an entry of custom. At the same time if that very clause which recites such a right contains other matters relating to the transfer of devolution of property which cannot possibly be a record of custom then that presumption is negated. (*Piggott, Lindsay and Sulaiman, JJ.*) RANDHIR SINGH v. RAJPAL MISIR. 81 I. C. 25; 46 A. 478; L. R. 5 A. 151; 22 A. L. J. 561; 1924 A. 321.

——— *Right to—Wajib-ul-arz—Entry in—Right of pre-emption denied to persons becoming co-sharers by collateral inheritance—Effect of.*

Although a *Wajib-ul-arz* raises a *prima facie* presumption of the existence of the custom it recites, nevertheless if it contains certain other matters relating to that right which cannot possibly form the subject of a custom, there would be no justification for presuming that the entry is one of custom. It is impossible to conceive of a custom which makes distinctions between persons who inherited by collateral succession and persons who have inherited by direct descent. All such persons become co-sharers in the village and have equal status and rights in the eye of the law. *Held*, that an entry in the *Wajib-ul-arz* in the case to the effect that a stranger who had inherited property from an issueless co-sharer was not entitled to the right of pre-emption was one of contract and not of custom. 21 A. L. J. 542 foli (*Lindsay and Sulaiman, JJ.*) KARAMAT v. WAZIR HUSAIN. 46 A. 140; 78 I. C. 587; L. R. 5 A. 7; 1924 A. 542.

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——— *Right to—Wajib-ul-arz—Record of custom—No instances after the date of the Wajib-ul-arz—Effect of—Sherishla Nizammat—Record of settlement with single proprietor—Superior and inferior proprietor.*

In a suit for pre-emption the question arose whether there was a custom as alleged. The principal piece of evidence on which the plaintiffs took their stand was the *Wajib-ul-arz* of 1860. There was no evidence as to the *Wajib-ul-arz* of the settlement of 1833. In the *kaifat sherista nizammat* it was stated that up till the year 1833 the settlement of the village was made with a single person who was apparently a Rajah. After that time the settlement was made with a numerous body of proprietors, all thakurs, and the Raja was treated as excluded from the settlement. He was allowed a certain *malikana* allowance as the excluded superior proprietor. *Held*, that it could not be argued from this material that no custom could possibly have existed prior to 1833 on the ground that the village was the property of a single owner. It seems to have been the policy in the earlier years of the British administration to deal with the superior proprietor and to take the revenue engagement from him, but this policy was reversed and from the year 1833 settlement began to be made with the *birtyas* who were in fact the real owners of the village. The co-existence of these superior and under-proprietors ought to be assumed in this case. The fact that no evidence of a transfer subsequent to 1860 was forthcoming did not overturn the presumption raised by the *wajib-ul-arz* about the existence of the custom. (*Lindsay and Sulaiman, JJ.*) GANESH SINGH v. JAI MANGAL SINGH. L. R. 5 A. 11; 1924 A. 11 723 (2).

——— *Right to—Wajib-ul-arz—Zamina L. R. 5 A. 11 khewat—Existence of custom—Gorakhpur District.*

In a case of pre-emption from the Gorakhpur District, the two pieces of evidence which were relied upon for the purpose of establishing a custom of pre-emption were the *wajib-ul-arz* of 1860 and the *Zamina Khewat* of 1885. The *Kaifiyat Sherishla* was in evidence for the purpose of showing the history of the village. *Held*, that in coming to a conclusion as regards the custom, the Court was entitled to place reliance on the *Zamina khewat* which was prepared with great care under the instructions of the Settlement Officer and the Board of Revenue and that the entry therein in favour of the custom was strong evidence.

According to the *Wajib-ul-arz* the pre-emptors were divided into four categories (1) hissedar kasib, (2) digar hissedar thok, (3) dusre thok, Kehissedar, the *Zamina khewat* enquired four categories:—(1) rishledar kasil, (2) rishledar bassd, (3) Shuskai bassd, and (4) shuskai thate nambardari. Under the settlement of 1886 preference in matters of pre-emption was given with reference to nearness of degree in relationship. *Held*, the existence of the custom of pre-emption was amply proved by these documents and that the expression *rishledar* in the *Zamina khewat* meant a person who was at the same time a sharer and a relation. (*Lindsay and Sulaiman, JJ.*) NANDAN SINGH v. GUPTAR SINGH. 22 A. L. J. 7; 79 I. C. 630; 1924 A. 424.

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———*Right to—Woman succeeding as heir and taking a life estate.*

A woman is not precluded from maintaining a suit for pre-emption if she is by law entitled to inherit, even though it may be a life-estate. 212 P. W. R. 1912 : 46 R.R. 1914 Ref. (*Martineau and Moti Sagar, JJ.*) MT. ISHAR DEVI v. SHED RAM. 5 Lah. 435 : 1925 Lah. 83.

———*Sale—Agreement to reconvey to one of the vendors—Nature of the transaction—Mortgage by conditional sale.*

A sale-deed and an agreement by the vendee giving to one out of the two vendors an option to re-purchase the property on payment of a certain sum by a certain time were executed on the same date. In a suit for pre-emption, held, that transactions were distinct and separate from one another and did not amount to a mortgage by conditional sale. The mere option to re-purchase arising out of a contract conveyed no interest, in immovable property and its transfer did not give rise to a right of pre-emption. (*Lindsay and Sulaiman, JJ.*) MT. WASIFATIMA BIBI v. ABDUL GHAFFAR KHAN. 78 I. C. 171 : L. R. 5 A. 110

———*Strangers associated with suit—Effect.*

The effect of a pre-emptor associating with himself in a suit for pre-emption persons who have no right of pre-emption is to disentitle himself to all remedies at law. (*Lindsay and Sulaiman, JJ.*) SHANKAR LAL v. KIRARI MAL. 1924 A. 81.

———*Subsisting right of pre-emptor.*

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———*Suit for—Portion of the property sold—Maintainability of.*

The general rule is that the pre-emptor must take over the bargain as a whole and he is not entitled to sue for a part only, when he is entitled to sue for the whole. The principle of denying the right of pre-emption except as to the whole of the property sold, is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. But where the plaintiff is not seeking to pick and choose part of the property in the possession of the vendee and where the vendee himself having parted with a portion of the property does not suffer in any way whatsoever by plaintiffs suing only in respect of the portion remaining in the vendee's hands the reason for the rule that the pre-emptor must take over the whole of the property sold no longer exists. (*Scott Smith and Fforde, JJ.*) UDE RAM v. ATMA RAM. 5 Lah. 80 : 80 I. C. 960 : 1924 Lah. 431.

———*Suit for—Separate suits by plaintiffs having equal rights—Procedure.* 1924 A. 94

———*Suit—Stranger as co-plaintiff along with a co-sharer—Whether amendment can be allowed.*

Where a plaintiff having a right to pre-empt joins with himself in a suit for pre-emption a stranger, i.e., a person who has no such right, he thereby forfeits his right to pre-empt and this disability cannot be overcome by amending

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the plaint by striking out the name of the stranger. 19 All. 334. Foll. (*Lindsay and Rafique, JJ.*) BADRI SING v. GOBARDHAN. 1923 All. 187.

———*Suit for—Strangers joined in respect of a portion of the property—Claim in respect of whole fails.*

Where plaintiffs associated with them strangers to the property in respect of their claim to a portion of the property,

Held : the claim in respect of the whole property fails as suit for partial pre-emption cannot be allowed. (*Lindsay and Sulaiman, JJ.*) SANKAR LAL v. KIRARI MAL. 1924 A. 81.

———*Transaction misdescribed in a deed—Test for determining real character—Construction of a deed, whether a sale or a perpetual lease—Presumption of fraud.*

Each case in a suit for pre-emption, where the true transaction is in the nature of things misdescribed, must be decided on its own circumstances. A transaction is known by the rights it confers on the transferee and not by the name with which it is labelled by the parties for a fraudulent object. Where a document purporting to transfer under-proprietary rights was described as perpetual lease and Rs. 12,000 was mentioned as paid on account of *nazarana zar-i-peshgi* and the transferee was directed to pay his share of the revenue and Rupee one *malikana* to the superior proprietor.

Held, that the transaction was one of a sale of under-proprietary rights which gave rise to the right of pre-emption 1 W. N. 133 followed. 9 O. L. J. 334 referred to.

Where pre-emption was possible but for the devise to circumvent the law of pre-emption fraud would be presumed when on the face of the document it appears that the transfer was mis-called a lease when in reality it was a sale of under-proprietary rights. (*Dalal, J.C.*) HAR BUX SINGH v. RAM AUTAR. 1 O. W. N. 897.

———(*Punjab*)—*Waiver by father of right to pre-empt—Son is not bound.*

Waiver of the right to pre-empt by father does not disentitle son to bring a suit for the pre-emption. (*Lumsden and Abdul Raoof, JJ.*) SANWAL DAS v. JAIGO MAL. 1924 Lah. 68.

———*Wajib-ul-arz—Evidence of custom—Entry of rights of contiguous zamindars.*

The right of pre-emption which is recited in a *wajib-ul-arz* in favour of the owners of the contiguous villages is an extraordinary right and one which it is very unusual to find in the records of custom. While this may be admitted this fact by itself would not be sufficient to render the *wajib-ul-arz* of no value as evidence of custom.

Any presumption of the existence of a custom which arises from the production of this *wajib-ul-arz* of 1884 was held to be destroyed by a reference to the earlier document of 1863. On these two documents it was impossible to conclude that there was clear and unambiguous evidence of the existence of the custom of pre-emption in the village in question. (*Lindsay and Sulaiman, JJ.*) MUTSADDI LAL v. KHARAG BAHADUR SINGH. 78 I. C. 508 : L. R. 5 A. 228 : 1924 A. 925.

PRESY. SM. C. C. ACT, S. 22.

PRESY. SM. C. COURTS ACT, S. 22—Suit triable by Court of Small Cause—Trial before High Court—Dismissal—Courts.

When a suit triable by a Small Cause Court is tried by the High Court and dismissed, the Judge can certify the case was one fit to be tried by the High Court, in which case the provisions of S. 22, Presidency Small Cause Courts Act do not apply and the Court has got power in a proper case to deprive the successful party of his costs. (*Marleod, C. J. and Shah, J.*) **MEHTA & Co. v. JOSEPH HEUREUX.** 48 Bom. 531: 26 Bom. L. R. 382. 80 I. C. 766: 1924 Bom. 422.

——— **S. 48—Ejectment order—Obstruction to carrying out of—Removal—Jurisdiction—O. 21, R. 98, C. P. C. Applicability to proceedings under Chapter VIII of the Act.** 1924 Mad. 74.

PRESY. TOWNS INSOLV. ACT (III OF 1909), Ss 7 and 36—Fraudulent transfer by Official Assignee—Power of court to order to reconveyance.

In the case of a fraudulent transfer of property by the Official Assignee, the Insolvency Court has power under Ss. 7 and 36 of the Presidency Towns Insolvency Act to direct the property to be re-conveyed to a substituted Official Assignee. (*Schwabe, C. J. and Ramesam, J.*) **THE OFFICIAL ASSIGNEE OF MADRAS v. THE OFFICIAL ASSIGNEE, RANGOON.** 79 I. C. 910: 1925 Mad. 141.

——— **Ss. 8 and 41—Adjudication—Jurisdiction of Registrar to annul.** *MEGRAJ PARUSHOT In re:* 1924 Cal. 83.

——— **Ss. 8 and 22—Insolvency Appeal—Order of adjudication annulled—Pendency of proceedings in another Court—Power of Court to review order—"The same debtor"—Meaning of—Two persons adjudicated in one Court and one of them in another—If Court can annul order under S. 22.**

Where in an appeal against an order of a Judge of the High Court exercising insolvency jurisdiction, the appellate Court acting under S. 22, Presidency Towns Insolvency Act annulled an order of adjudication on the ground that insolvency proceedings were pending in another British Court, it has also power under S. 8 to review, rescind or vary the same, as the order was made in the exercise of its insolvency jurisdiction. *In re Maugham Ex parte Maugham* (1888) 21 Q. B. D. 21, 23. *Ex parte Perkins* (1893) 7 Morr. 78 followed.

Two persons constituting a firm were adjudicated insolvents by the Madras High Court and thereafter insolvency proceedings were instituted in Burma against the same firm but they resulted in the adjudication of only one of them as insolvent. *Held*, S. 22 cannot apply and the former order of adjudication cannot be annulled as the debtor or debtors in the two Courts are not the same. (*Schwabe, C. J. and Ramesam, J.*) **OFFICIAL ASSIGNEE OF MADRAS v. OFFICIAL ASSIGNEE OF RANGOON.** 19 L. W. 316: 1924 Mad 662: 34 M. L. T. (H. C.) 99: (1924) M. W. N. 458: 46 M. L. J. 580.

——— **Ss. 8 and 17—Power of Insolvency Court to rescind or vary its orders—Joint Hindu family—Adjudication of adult sons as insolvents—Minor son's shares if vest in Official Assignee.**

PRESY. TOWNS INSOLV. ACT (III OF 1909), S. 15.

In insolvency the jurisdiction to annul a prior order under S. 8 of the Pres. T. Ins. Act, is wider than the power to review under the C. P. Code. Where in a joint Hindu family consisting of a father and his adult and minor sons, the adult sons alone were adjudicated insolvents, there is no vesting of the shares of the minor sons in the Official Assignee and he has no power to deal with their shares under S. 17 of the Pres. T. Ins. Act. (*Ramesam, J.*) **RADHAKRISHNIAH CHETTY In the matter of.** 34 M. L. T. (H.C.) 335: 19 L. W. 415: 1924 Mad. 791.

——— **S. 9—Insolvency—Application for adjudication of a firm as insolvent—Departure of partner from place of business—Intention to defeat or delay creditors.** 75 I. C. 203 (2).

——— **S. 13—Insolvency—Adjudication—Act of insolvency—Fraudulent preference—Order of adjudication when to be made—Discretion of Court.**

Under S. 13 of the Pres T. Ins Act if the Court is satisfied about the debt of the petitioning creditor and about the particular act or acts of insolvency alleged in the petition of the creditors the Court ought to make an order of adjudication unless there are materials before it showing that the bankruptcy proceedings are being used for the inequitable purpose of extortion or of exercising improper pressure over a debtor or are of such a nature as come within the category of proceedings which are vexatious or oppressive or constitute an abuse of the process of Court. The jurisdiction in bankruptcy is entirely discretionary. And in exercising the discretion the Court is bound to look into the circumstances as a whole. A creditor who takes legitimate steps for enforcing payment of the debt due to him is entitled, if his demands are not satisfied to proceed in bankruptcy; but on the other hand if as a matter of fact indications are not wanting that the proceedings in bankruptcy and the persistence in them are spiteful, that in itself is sufficient cause for refusing on the petition of the creditors to make an adjudication order. After the committal of an act of bankruptcy and pending the period during which such an act is available for adjudication, a creditor who is aware thereof, is under ordinary circumstances justified in declining to receive payment of his debt from the debtor and may proceed to present his petition. The rule however is not an inflexible one because circumstances may exist which would justify the Court in refusing to make an adjudication order after a tender to the petitioning creditor of his debt and costs.

Where there was real and tangible pressure on the part of the creditors by means of attachment of the judgment debtors' moveable properties and which pressure was bound to exercise an appreciable influence on the minds of the judgment debtors and thus would have rendered their principal motive not the view to prefer; the transaction, namely the satisfaction of the debt by the judgment debtors and the receipts of the decretal amount by the creditors could not be considered as a fraudulent preference and could not be set aside at the instance of any other creditor. (*Ghose J.*) *Ex parte HARSURDAS BALKISSENDAS.* 39 C. L. J. 512: 1924 Cal. 964.

PRESY TOWNS INSOLV. ACT (III OF 1909), S. 17.

—S. 17—Joint Hindu family—Adjudication of adult sons as insolvents—Minor son's shares do not vest in Official Assignee. *See* PRESY. T. INS. ACT, SS. 8 AND 17. 19 L. W. 415.

—S. 17, Proviso and Sch. II, para. 23—Secured creditor—Right to interest—Contract rate.

A secured creditor can claim interest at the contract rate beyond the date of adjudication of the insolvent and up to the time of realisation. (*Rutledge, J.*) *BULALBAT SAGEERMALL In the matter of.* 2 Rang. 197 : 83 I. C. 576 : 1924 R. 352. (2).

—S. 18—Jurisdiction of commissioner Insolvency to stay proceedings in Dt. Court—Practice—Procedure. *MANEKCHAND VIRCHAND. PATNI In re.* 75 I. C. 61.

—S. 27—Public examination of insolvent—Application for discharge.

If a creditor wants a public examination of the insolvent, he should apply before the insolvent applies for discharge. It is too late to apply for the examination of an insolvent when the petition for discharge is on the board for final hearing, except in very special circumstances. (*Macleod, C. J.*) *FARDUNJI DADABHAI In re.* 26 Bom. L. R. 627 : 1924 Bom. 512

—S. 30 (2)—Application by creditor against guarantor under composition scheme—Power to vacate order. 1924 Cal. 176.

—S. 49 (a)—Partnership—Insolvency of partners—Right of creditors to proceed against separate assets—Election.

Where persons carrying on business in partnership are adjudicated insolvents it is open to the creditors to elect as to which assets they will go against, the general assets of the two partners or the separate assets of the one against whom they elect; and they could elect, until the very end of the proceedings and only when they have actually received a dividend there is an election. Even after they have received their dividend, they could still pay it back and proceed against the other assets. (*Schwabe, C. J. and Ramesam, J.*) *SUBRAMIAH v. BANSILAL ABER CHAND.* 19 L. W. 46 : 79 I. C. 966 : (1924) M. W. N. 164 : 1924 Mad. 595.

—S. 52—Applicability—Floating charges.

S. 52 of the Insolvency Act has no application to cases of floating charges. (*Kumarasamy Sastri, J.*) *In the matter of INDIAN COMPANIES ACT, 1913 AND In the matter of MORRISONS, LTD.* 20 L. W. 861.

—S. 52—Insolvency—Hindu Father adjudicated insolvent—Son's shares do not vest in Official Assignee. *See* HINDU LAW, JOINT FAMILY FATHER. 47 M. L. J. 857 (P. C.)

—S. 52 (2) (c)—Property hypothecated—Possession with insolvent with permission of creditor. If passes to Official Assignee—Withdrawal of consent—Effect. OFFICIAL ASSIGNEE *v. MD. E. NAIKWARAH.* 1924 Rang 27.

—Ss. 62 and 66—Tenancy of insolvent—Vesting in Official Assignee—Disclaimer—Right of landlord to obtain possession by order of Insolvency Court.

PRINCIPAL AND AGENT.

Under the Bombay Rent Act, II of 1918, a monthly tenant became a statutory tenant of the premises and could not be ejected so long as he paid the standard rent. Consequently where a tenant is adjudicated an insolvent, the statutory tenancy vests in the Official Assignee. If the Official Assignee disclaims all interest in the tenancy, it comes to an end and it is open to the landlord to apply for an order for possession of the premises under S. 66 of the Presy. T. Ins. Act. (*Macleod, C. J.*) *ABUBAKER HAJI In re.* 26 Bom. L. R. 628 : 48 Bom. 580 : 1924 Bom. 513.

PRESUMPTION—Advancement—Anglo-Indians—Purchase of property by husband in the name of his wife. *See* ADVANCEMENT. 3 Bur. L. J. 85.

—Ownership—Possession—Trees.

The presumption of title arising from possession in the case of trees is stronger than the presumption arising from the ownership of the lands. (*Simpson, A. J. C.*) *BHAGWAN v. GANGA BAKSH.* L. R. 5 O. 109 : 1924 Oudh 304

—Possession follows Title—Vacant land not capable of effective physical possession—Ejectment. *See* ADVERSE POSSESSION. 46 M. L. J. 560.

—Settlement Record—Entries in—Correctness of.

An entry in the Settlement Record shall be presumed to be correct until it is proved by legal evidence to be incorrect. (*Morshead, M. C.*) *BHU KHUL MISSEER v. MAHARANI JANKI KUER.* 2 Pat. L. R. 111 (Cr).

PREVENTION OF CRUELTY TO ANIMALS ACT (XI OF 1890), S. 6—Bridle leather—Disc studded with nails—Sentence—Revision.

A hackney carriage driver was prosecuted for working a lean pony and using a bridle with a leather disc studded with nails and convicted and fined Rs. 20 under S. 6 of Act XI of 1890. *Held*, that the sentence was inadequate and that the conviction ought to have been under S. 3 of the Act. Though the High Court has power to interfere in revision with an inadequate sentence, it does not do so ordinarily merely because it would itself have passed a heavier sentence so long as the sentence passed by the lower court involves a substantial punishment. (*Heald, J.*) *EMPEROR v. BEJAL.* 3 Bur. L. J. 155 : 1924 Rang. 373 (1).

PRINCIPAL AND AGENT—Accounts—Claims and cross-claims—Business of principal Company transferred to another Company set up by former and closely identified with it—Business conducted as before—Latter Company it may sue without reference to set off. OFFICIAL TRUSTEE OF MADRAS *v. SUNDARA MURTHI MUDALIAR.* 76 I. C. 944 : 1920 P. C. 811.

—Accounts—Liability of legal representatives of deceased agent to account to principal—Damages caused by neglect or misconduct of deceased agent—Liability of legal representatives. *See* LIM. ACT, ARTS. 62, 89 AND 90, ETC. 5 Pat. L.T. 355.

PRINCIPAL AND AGENT.

—*Agent's right to sue for accounts.*

An agent cannot maintain a suit for accounts against his principal unless he makes out a special case. The limits of such right as common law discussed. (*Aston, A. J. C.*) *FIRM OF JESSARAM BHAGWANDAS v. RATANCHAND FATCHAND.*

78 I. C. 846.

—Commission agent—Despatch of goods by rail—Absence of insurance—Usual course of business—Loss—Liability for—Legal position of parties. See CONTRACT ACT, S. 91.

47 M. L. J. 312.

—*Fund of agent—Liability of principal—Tort—Extent of liability.*

The principal is not liable for the torts or negligence of his agent in any matters beyond the scope of agency unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit, 36 C. 647; 43 C. 511 Ref.

The principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. (1912) A. C. 716 Rel. (*Baker, J. C.*) *VARDHMAN BROS. v. JAIKRISHAN.*

7 N. L. J. 74:

79 I. C. 139 : 1924 Nag. 79.

—*Negligence—Liability for—Disregard of instructions by agent—Defalcation by subordinates of agent.*

Where it can be shown that a loss sustained by the principal is directly traceable to disregard on the part of the agent of directions issued to him regarding the conduct of business, even though such disregard may have been due to nothing worse than negligence or overconfidence in the honesty of others, such misconduct on the part of an agent is clearly actionable. (*Mears, C. J. and Piggott, J.*) *MUKERJI v. THE MUNICIPAL BOARD, BENARES.* 46 A. 175 : 80 I. C. 241 : 22 A.L.J. 26 : L. R. 5 A. 113: 1924 A. 467.

—*Relationship—What constitutes—Direction to pay money.*

A mere direction given by a man to pay money due to him to another does not make the latter an agent of the former. (*Newbould and Ghosh, JJ.*) *HARI CHARAN DAS v. TARAPRASANNA SEN.*

79 I. C. 354.

PRINCIPAL AND SURETY—Rights of creditor—Collateral security given by debtor to surety—Liability of surety.

There is no authority for the unqualified proposition that the principal creditor is entitled to the benefit of every collateral security given by the principal debtor to the surety, or that, all securities given by a principal to his surety are held in trust. This theory of trust is rested on the analogy derivable from the class of cases where the remedies of a creditor against the principal debtor are transferred to a surety who has paid the debt.

In the case where the remedies of the creditor are transferred to the surety, who has paid the debt, the payment by the surety extinguishes the creditor's claim, and what he seeks is a substitution to the creditor's remedies against the principal

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debtor. Where this does not happen, there can be no question of substitution proper, for the receipt of the surety's securities by a creditor does not relieve the surety from liability in case the securities prove insufficient. The relief by substitution is extended on the assumption that the debt has been, or is to be paid in full, so that further detention of the security is against equity. Another objection to the substitution may be found in the fact that the security being for the surety, he has no right to it till he has been indemnified by payment; the creditor's remedies against the principal debtor, on the other hand ripen as soon as there has been a refusal to pay. By subrogating the creditor's remedies against the debtor, the burden is finally placed where it belongs, and therein lies the equity of the transaction. No such object is attained in doing the converse of this, where the result is to place the creditor in a position of advantage which he cannot claim. The burden in the latter case is not always placed where it belongs; if the securities are sufficient in value, the burden will take care of itself; if they are insufficient, the loss will fall, in part at least on the surety. Consequently a creditor can derive no benefit from the securities given by the principal to the surety unless he can show a direct interest in them by contract or under a trust or unless both the principal and surety are insolvent or the debtor has refused to pay. (*Mookerjee and Rankin, JJ.*) *BANK OF BENGAL v. WILLIAM ARRATON LUCAS.*

51 Cal. 185 : 28 C. W. N. 497:

81 I. C. 471 : 1924 Cal. 578.

PRISONS ACT (IX of 1894), S. 3—Judicial lock up—If a prison—Person committed to custody—If a prisoner. 25 Cr. L. J. 93 : 76 I. C. 29 : 1924 Lah. 257 (2).

—S. 42—Carrying newspapers from a prisoner inside gaol to outside people for illegal gratification—Offence. See PENAL CODE, Ss. 161 AND 21. 26 Bom. L. R. 267.

PRIVY COUNCIL—Criminal Trial—Special leave. Points not properly raised at the trial are not points which in ordinary circumstances deserve much consideration as grounds for special leave. (*Lord Sumner.*) *PARENDRA KUMAR GHOSH v. EMPEROR.* 1 O. W. N. 935 : 1925 P. C. 1.

—Practice—Issue of fact—Findings of trial Judge reversed on appeal—Practice of the Privy Council to announce their decision without elaborate discussion of the views of inferior Courts. See PRACTICE, PRIVY COUNCIL.

46 M. L. J. 625.

PRIZE—Hague convention—Treaty of Versailles—Priority—Ships of over 1,600 tons—Rights of Allies and Associated powers—Change of nationality after treaty.

A German ship was at the time of the outbreak of the war in Karachi harbour. It was seized as prize and after the Versailles Treaty, the Crown claimed ownership as it was over 1,600 tons, Held according to well-known canons of construction of agreements governed by International or Municipal law, it is the later and not the prior agreement which governs the rights of parties, except

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where the later one does not abrogate the former. The Treaty of Versailles operates as a transfer of the former owner's rights and the change of nationality after the Treaty is immaterial. The question of the owner's right of compensation against the German Government left open.

Quære—Whether the owners have no *locus standi* to open such an application unless they pay court fees under the Court Fees Act? (*Kincaid, J. C. Aston and Madgavkar, A. J. C.*)
In Re S. S. "BRAUNFELS" 76 I. C. 337:
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PROBATE—Intermeddler.

Obiter: An executor intermeddling with the estate of a deceased is liable to account for his dealings with the estate. *Quære*:—Should such intermeddling executor be compelled to take out probate. (*Newbould and Ghose, JJ.*) BROJO LAL BANERJEE v. SHARAJUBALA DEBI.

51 Cal. 745 : 1924 Cal. 864.

—Procedure.

Application for probate should be dealt with as a suit. (*Newbould and Ghose, JJ.*) BROJO LAL BANERJEE v. SHARAJUBALA DEBI.

51 Cal. 745 : 1924 Cal. 864.

PROBATE AND ADMINISTRATION ACT (V of 1881)—Party interested to oppose—Adverse claim. MOHADEB KUDU v. BENODE LAL PATRA.
77 I. C. 534.

—S. 3—Deed—Construction—Gift or will—No disposal of any immediate interest in property.

A document purported to dispose a part of a house to which the donor was entitled, in these terms:—'You (donee) shall yourself after my life-time use and enjoy two rooms. I shall myself enjoy the rent in respect of the two rooms as long as I may be alive. You shall yourself use and enjoy after my life-time that rent and the two rooms from son to grandson with power of sale, etc. To this effect is the gift deed executed and given in respect of the aforesaid two rooms' Held, that the document, though in the form of a deed of gift, was in fact a will. It was a declaration of the intentions of the donor with respect to her property after her death inasmuch as there was no disposal of any immediate right of possession or any immediate interest in the property. In wills in this country it is not uncommon for the donor to reserve to himself a life interest in the property disposed of and such a reservation is not conclusive against the document being testamentary in its character. (*Schwabe, C. J. and Waller, J.*) VENKATACHALAM CHETTY v. GOVINDASWAMI NAICKER. 78 I. C. 156 : 1924 Mad. 605 : 19 L. W. 434 : 46 M. L. J. 288.

—Ss. 4, 88, 89, 100 and 147—Scope and effect of—Executor—Position of—Representative of the testator and not of the legatees—Limitation against executor—Beneficiaries barred—Liability of executor for devastavit—Limitation Act, Arts.

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140 and 141 subject to the provisions of the Prob. and Administration Act, See LIMITATION ACT. ARTS. 140 AND 141. 5 Pat. L. T. 513.

—S. 17—Invalid renunciation.

Renunciation by executor is not rendered invalid by his having intermeddled with the estate of the deceased. (1894) A. C. 437, foll. (*Newbould and Ghose, JJ.*) BROJO LAL BANERJEE v. SHARAJUBALA DEBI. 51 Cal. 755 : 1924 Cal. 864.

—S. 17—Renouncing of executorship—Withdrawal of. 75 I. C. 218.

—S. 17—Renunciation—Probate and Administration Act, S. 16.

Renunciation of executorship can be made by the executor without issue of citation. (*Newbould and Ghose, JJ.*) BROJO LAL BANERJEE v. SHARAJUBALA DEBI. 51 Cal. 745 : 1924 Cal. 864.

—S. 17—Retraction.

A renunciation by an executor cannot be retracted. (*Newbould and Ghose, JJ.*) BROJO LAL BANERJEE v. SHARAJUBALA DEBI.

51 Cal. 745 : 1924 Cal. 864.

—S. 23—Joint Hindu family—Death of Co-parcener—Application for letters of administration by son.

Where a member of a joint Hindu family dies, it is not open to his son, not being the sole surviving co-parcener, to apply for letters of administration to the property alleged to have been left by the deceased as such member of the joint family. (*Beasley, J.*) RAMAGIRI GURUVAYYA NAIDU v. GOVINDAMMAH. 3 Bur L. J. 116 : 82 I. C. 824 : 1924 Rang. 329.

—S. 34—Administrator pendente lite—Appointment of, pending appeal.

The executors under a will applied for probate and on the application of the objectors an administrator *pendente lite* was appointed. Subsequently judgment was pronounced in favour of the will and probate was issued. On the day on which probate was issued the unsuccessful caveators applied to the District Court to stay proceedings to enable them to file an appeal to the High Court. The District Judge held that possession having been already delivered by the administrator to the executors nothing further could be done by him. On appeal to the High Court Held, that though possession had been taken by the executors, it did not take away the High Court's authority to appoint an administrator *pendente lite* in the High Court. (*Mookerjee and Chotzner, JJ.*) PRAMILA BALA DEVI v. JYOTINDRA NATH BANERJEE. 28 C. W. N. 576: 83 I. C. 597 : 1924 Cal. 631.

—S. 41—Appointment of administrator—Considerations to be taken into account.

In appointing an administrator for the estate of deceased person, one of the elements to be taken into consideration is consanguinity; there are however, other elements which must be taken into consideration, such as the safety of the estate

PROBATE AND ADMINISTRATION ACT, S. 50.

and the probability that it will be properly administered. The primary concern is the interest of the property and the court would not force administration on an unwilling person. (*Mookerjee and Cuming, JJ.*) *SIVADAS MOOKERJEE v. SURENDRA NATH CHATTERJEE*, 40 C. L. J. 24 : 82 I. C. 382 : 1925 Cal. 178.

———S. 50—Probate—Revocation of grant—Just cause—Non-citation of necessary party—Effect of—Reversioner—Locus standi to contest will—Genuineness of will—Proof of.

It is an elementary principle that no question of the genuineness of a will arises for consideration till the court has decided that the grant of probate or letters of administration must be revoked on one or more of the grounds specified in S. 50 of the Prob. and Admn. Act. The only matter for consideration upon an application for revocation is whether the applicant has made out a just cause for revocation. The application cannot be thrown out at this stage on the ground that the applicant has not adduced evidence sufficient to throw doubt upon the genuineness of the will. 19 C. W. N. 1108 ; 33 C. 1001 Ref. At that stage the only question that could be properly considered is whether the proceedings to obtain the grant were defective in substance because the grant was made without citing parties who ought to have been cited. Reversionary heirs who but for the will would have been entitled to the estate of the deceased are entitled to special citation. The object of issue of citation is that all persons whose interests are or may be adversely affected by the decrees of the probate court shall have notice of the proceedings and an opportunity of intervening for the protection of their interests. This purpose is not achieved by issue of citation to infants and the propounder should take steps for the appointment of a guardian-adlitem. 10 C. L. J. 263 Ref. (*Mookerjee and Rankin, JJ.*) *AKHILESWARI DAS v. HARICHARAN MIRDHA*. 40 G. L. J. 297 : 1925 Cal. 223.

———S. 50—Probate—Order granting—Effect of—Revocation—"Just cause"—Meaning of—Right to apply for revocation.

An order passed after contest in a probate proceedings is *res judicata* in any subsequent proceeding of any sort against the caveators who contested it. The grant of probate by a competent Court is, on the general principle of the Probate and Administration Act, binding on all persons who had an opportunity of putting forward their objection before it was passed unless they can make out a good cause under S. 50 of the Act for setting it aside.

There is no period of limitation for putting forward a "just cause" under S. 50 of the Probate and Administration Act but where a party has had an opportunity to put forward a particular just cause and has not chosen to put it forward, he cannot be heard to agitate the same cause later. There is no difference in principle between disallowing an application to revoke a grant for a "just cause" on the ground of *res judicata* and disallowing it on the ground that the party already had a full opportunity of putting forward his just cause and omitted to do so.

PROBATE AND ADMINISTRATION ACT, S. 73.

The mere absence of a special citation in proceedings in which probate of a will is granted is not, where the person to whom a citation has not been issued is otherwise aware of the proceedings, a "just cause" for revocation.

S. 50 of Probate and Administration Act, in certain circumstances, no doubt allows one party after another to attack in turn the grant of probate but nothing in it supports the contention that each of such attacks in turn reopens all previous attacks and enables parties already defeated to press their attacks anew.

Per *Wallace, J.*—A decree cannot be set aside by a mere petition on the ground of fraud. (*Odgers and Wallace, JJ.*) *RALLABANDY VENKATARATNAM v. YANAMANDRA SATYAVATI*.

34 M. L. T. (H. C.) 141 : 1924 Mad. 578 : 79 I. C. 44 : 46 M. L. J. 383.

———S. 51—Revocation of probate—Power of Additional District Judge in Bengal.

An Additional District Judge appointed under S. 8 of the Bengal, N. W. P. and Assam Civil Courts Act, to whom a probate case has been transferred has all the powers of a District Judge with respect to it and hence he can revoke a probate granted. (*Jwala Prasad and Kulwant Sahay, JJ.*) *DAHO KUER v. TURAL DEI*.

78 I. C. 701 : 3 Pat. 609 : 1924 P. 593.

———Ss. 71 and 83—Object—Necessity for filing caveat—Non-observance of rules relating to pleadings—Remand.

In contentious proceeding under the Probate and Administration Act, 1881, a caveat in accordance with S. 71 of that Act should be filed, and the grounds of objection, as well as any petition in reply, should take the form of pleadings and should be verified in accordance with the provisions of O. 6, R. 15. The further proceedings thereafter should be conducted in the same way as a suit according to the provisions of the Civil Procedure Code.

Their Lordships remanded the application for hearing owing to neglect to observe the prescribed form and procedure. (*Lentaigne and Carr, JJ.*) *U. SHWE MIN v. MAUNG MAUNG GYI*. 3 Bur. L. J. 68 : 82 I. C. 973 : 1924 R. 273.

———Ss. 73 and 83—Contentious proceeding—Meaning of—Objector's pleader withdrawing from case—Effect of—Probate in solemn form.

A probate proceeding becomes contentious when there is an appearance with a view to oppose the proceedings. The subsequent withdrawal from the case of the pleader for the objector does not have the effect of transforming it into a non-contentious proceeding. Its effect is merely to make it an undefended suit. Consequently probate cannot be granted even in such a case in common form. A probate in common form is issued where the validity of the will is not contested or questioned. The executor proves the will either before the District Judge or the District Delegate competent to grant it in the absence of the parties interested upon his oath or upon such further evidence as may be required. Probate in solemn form is obtained by the executor

PROBATE AND ADMINISTRATION ACT, S. 76.

in an action in which the persons prejudiced by it have been made parties and the court upon hearing the evidence pronounces for the validity of the will. The mere fact that the pleader for the objector withdraws from the proceeding does not mean the withdrawal of the opposition to the grant of probate. (*Mookerjee and Chotzner, JJ.*) PHANENDRA CHANDRA SETT v. NAGENDRA CHANDRA SETT. 39 C. L. J. 569 : 1925 Cal. 75.

—S. 76—Date of grant—Which is.

75 I. C. 218.

—S. 86—Appeal—Order granting permission to administrator to sell property—Considerations to be taken into account in giving permission to sell.

An order of a District Judge granting permission to an administrator to sell immovable property is appealable. It is not desirable that permission should be given to sell immovable properties not in the possession of the administrator, to some of which third parties claim an absolute title, and others of which were subject to ostensible encumbrances, unless it was proved that other properties, not the subject of contention were unavailable for sale. The Court ought to satisfy itself that the sales were necessary and in the interests of the estate as a whole. (*Pratt and Mac Coll, JJ.*) HAJI PU v. TIN TIN.

2 R. 117 : 80 I. C. 746 : 1924 Rang. 237.

—S. 90—Lease by administratrix without permission of court—Void or voidable—Settling aside—Compensation.

S. 90 of the Pro. and Admn. Act no doubt, makes it obligatory upon the administratrix to obtain the sanction of the Court if a lease for more than five years is granted, but noncompliance with this provision does not invalidate the transaction, which becomes merely voidable and not void. If the party prejudicially affected thereby seeks relief, the Court will assist him only on equitable terms of reimbursement.

An alienation by an executor or administrator without leave of the Court where such leave is necessary under S. 90 of the Probate and Administration Act, is not void but voidable: This attracts the operation of the elementary rule that no person can be allowed to avoid a transaction in such a manner as to enable him to recover property which would otherwise be lost to him and at the same time keep the money or other advantages which he has obtained thereunder. The maxim that "he who seeks equity must do equity" is applicable to a defendant as well as to a plaintiff and a party who seeks to avail himself of an equitable defence must stand the test as well as one who appears as plaintiff in such a case as the present. (*Mookerjee and Walmsley, JJ.*) SITA SUNDARI BARMANI v. BARADA PROSAD ROY. 28 C. W. N. 444 : 1924 Cal. 636.

—Ss. 128 and 130—Demonstrative legacy—Interest on.

Even where the will is silent as regards interest on demonstrative legacies and no provision is made for the same, the legatee is entitled to be paid interest from one year after the death of the testator. (*Phillips and Venatasubba Rao, JJ.*) KUDITHIPUDI VENKATARAMAYYA v. PITCHAMMA.

78 I. C. 274.

PROVIDENT FUND ACT (IX OF 1897), S. 4.

PROBATE PROCEEDINGS—Title to property—Adjudication—If binding.

A probate court has no jurisdiction to deal with title to property covered by a testamentary instrument. Hence an abandonment of title to property by means of a compromise decree in a probate court does not destroy title or vest it in another in the absence of a registered deed where the property in dispute exceeds Rs. 100 in value. (*Mookerjee and Rankin, JJ.*) SRI MATI HARIDAS DEBI v. PRAMATHA BHUSAN.

1924 Cal 905.

PROMISSORY NOTE—Consideration—Burden of proof. See BURDEN OF PROOF. 79 I. C. 1055.

—Consideration—Want of—Taking of accounts—Permissibility of

It is a common thing for a borrower from a banker giving a promissory note to cover overdrawing from the banker by himself or by another. Consequently in a suit upon a pronote it is open to the defendant to plead want of consideration for the pronote wholly or in part and to insist on an account being taken to determine the liability of the defendant. 45 B. 1155 ; 44 A 521 ; (1921) M. W. N. 636 Ref. (*Ramesam, J.*) SUNDARAM CHETTY v. DAMODARAM CHETTY.

(1924) M. W. N. 529 : 1924 Mad. 850.

—Partnership—Suit on pronote executed by one partner in favour of another—Maintainability of, without taking accounts. See PARTNERSHIP. 2 Mys. L. J. 90.

—Suit on—Decree on original claim when can be granted.

Where money is lent and at the same time a promissory note is given therefor, the creditor can sue for the money due as on the original contract of loan, if the pronote cannot be proved. It is impossible in one and the same suit to sue some of the defendants on the note and the rest on the original cause of action. (*Young, J.*) MAUNG LEE GALE v. PROHTADO BARICKAN.

3 Bur. L. J. 127 : 1925 Rang. 37.

—Suit on—Note inadmissible for want of Stamp—Decree on original consideration.

Where a suit is based on a promissory note which is inadmissible in evidence for want of stamp the suit must fail and it is not open to the court to give a decree on the debt evidenced by the note. 38 M. 660 foll. 40 M. 727 ; 34 I. C. 417 Ref. (*Madhavan Nair, J.*) PULUGURTA SOMARAJU v. M. VENKATA SUBBARAYADU. 20 L.W. 943.

PROVIDENT FUND—Rights of subscribers—Bank employees subscribing to Provident Fund Started by the Bank—Liquidation of the Bank—Priority of Provident Fund subscribers to shareholders and simple creditors. See COMPANY, LIQUIDATION. 23 C. W. N. 721.

PROVIDENT FUND ACT (IX OF 1897) S. 4—Optional subscriber—Deposit made by—Attachment—Legality of—C. P. Code, S. 60—Provident Fund Rules.

Where the Judgment debtor who was a Nazir in the Civil Court was an optional subscriber to a General Provident Fund within the meaning of

PROVIDENT FUND RULES, R. 14.

Rule 3 of the Rules regulating the fund but the deposits were not capable of withdrawal except under Rules 10, 15 and 18. *Held*, that the deposits were compulsory deposits within the meaning of S. 2 of Act IX of 1897 as amended by Act IV of 1903, the test being whether the money was repayable on demand or at the option of the subscriber or depositor. Under S. 4 of the Act the deposit is exempt from attachment and S. 60, C.P. Code does not stand in the way. The Act does not empower the Government to prescribe by rules the procedure which shall be followed for the recovery of debts due by depositors for which a decree has been obtained in the Civil Court. 29 B. 259; 46 C. 952; 27 C.W.N. 472 Ref. (*Miller, C.J. and Bucknill, J.*) JAGANNATH THIRANI v. TARAPRASANNA GANGULI.

3 Pat. 74 : 6 Pat. L. T. 129 : 80 I. C. 424 :
1924 F. C. 524 (2).

PROVIDENT FUND RULES, R. 14—*Nomination of person to receive fund—If takes absolutely.*

Where a person is nominated under the rules framed under the Provident Funds Act to receive the fund on the death of the employer, the nominee does not take the fund absolutely, but only on behalf of the estate. (*Kennedy, J. C. and Raymond, A. J. C.*) AIMAI v. AWABAI DHANJISHAW JAMSETHI.

1924 Sindh 57.

PROVINCIAL INSOLVENCY ACT (III OF 1907).
Ss. 2 (e) and 16—*Joint Hindu family—Father and sons—Insolvency of father—What vests in Official Receiver—Property or power of disposal—Sons' right to impeach—Binding nature of debts—Adverse finding—Decree in favour of party—Res judicata.*

Where in a joint Hindu family consisting of a father and his sons the father is adjudicated insolvent, what vests in the Official Receiver under S. 16 read along with S. 2 (e) of the Provincial Insolvency Act is the entire property inclusive of the shares of the sons therein and not merely the power of disposal which the father has under the Hindu Law. The vesting of the property is not dependent on the nature of the debts incurred or conditional on the debts being for a binding purpose. In a suit by the sons for partition after the father's adjudication, it is open to them to prove that the debts were for an illegal or immoral purpose and as such not binding on them. Case-law referred to. Where a suit is dismissed against a defendant but the judgment contains a finding adverse to him, such finding does not operate as *res judicata*, 48 C. 460 followed.

Per Srinivasa Aiyangar, J.—The proper way of regarding the vesting so far as the sons are concerned would be to regard it as in the nature of a trust for the exercise of the father's power of disposal of the family property for his antecedent debts on the one hand and on the other for the ascertainment and delivery over to the sons of the remainder of the property, if any.

Quære :—Whether the mere making of a vesting order by a court as regards the father or other co-parcener does not bring about in Law the status of division. (*Spencer, O. C. J. and Srinivasa Aiyangar, J.*) KUPPUSWAMI GOUNDAN v. MARIMUTHU GOUNDAN.

(1924) M. W. N. 807 :
1925 Mad. 52 : 20 L. W. 783 : 82 I. C. 438 :
47 M. L. J. 487.

PROV. INSOLVENCY ACT (IX OF 1897), S. 18.

—Ss. 4 and 80—*Insolvency—Sale of properties by Official Receiver—Objection by claimant—Procedure—Power of Official Receiver to inquire.*

Where in the course of an insolvency proceeding the Official Receiver either at his own instance or at the instance of a creditor proposes to sell properties claimed by a third person the claimant may apply to the District Judge under S. 4 of the Provincial Insolvency Act for an order to prevent the sale of the properties. It is not competent to the claimant to apply to the Official Receiver or for the Official Receiver to adjudicate on the claim. (*Krishnan and Waller, JJ.*) SAVANNA VENKA ANA RUNA, VELLAPPA CHETTIAR v. RAMANATHAN CHETTIAR.

47 Mad. 446 : 78 I. C. 1017 :
1924 Mad. 529 : 19 L. W. 251 :
(1924) M. W. N. 163 : 33 M. L. T. (H. C.) 279 :
46 M. L. J. 80.

—S. 16 (6)—*Payment to creditor of insolvent—Liability to Receiver.*

A payment by a debtor of the insolvent after an insolvency petition has been presented of the debt due to a creditor of the insolvent is not valid against the Official Receiver. The property of the insolvent by reason of the principle of relation back, on the date the insolvency petition was presented, became the property of the Official Receiver and as such payment to the creditor is not sufficient satisfaction of the debt. (*Oldfield and Devadoss, JJ.*) JANAKI RAM VILAS NIDHI, LTD. v. OFFICIAL RECEIVER, COIMBATORE.

78 I. C. 16.

—S. 18 (1)—*Receiver—Vesting of property in—What amounts to—Sale by Receiver—As agent of Court—Hindu Joint family—Father and Son—Adjudication of father—Power of Official Receiver to sell family property.*

Defendants 1 and 2 and 3rd defendant, who were carrying on business together, were adjudicated insolvents. At the same time, the plaintiffs, who were the sons of defendants 1 and 2, and who were made parties to the insolvency petition were also adjudicated. The order of the District Judge on the insolvency petition was:—Petitioner 1 examined. No opposition. Adjudication order passed. Referred to Official Receiver for further proceedings.—The family properties of defendants 1 and 2 were sold by the Official Receiver, the sale deeds showing that the Official Receiver purported to convey his entire interest in the properties. The deeds further showed that the Official Receiver professed to act as the assignee of the adult as well as the minor insolvents and that he did not purport to exercise the power possessed by a Hindu father to dispose of his son's interest for causes which are recognised as just and proper.

In a suit brought by the plaintiffs to recover their 4/9ths share in the properties sold by the Official Receiver on the grounds (1) that, as they were minors at the time, their adjudication was illegal, the Official Receiver had no authority to sell their shares, and his sale of the properties was therefore void as against them; and (2) that the property of the insolvents did not vest in the Official Receiver, *held*, (1) that the order on the

PROV. INSOLVENCY ACT (III OF 1907), S. 24

insolvency petition, by implication, appointed the Official Receiver, the Receiver for the property of the insolvents and vests the property in him, (2) that even otherwise, the property of the insolvent vested in the Court, the Official Receiver could have acted as its agent, and, as his proceedings were ratified by the Court, the sales effected by him were valid; (3) that, on the insolvency of defendants 1 and 2, their right to dispose of their son's interest in ancestral immovable property for the payment of their debts not tainted with illegality or immorality vested in the Official Receiver; and (4) that, even if the adjudication of the minor plaintiffs as insolvents was illegal, the sales by the Official Receiver must, on the authority of the decisions in 42 C. 56 and 25 A. 407, be held to have passed the entire properties sold, including the interest of the minor plaintiffs therein. (*Phillips and Venkatasubba Rao, JJ.*) SANKARANARAYANA PILLAI v. RAJAMANI. 47 Mad. 462 : 20 L. W. 357 : 1924 Mad. 550 : 34 M. L. T. (H. C.) 152 : 46 M. L. J. 314.

— SS. 24 and 27, (7)—*Composition deed—Effect—Creditor whose name is not in Schedule—If can proceed against insolvent after discharge.*

A creditor who does not prove his debt or get his name entered in the list of creditors and who is not a party to a composition deed is not debarred from proceeding against his debtor after he is discharged. (*Raymond and Bilaram, A. J. C.*) FIRM OF MENGHRAJ—NEVANDRAM v. FIRM OF VIRBHANDAS—SIRUMAL. 1924 Sindh 122.

— S. 34—*Execution sale before adjudication—Sale proceeds—Right of Receiver.*

Prior to an adjudication in insolvency, property of an insolvent had been sold in execution of a decree and the sale proceeds deposited in Court. Held, the amount was exempted from the General provision of S. 34 of Act III of 1907 and can be claimed by the attaching decree-holder as against the receiver. (*Oldfield and Devadoss, JJ.*) SRINIVASA NAICKER v. OFFICIAL RECEIVER, SOUTH CANARA. 75 I. C. 172 : 1925 Mad. 224.

— S. 37—*Burden of proof—Fraudulent preference—Intention—Mortgage for paying off creditors.*

Where the Official Receiver wants to challenge an alienation as a fraudulent preference, the onus is on him that the intention was to prefer and there must be evidence to show this, apart from the mere fact he was insolvent.

Where money is raised by pledging property for the purpose of paying creditors, whatever may be the view of the mortgagor in paying creditors, if the mortgagee acts *bona fide* the transaction would be valid against the Receiver. (*Oldfield and Devadoss, JJ.*) JANAKI RAM VILAS NIDHI, LTD v. OFFICIAL RECEIVER, COIMBATORE. 78 I. C. 16.

PROVINCIAL INSOLVENCY ACT (V OF 1920)—Suit against Receiver—Civil Court. MT. MAHARANA KUNWAR v. E. V. DAVID. 1924 A. 40.

— Ss. 2 and 27—*Joint Hindu Family—Father adjudged insolvent—Sons' interest if vests in Official Receiver—Suit for partition by*

PROV. INSOLVENCY ACT (V OF 1920), S. 2.

son—Maintainability of—Sale of property by Official Receiver prior to passing of vesting order by court—Rights of purchaser—Order vesting property in Official Receiver—Ratification—Title by Estoppel—Transfer of property Act, S. 43.

Where a father in a joint Hindu family consisting of himself and his sons is adjudicated an insolvent it is not merely the share of the father but the share of his undivided sons also that vests in the Official Receiver. That does not prevent a son from bringing a suit for partition of his share as against the Official Receiver or persons claiming under him, on the ground that the father's debts were illegal or immoral and that the father could not convey his share validly for such debts. 46 M. 54 not followed, 47 M. L. J. 487 foll. In the absence of an order by the District court vesting the property of the insolvent in the Official Receiver, the property vests in the court and not in the Receiver 40 M. L. J. 184 ; 41 M. L. J. 78 Ref. Where the official Receiver purported to sell the property of an insolvent before the passing of such a vesting order and subsequently the District court on being apprised of the fact, passed an order vesting the property in the Receiver the title of the vendee becomes complete either on the principle of ratification by the court or the act of its agent or on the principle embodied in S. 43 of the Transfer of Property Act. 40 M. L. J. 209, 46 M. L. J. 314 relied on. (*Devadoss, J.*) NAKASIMUDU v. BASAVA SANKARAM.

1925 Mad. 249 : 20 L. W. 946 : 47 M. L. J. 749.

— Ss. 2 (1) d—*Meaning of Property—Power of father and major sons to dispose of minors' shares.*

Where the father and his major sons are adjudicated insolvents on account of trade losses and when the Receiver attempted to sell the joint family property, the minors objected that their shares are not property within the meaning of S. 2 (d) of the Act. Held overruling their contention that the son's share is the property of the insolvent within the meaning of the section. (*Doss and Ross, JJ.*) AMOLAK CHAND v. MANSULLA RAI MANGAN LAL. 3 Pat. 857 : 1925 P. 127.

— S. 2 (d)—*Property of insolvent—Share in a Joint Hindu family—Vesting in Official Receiver.*

The word used in defining the term property is 'includes' and not 'means,' and therefore the definition in S. 2 (d) of the Prov. Ins. Act (V of 1920) is not exhaustive. The definition was inserted to make it clear that certain kinds of property which do not actually belong to the insolvent are to be treated as his property for the purposes of the Insolvency Act, e. g. property over which he may have a power of appointment which he may exercise for his own benefit. A share in joint family property is not saved from such attachment and sale and is therefore not outside the jurisdiction of the Insolvency Court. It will vest in the Official Receiver. (*Daniels and Dalal, A. J. C.*) MUNSHI LAL BAHADUR v. PASPAT PRASAD. 26 O. C. 384.

— S. 2 (d)—*Property—What it includes—Partner's share—If property.*

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The definition of "property" in S. 2 (d) is very comprehensive and includes any property over which or the profits of which any person has a disposing power which he may exercise for his own profit. It includes all rights of action which relate directly to the bankrupt's property and can be turned into assets for the payment of debts including claims in the nature of damages except such as arise from bodily or mental suffering or personal inconvenience.

A partner's share in the partnership is "property" within the meaning of S. 2 (d) (*Kennedy and Bilaram, A. J. Cs.*) SETH VISHINDAS NIHALCHAND v. THAWERDAS. 80 I. C. 642 : 1925 Sindh 18.

—Ss. 2 (d) and 28—*Partner—Insolvency—Right to sue for accounts—If vests in Official Receiver.*

Where a partner becomes insolvent, the rights of the partner to sue for an account in a partnership that has been dissolved is property within the meaning of S. 2 (d) and vests in the Official Receiver. (*Raymond, A. J. C.*) THAWERDAS JETHANAND v. SETH VISHENDAS NIHALCHAND. 79 I. C. 384 : 1925 Sindh 72.

—S 2 (1) (e)—*Rent due to landlord—If a secured creditor.*

A Zemindar in Oudh to whom rent is due from the tenant is a secured creditor within the meaning of S. 2 (1) (e) of the Prov. Insolvency Act, as under S. 72, Oudh Rent Act the produce of every part of the holding is security for the rent payable. (*Datal, J. C.*) BISHAMBAR NATH v. RUKKHA. 10 O. & A. L. R. 183 : 10 O. L. J. 442 : I. R. 5 O. 98 : 81 I. C. 647 : 27 O. C. 99 : 1924 Oudh 296.

—S. 4—*Conveyance shortly before adjudication—Creditor if can move for annulment.*

Where a person effected a conveyance shortly before he was adjudicated an insolvent, proceedings to have the conveyance annulled can be instituted only by the Official Receiver and not by any creditor. S. 4 of Act V of 1920 cannot be taken to authorise action by a creditor. (*Walmsley and Mukerji, JJ.*) RAM SUNDER RAM v. RAM CHARIT BHAKAT. 51 Cal. 663 : 79 I. C. 326 : 1924 Cal. 827.

—S. 4—*Question of title—If to be raised only in insolvency court.* MT. MAHARANA KUNWAR v. E. V. DAVID. 1924 A. 40.

—S. 4—*Question of title—Right to decide—When not to be exercised.* Official Receiver, SOUTH ARCOT v. PERUMAL PILLAY. 1924 Mad. 387 (1).

—Ss. 4, 5 and 28—*Equity of redemption—Insolvency of Mortgagor—Compulsory acquisition of lands—Rights of mortgagee.*

Where a mortgagor becomes insolvent, it is only the equity of redemption that vests in the Official Receiver. If the lands are acquired under the Land Acquisition Act, the mortgagee is entitled to be paid the amount of his mortgage

PROV. INSOLVENCY ACT (V OF 1920), S. 10.

from the compensation paid by the Government for the acquisition. (*Wallace and Madhavan Nair, JJ.*) PURUSHOTHAMA NAIDU v. RAMASWAMI AIYAR. 20 L. W. 667 : 1925 Mad. 245.

—S. 5—*Interim protection to person who has applied to be adjudicated insolvent—Grant of—District Judge—Power of—Order declining to grant protection—Interference with, in appeal—Conditions.*

Under S. 5 of the Provincial Insolvency Act, the District Judge has inherent power to grant interim protection to a person who has applied for being adjudicated an insolvent. Where, in the exercise of his discretion, the District Judge has declined to grant interim protection, the High Court will not interfere with his discretion unless it has been wrongly exercised (*Madhavan Nair and Jackson, JJ.*) NALLAGATTI GOUNDAN v. RAMANA GOUNDAN. 1925 Mad. 170 : 20 L. W. 879 : 47 M. L. J. 783.

—S. 9—*Act of bankruptcy—Deed of arrangement for benefit of creditors—Person party to deed—Petition for adjudication.*

A creditor who has assented to a deed of arrangement by a debtor for the benefit of all his creditor cannot file a petition for adjudicating the debtor an insolvent treating the deed as an act of bankruptcy. (*Spencer and Rameasam, JJ.*) RUKMANI AMMAL v. RAJAGOPALA AIYAR. (1924) M. W. N. 813 : 1924 Mad. 839 : 20 L. W. 681 : 47 M. L. J. 494.

—S. 9—*Application for adjudication—Act of insolvency—Presentation of petition without deposit—Return of petition—Limitation—Bombay Rules, R. 27 (4).*

A creditor presented a petition for adjudicating a debtor an insolvent. The petition was presented within three months of an alleged fraudulent transfer under R. 27 (4) of the Rules framed by the Bombay High Court. The petitioner had to deposit Rs. 150 with the petition but he omitted to do so. The petition was returned to the petitioner in order that it might be re-presented with the necessary deposit. As the Court was closed for the vacation, the petition was represented on the re-opening day with the necessary deposit. Held, that the petition was in time and that the order of adjudication was valid. The petition should not have been returned but the petitioner should have been called upon to make the proper deposit within a given time. (*Macleod, C.J. and Shah, J.*) CHHOTUBHAI BHIMBHAI v. DAJI BHAIKABHAI. 26 Bom. L. R. 432 : 80 I. C. 482 : 1924 Bom. 472.

—S. 10—*Prima facie inability to pay debts—If ground for order.*

Where a debtor is unable to pay his debts and the assets are less than the liabilities an order of adjudication should be made. (*Scott-Smith and Fforde, JJ.*) MUL SINGH v. RAM SINGH JAIMAT SINGH. 1924 Lah. 724 (1).

PROV. INSOLVENCY ACT (V OF 1920), S. 10.

———Ss. 10 and 25—Scope of.

Ss. 10 and 25 were intended to prevent the abuse of debtors filing their applications as a method of evading liability of arrest and getting out of payment of their debts. A finding by the court that a petitioner is unable to pay his debts must be one arrived at judicially with reasons given therefor which can be checked with reference to the evidence. The matter must be considered from the point of liquid assets. (*Walsh and Ryves, JJ.*) *MATHURA RAM v. BALDEO RAM.*

L. R. 5 A. 645 : 80 I. C. 21 :
1924 A. 800 (2).

———S. 14—Withdrawal of petition—When allowed.

A petition for adjudicating a person insolvent cannot be withdrawn without the permission of the court. (*Venkatasubba Rao and Jackson, JJ.*) *GADGI MUDAPPA v. PARAMESWARAN BHAT.*

20 L. W. 880.

———Ss. 15, 18 and 79—Husband and wife jointly indebted—Single petition for adjudication—Legality of.

Where a Burmese Buddhist husband and wife were alleged to be jointly indebted to the petitioning creditor, a single petition for adjudicating them as insolvents is maintainable. 44 M. 810 Foll. 2 C.L.J. 318 not foll. (*Young and Lentaigne JJ.*) *MAUNG KYI OH v. ARUNACHALAM CHETTY.*

2 Rang. 309 : 1925 Rang. 36.

———S. 16—Insolvency—Receiver—Appointment of.

The mere fact that seven years had passed since the date of adjudication is not a sufficient reason for refusing to appoint a Receiver. (*Walmsley and Mukerji, JJ.*) *HORO MOHUN PRAMANICK v. MOHAN DAS PALI.*

39 C. L. J. 432 : 1924 Cal. 849.

———S. 16—Order of adjudication—Execution proceedings—Effect on.

The mere presentation of an insolvency application does not prevent the execution of the decree. This is all the more the case where no order for adjudication is made after the presentation of the insolvency petition. (*Daniels, J.*) *RAM BHAROSEY v. SOHAN LAL.*

L. R. 5 A. 408 :
82 I. C. 1 : 1924 A. 707.

———S. 16 (5) and 31—Insolvency of mortgagor—Sale by official receiver free of incumbrance—No actual consent by mortgagees—Application to set aside sale dismissed—Suit to enforce mortgage—Maintainability.

On a mortgagor becoming insolvent, his properties vested in the Official Receiver and he gave notice to all the mortgagees that he proposed to sell the properties free of incumbrances giving them the same charge on the sale proceeds as they had on the properties. He called upon them to consent to it and added that if he did not hear to the contrary within a certain time, he would take it that they consented. No reply was received and the properties were sold. The mortgagees then applied to have the sale set aside on the ground that no notice was served upon them, and that they did not consent to the sale, and also

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of inadequacy of price. The petition was dismissed as out of time, whereupon they brought a suit for recovering the amount due under the bond. *Held* that the sale was not binding on the mortgagees and the suit was maintainable. (*Ramesam and Jackson, JJ.*) *KANNIAPPA MUDALI v. RAJU CHETTIAR.*

20 L. W. 45 : 47 Mad. 605 :
1924 Mad. 761 : (1924) M. W. N. 520 :
79 I. C. 850 : 47 M. L. J. 16.

———S. 20—Insolvency of landholder—Effect of—Ejectment—Notice.

The insolvency of a landholder does not render him incompetent to issue a notice of ejectment to tenants. (*Fremantle, S. M. and Burn, J. M.*) *RANGAI v. DEOKINANDAN PANDAY.*

L. R. 5 O. 77.

———S. 23—Arrest of judgment-debtor—Insolvency court—Protection order.

Under S. 23 of the Prov. Ins. Act, it is discretionary with a judge on admitting a petition for insolvency to release the petitioner from arrest in execution of a money decree. Where the court refuses to release the petitioner on giving security it must record its reasons. (*Adami and Bucknill, JJ.*) *NAND LAL v. NATH MULL SRINIWAS.*

3 Pat. 543 : 1924 P. 559.

———Ss. 23 and 31—Insolvency—Right to apply for protection before adjudication.

Under the Provincial Insolvency Act an insolvent is not entitled to apply for protection before adjudication, unless he has been actually arrested in execution of a decree (*Krishnan and Odgers, JJ.*) *SINNASAMI CHETTIAR v. ALIGI GOONDAN.*

1924 M. W. N. 836 :
80 I. C. 938 : 1924 Mad. 893 (1) :
20 L. W. 870 : 47 M. L. J. 530.

———S. 25—Petition by creditor—Dismissal of—Procedure—Grounds for—Payment of debt—"Other sufficient cause"—Meaning of.

Where on an application by a creditor to have his debtor adjudged an insolvent, an act of insolvency is alleged, the court must first satisfy itself whether the creditor is a creditor for the amount alleged or for a sufficient amount to justify a petition under the Act, or in other words, that the creditor has a right to present the petition. The Court must then be satisfied of the service on the debtor of the order admitting the petition. It must then be satisfied or express its dissatisfaction, for adequate reasons, with the alleged act or acts of insolvency. It must then consider whether it has been satisfied by the debtor that he is able to pay his debts. When the court has come to all the necessary findings on the above issues and still finds that there is *prima facie* ground for making an order against the insolvents, he must consider whether there is any sufficient cause why no order should be made. If the court finds the above issues not made out against the insolvents, it should dismiss the petition without considering any other sufficient cause. Meaning of "other sufficient cause" in S. 25 explained. (*Walsh, A. C. J. and Ryves, J.*) *TARA CHAND v. JUGUL KISHORE.*

22 A.L. J. 684 : 46 A. 713 L. R. 5 A. 498 :
1924 A. 686.

PROV. INSOLVENCY ACT (V OF 1920), S. 27.

—Ss. 27 and 43—*Insolvency petition—Transfer to Official Receiver for adjudication—Period fixed for discharge—Application for annulment—Extension of time—Power of Court, C. P. Code, S. 148.*

Where an insolvency petition is transferred to the Official Receiver for adjudication he has the power to fix the period for applying for discharge as part of the order of adjudication.

Per Krishnan, J. and Waller, J. (dissenting) under S. 27 (2) of the Prov. Ins. Act the power to extend time is not exhausted by the period originally fixed in the order of discharge having expired. Even after the expiry of the period, the Court has power to extend the period, 17 C. 512; 16 B 263 Ref. (Krishnan and Waller, JJ.) ARUNAGIRI MUDALIAR v. KANDASWAMI MUDALIAR.

19 L. W. 418 : 34 M. L. T. (H. C.) 170 : (1924) M. W. N. 331 : 1924 Mad. 635.

—Ss. 27 (2) and 43—*Discharge—Time for—Power of Court to extend.*

Under S. 27 (2) of the Prov. Ins. Act the court has power to extend the time for discharge even after the expiry of the period of the order for discharge. (*Chatterjee and Panton, JJ.*) ABRAHIM v. SOOKIAS. 51 C. 337 : 81 I. C. 584 : 1924 Cal 777.

—S. 28—*After-acquired property—Suit for recovery—If insolvent can maintain—Share in partnership—If vests.* 76 I. C. 805.

—S. 28—*Co-sharers—Adjudication of one sharer as insolvent—Suit for share of profits by assignee from co-sharer against lambardar—Defence that plaintiff has no title to sue by reason of his assignor's insolvency—Jurisdiction of Revenue Court. See AGRA TEN. ACT, S. 193.* 22 A. L. J. 217.

—S. 28—*Debt incurred after adjudication—Civil Court—Jurisdiction to entertain suit.*

Creditors who lend money to a debtor after the date of his adjudication as insolvent cannot prove the debt in insolvency, but there is nothing in law to prevent their suing on the Civil Courts in their debt. (*Kinkhede, A. J. C.*) HIRALAL v. TULSIRAM. 80 I. C. 946 : 1925 Nag. 77.

—S. 28—*Insolvency of Hindu father—Receiver—Sons' share in family property if vests.*

The claim of the receiver, in whom a Hindu father's rights and interests have vested under S. 28 of the Prov. Ins. Act is based on the principle of Hindu law. As soon as the sons received joint family property at partition the right became vested in the receiver of taking that property to pay the Hindu father's debts. The receiver does not become entitled to this right subsequent to the partition. The sons are liable to contribute towards the payment of any such debts of the father as are not tainted with immorality and they must be given an opportunity to prove the immoral or illegal character of the debts. (*Walsh, A. J. C. and Datal, J.*) SITA RAM v. BENI PRASAD. 22 A. L. J. 1097.

—S. 28—*Malguzar becoming insolvent—Sir rights—Sale of occupancy rights.*

When a *malguzar* is adjudicated insolvent, his

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proprietary rights in the *sir* land are vested in the insolvency court but not so the occupancy rights in the land, as under the C. P. Tenancy Act no one but the proprietor could divest himself of the occupancy rights. (*Prideaux, A. J. C.*) SHRI KISHAN v. NAGOBA. 1924 Nag. 158.

—S. 28—*Remedy of creditor.*

Where after an insolvency, the property of the insolvent is vested in the Court, the creditor has no remedy against the property in respect of the debt other than that provided under S. 28. (*Baker, J. C.*) SETH SHEOLAL v. GIRDHARILAL. 1924 Nag. 361.

—S. 28, Cl. 4—*Insolvent Debtors' Act (1848), S. 7—After-acquired property of insolvent—Bona fide transaction—Disposal of property—Right of Receiver in insolvency.*

In spite of the fact that by order passed under S. 7 of the Insolvent Debtors' Act, 1848, the property of the insolvent was to vest in the Official Assignee, he was left free to dispose of any property that he might acquire after being declared an insolvent and all persons dealing with him *bona fide* and for a consideration were to be discharged from making a further payment, to the Official Assignee, provided the transaction took place before the Official Assignee intervened and claimed the property on behalf of the insolvent's estate, 43 Bom. 890 ; 80 M. 145 ; 47 Cal. 696, referred to. (*Daniels and Mukerjee, JJ.*) CHHOTE LAL v. KEDAR NATH. 22 A. L. J. 455 : L. R. 5 A. 329 : 46 A. 565 : 1924 A. 703.

—S. 28 (5)—*Damages for breach of contract—Vesting prior to insolvency—Deed of arrangement—If passes to trustees—T. P. Act, Sec. 6 (a).*

Prior to a person becoming insolvent, he became entitled to sue for damages for breach of certain contracts. Subsequently by a deed of arrangement, he transferred his rights to certain trustees who sued to enforce the same. *Held*, there was nothing in law to prevent the vesting of the right in the trustees and they could sue to enforce their rights. T. P. Act, S. 6 (a) and (e) considered. (*Bilaram, A. J. C.*) FIRM of MOTHARAM DOWLATRAM v. GOPALDAS. 80 I. C. 141.

—S. 28 (5)—*Partner's share in assets—If can be attached and sold.*

S. 28 (5) cannot be construed to mean that it is not the whole property but only the property which is liable to attachment and sale under S. 60, C.P. Code, which vests in the official Receiver. An insolvent partner's share of assets in a partnership vests in the Receiver and can be attached and sold. (*Kennedy and Bilaram, A. J. C.*) SETH VISHINDAS NIHALCHAND v. THAWERDAS. 80 I. C. 642 : 1925 Sindh 18.

—S. 28 (6)—*Second creditor—Charge—Rights of.* MOTI RAM v. RODWALL. 76 I. C. 749.

—S. 29—*Suit against insolvent—Adjudication, not known to plaintiff—Permission of Insolvency Court not obtained—Effect.*

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S. 29 of Act V of 1920 contemplates not only a suit filed before an order of adjudication but also one filed after the order but in real ignorance of it. In such a case the procedure is not to obtain permission under S. 28 from the Insolvency Court but the civil court can under S. 29 either stay the suit or continue it under such terms as it thinks fit. (*Hallifax, d. J. C.*) *UMAR SHARIF v. JWALA PRASAD.* 1924 Nag. 800.

—S. 39 (4)—Rules framed by the Madras High Court—R. 21 (b)—Creditor—Claim for final dividend—Notice—Form of—Strict compliance necessary.

Under R. 21 (b) of the Rules framed by the Madras High Court under the Provincial Insolvency Act (III of 1907), the notice to be sent by the Receiver under S. 39 (4) of the Act should be in the form of a registered letter addressed to each creditor. If the Receiver proposing to declare a final dividend does not strictly comply with the provisions of the Rule and a creditor as a result of not getting such a notice fails to prove his claim and is therefore not given his dividend, he should be allowed to reopen the matter and be given an opportunity to prove his claim within a time to be fixed by the Court. (*Krishnan and Odgers, JJ.*) *VENKATANARAYANA CHETTY v. SEVUGAN CHETTY.* 20 L. W. 163 : 80 I. C. 620 : 47 Mad. 916 : 47 M. L. J. 240.

—S. 41—Order refusing discharge—Insolvent obstructing—Receiver.

Where an insolvent's assets were not of a value equal to 8 annas in the rupee and he obstructed the Receiver in paying debts, an order refusing to discharge him is proper. (*Kendall, A. J. C.*) *JAGMOHAM SINGH v. DEPUTY COMMISSIONER, FYZABAD.* 80 I. C. 54 : 1925 Oudh 112.

—Ss. 43 and 75—Application by creditor—Wrongful refusal of order of annulment—Appeal—"Aggrieved person"

An order of adjudication prevents an unsecured creditor from realising his debt except by receiving a dividend under the Act. Consequently an unsecured creditor would undoubtedly be a person aggrieved by the refusal to annul the order of adjudication. A creditor who is affected by the adjudication is certainly a person entitled to apply to the Court under S. 43 and if his claim is dismissed without proper reason for it, he will certainly be a person aggrieved under S. 75 and can appeal against the order. *Ex parte Sidebotham. In re Sidebotham.* (*Krishnan and Waller, JJ.*) *ARUNAGIRI MUDALIAR v. KANDASWAMI MUDALIAR.* 19 L. W. 418 : 34 M. L. T. (H.C.) 170 : (1924) M. W. N. 331 : 1924 Mad. 685

—S. 43—Creditor applying—If a person aggrieved—A, appeal

1924 Mad. 185.

—S. 51 (1)—Assets realised after the date of the admission of the insolvency petition—Sale held before such date—Rights of execution creditor.

The expression "date of the admission of the petition" occurring in S. 51 (1) of the Provincial Insolvency Act qualifies "assets realised" and

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therefore only assets realised before the date of the admission of the petition will enure to the benefit of the execution creditor.

Meaning of the expression "assets realised in the course of execution" considered. (*Wallace and Madhavan Nair, JJ.*) *K. M. K. R. K. R. RAMANATHAN CHETTIAR v. P. L. V. R. SUBRAMANIA CHETTIAR.*

1925 Mad. 248 : 20 L. W. 872 : 47 M. L. J. 759.

—S. 52—Execution—Sale of judgment-debtor's property—Pendency of insolvency petition.

There is no provision in the Provincial Ins. Act, which prohibits a court executing a decree from selling the judgment-debtor's property merely by reason of its having been given notice that an insolvency petition by him has been admitted. It is only when an application is made to the executing court for the delivery of the property that the court is required by S. 52 to direct the property if in its possession, to be delivered to the Receiver. Where no such application is made the court is at liberty to sell the property and the sale being legal, cannot be impeached by the Receiver or the creditors. (*Martineau, J.*) *RALLA RAM v. RAM LABHAYA MAL.* 6 Lah. L. J. 232. 80 I. C. 509 : 1925 Lah. 158.

—S. 52—Scope of—Property—Attachment under O. 21, R. 54—If can be directed to be handed over—Receiver—Who is—Costs of arbitration proceedings.

Where an attachment of immoveable property has been made under O. 21, R. 54, such property cannot be said to be in the possession of the Court so as to entitle a Receiver to apply for its possession under S. 52 of the Prov. Ins. Act. The section contemplates both moveable and immoveable properties in the possession of the Court.

The Receiver referred to in the section is the Receiver who is appointed after adjudication, and not an interim Receiver appointed under S. 20.

The costs of an arbitration cannot be treated as costs of the suit within the meaning of S. 52. (*Bilaram, A. J. C.*) *FIRM OF LYON LORD & CO. v. FIRM OF VIRBHANDAS RATTANCHAND.*

1924 S. 69.

—S. 53—Creditor—If can take action—Limitation.

S. 53 contemplates that action should be taken by the Official Receiver to set aside a fraudulent transfer, but this does not mean that no one else can set the law in motion even when the Receiver refuses or neglects to act. In such cases creditors can apply. Action can be taken at any time during the pendency of the insolvency proceedings and Art. 181, Lim. Act does not govern such an application. (*Moti Sagar, J.*) *DARYAI SINGH v. KUNJ LAL.* 1924 Lah. 553.

—S. 53—Order under—Second appeal—Question of law. See PRO. IN. ACT, S. 75.

78 I. C. 140.

—Ss. 53 and 55—Purchaser in good faith—Transfer of property to trustees—If protected.

Ss. 53 and 55 of the Pro. Ins. Act are taken verbatim from the English Bankruptcy Act and the expression "purchaser" in S. 53 is used in the wider sense commonly given to that term in

PROV. INSOLVENCY ACT (V OF 1920), S. 53.

English Law and not in the mercantile sense of a person who has bought something by a contract of purchase and sale. Where a debtor made over his whole property to trustees in order that the residue after paying his debts should go to his son, with an annuity for himself and his wife, the transfer is not avoided by S. 53 of the Act, 30 M. L. J. 415 foll. (*IVazir Hasan and Pullan, A. J. C.*) SHARF-UZ-ZAMAN v. DEPUTY COMMISSIONER, BARA BANKI. 10 O. & A. L. R. 514.

11 O. L. J. 599 : 79 I. C. 888 : 1 O. W. N. 201
1925 Oudh 28

S. 53—Receiver not appointed—Remedy.

Where no Receiver has been appointed, an application under S. 53 can be maintained by a creditor based on which the Court can take the necessary action. (*Baker, J. C.*) SETH SHEOLAL v. GIRDHARILAL. 1924 Nag. 361.

S. 53—Sale set aside—Consideration for redeeming Mortgage—Vendee a scheduled creditor.

When a sale of property to pay off a mortgage is annulled under S. 53, the vendee is entitled to stand in the shoes of the mortgagee and is a secured creditor to that extent. The maxim *in pari delicto* will not apply to a case where the object was frustrated. (*Hallifax, A. J. C.*) RAM PRASAD v. JASKARAN. 82 I. C. 489.

S. 53—Transfer prior to insolvency—Absence of consideration—Transferee paying part of consideration to mortgagee—Effect.

76 I. C. 1006.

S. 53—Voluntary transfer—Release deed by extravagant son in favour of father—Consideration.

It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent; for if a man does it with a view to his being indebted at a future time, it is equally fraudulent and ought to be set aside. A man can commit what may be compendiously called "anticipatory fraud" and effect a transfer of his properties with a view to get into debt and prevent his creditors getting at his property. 33 M. 205 : 5 Bom. L. R. 255. In cases of settlements by a son on his father in consideration of the former and his wife and children being maintained by the father, the question that has to be considered is the *bona fides* of the transaction. If the consideration is inadequate or is such that it was not a real consideration it may be taken as one item for deciding whether the transaction itself was *bona fide* or not. Under S. 53 of the Prov. Ins. Act what has to be proved is that the transfer was in good faith and for valuable consideration if the transfer is within 2 years of the insolvency, the burden being on the person asserting it to prove it. Both good faith and valuable consideration have to be proved by the alienee or by the person who supports the transfer. The circumstances under which the deed came to be executed, the covenants made in the deed and the conduct of the parties both at the time and subsequently have all to be taken into consideration and if it can be held that the transfer at the time was really intended to be carried out and was made *bona fide* for saving

PROV. INSOLVENCY ACT (V OF 1920), S. 58.

the insolvent from incurring debts and ruining himself it may be that the transfer will not be interfered with. But if on the other hand there are circumstances to show that the transfer was actually screening his properties from the reach of his future creditors, there will be good ground for holding that the transfer is a fraudulent one. (*Krishnan and Odgers, JJ.*) OFFICIAL RECEIVER, TANJORE v. VEDAPPA MUDALIAR.

(1924) M. W. N. 506 : 82 I. C. 450 :
1924 Mad. 865 : 20 L. W. 683 : 47 M. L. J. 431.

S. 54—Fraudulent preference—What is—Creditor giving fresh loan only as security being given for all debts—If preferred.

Before a transfer can be avoided under S. 54 of the Prov. Ins. Act, it must be definitely proved that in making the transfer in favour of a creditor, the debtor acted with the view of giving him preference over other creditors and the onus of proving that such fraud was intended is on the person who impugns the transfer. If the transaction was to obtain some advantage to himself it is not a case of preference.

Where a debtor could secure a loan from an old creditor of his only by giving security for all the debts due and he effected mortgage, it is not a fraudulent preference. (*Moti Sagar, J.*) DAULAT RAM v. DEOKI NANDAN.

1924 Lah. 686.

S. 54—Fraudulent preference of creditor—What constitutes—Dominant intention—Motives of insolvent.

In deciding whether an insolvent is guilty of a fraudulent preference in favour of a particular creditor, it has to be ascertained what was the dominant intention in the mind of the insolvent at the time when the act was done. It might result in a preference in favour of one creditor, but if the act was done by the insolvent not as a free agent but under pressure, or to avoid certain legal consequences with a view to benefiting himself as the primary consideration, then there can be no fraudulent preference. The mere fact that the act was done very shortly before the insolvent filed his petition to be adjudicated, no doubt raises the presumption that the act was intended as a fraudulent preference. But it is necessary to consider all the facts in the case and arrive at a decision as to what was the principal object of the insolvent in so acting. (*Rabinson, C. J., and May Oung, J.*) RAEBURN COMPANY v. ZOLLI KOFER & Co. 2 Rang. 193 : 83 I. C. 440 :
1924 Rang. 308.

Ss. 58, 59 (c) and (e), 68 and 80—Transfer of insolvency petition to Official Receiver for disposal of—Vesting order—Sale of properties by Official Receiver—Setting aside—Limitation.

On a petition by a debtor to be adjudicated an insolvent the District Court made an order transferring it for disposal to the Official Receiver. The Official Receiver made an order of adjudication. There was no order of the District Court vesting the properties of the insolvent in the Official Receiver. Nevertheless the Official Receiver purported to sell the properties of the insolvent in the course of administration. A creditor of the insolvent applied to set aside the sale more than 21

PROV. INSOLVENCY ACT (V OF 1920), S. 58.

days after the date of the sale and it was contended that the application was barred by S. 68 of the Provincial Insolvency Act. *Held*, (1) that the Official Receiver had no right to deal with the properties of the insolvent without an express vesting order of the District Judge; (2) that the indorsement made by the Judge on the insolvency petition was not tantamount to vesting the property of the insolvent in the Official Receiver; (3) that a vesting order could validly be made only after adjudication; (4) that the sale in the present case was made by a person not authorized by law and was therefore void; and (5) that S. 68 of the Provincial Insolvency Act which pre-supposed a decision by a Receiver properly appointed did not bar the present application. 41 M. L. J. 78; 39 M. L. J. 438; 43 M. 869; 30 M. L. J. 415 followed; 44 M. 547; 40 M. L. J. 209 distinguished. (*Krishnan and Odgers, JJ.*) KAVALI SANKARA RAO v. RAMA KRISHNAYYA. 19 L. W. 450 :

34 M. L. T. (H.C.) 2 : (1924) M. W. N. 198 : 1924 Mad. 461 : 78 I. C. 294 : 46 M. L. J. 184.

S. 60—Sale of insolvent's property by Receiver—Legality of.

A sale of immoveable property of the kind specified in S. 60 of the Prov. Ins. Act by the Official Receiver is invalid and inoperative. (*Kendal and Pullan, A. J. Cs.*) NAZIR HASAN v. MOULVI MATINUZZAMAN. 10 O. & A. L. R. 730 :

1 O. W. N. 337 : 11 O. L. J. 672.

S. 68—Application by creditor to District Court under—Parties—Official Receiver—Non-joinder of—Effect—Evidence taken by Official Receiver—Use of, at hearing of application—Permissibility—Evidence, additional—Admission of—Power of District Court.

A creditor whose claim had been disallowed in part by the Official Receiver applied to the District Judge under S. 68 of the Insolvency Act against the order of the Official Receiver. All the other creditors of the insolvent were made parties to that application, and opposed the same; but the Official Receiver was not made a party. The District Judge allowed the entire claim of the applicant. On appeal preferred by one of the opposing creditors against the order of the District Judge, *held*, (1) that his order was not vitiated by the fact that Official Receiver was not made a formal party respondent to the application before him, and (2) that he was entitled to act on the evidence given before the Official Receiver.

There is no provision in the Act obliging the District Judge in such a case to take fresh evidence, though it is open to him to do so if he thinks fit.

The fact that a creditor gives up his security and agrees to treat himself as an unsecured creditor for the amount due to him is not conclusive on the question that the money was not due as a personal debt. (*Krishnan and Odgers, JJ.*) KUMARASWAMI NADAR v. VENKATASAMI KOUNDAN. 19 L. W. 193 : (1924) M. W. N. 212 : 1924 Mad. 830 : 34 M. L. T. (H.C.) 337 : 78 I. C. 857 : 46 M. L. J. 242.

S. 68 — Scope of. MT. MAHARANA KUNWAR v. DAVID. 1924 A. 40

PROV. SMALL CAUSE COURTS ACT (IX OF 1887), S. 16.

S. 75—Appeal—Order of adjudication—Insolvent necessary party.

Where a creditor appeals from an order of adjudication, the insolvent is a necessary party to the appeal. (*MacLeod, C. J. and Shah, J.*) CHHOTUBHAI BHIMBHAI v. DAIJI BHAI UKABHAI. 26 Bom. L. R. 432 : 80 I. C. 482 : 1924 Bom. 472.

S. 75—Deputy Commissioner with powers of Sub-Judge—Appeal—To whom lies—Procedure.

In insolvency matters, appeals from orders of Deputy Commissioners who have been invested with the powers of Subordinate Judges lie to the District Court and not the High Court. Such an appeal if presented to the High Court should be dismissed.

Quære if the High Court has power under Act V of 1920 to return a memorandum of appeal to be presented to the proper Court. (*Suhrawardy and Graham, JJ.*) CHATTURBHUI MAHESRI v. HARLALL AGARWALLA.

80 I. C. 858 : 1925 Cal. 335.

S. 75—Second appeal—Order under S 53—Question of law.

A second appeal will lie under S. 75 Pro. Ins. Act against an order passed under S. 53, but only on a point of law as provided by S. 100, C. P. Code. (*Baker, J.C.*) SETH SHEOLAL v. GIRDHARILAL. 1924 Nag. 361.

S. 75 (2) and 53—Aggrieved person—insolvent—Appeal by—Order annulling alienation by insolvent.

It is not open to the insolvent to appeal against an order of the Court annulling a transfer as a fraudulent preference without notice to the alienee for the insolvent is not a person aggrieved thereby. (*C. C. Watson.*) MASTAN KHAN v. SYED MAHOMED KHASIM.

2 Mys. L. J. (B and C) 15.

S. 78—Scope of to excuse delay.

1924 Mad. 400 (1).

PROVINCIAL SMALL CAUSE COURTS ACT, Ss. 16 and 35—Suit instituted in the Court of a Munsiff with small cause powers—Suit decided by successor without small cause powers—Effect of.

A suit of a nature cognizable by a Court of Small Causes was instituted before a Munsiff invested with small cause powers. The Munsiff was transferred before deciding the suit and his successor was not invested with small cause powers. The District Court directed him to try the suit under his original jurisdiction even though there was a subordinate court having small cause jurisdiction in the locality. *Held* that the suit should not have been tried by the Munsiff on the Original Side and that the decree was *ultra vires*. (*Wazir Hasaan, J.C.*) RAM LAKHAN v. MT JANKA. 10 O. & A. L. R. 741 : 1 O. W. N. 381 : 11 O. L. J. 662 : 80 I. C. 268 : 1925 Oudh 101.

S. 17—Attachment of immoveable property before judgment—Powers of Small Cause Courts—C. P. Code, Ss. 94 and 95.

It is competent to a court acting in the exercise of its jurisdiction as a court of small causes to make an order for the attachment of immoveable properties before judgment under O. 38 of

PROV. SMALL CAUSE COURTS ACT (IX OF 1877),
S. 25.

the C. P. C. but if the Small Cause Court passes an order for attachment before judgment of immoveable property it would have to send the order for execution to an ordinary Civil Court having jurisdiction. There is a difference between attaching property and making an order for attachment of property. (*Sanderson, C. J. Walmley, Newbould, Mukerji and Chotener, JJ.*)
BARADA KANTA RAY v. SHAIKH MAJUDDI.

28 C. W. N. 1056 : 82 I. C. 109 :
40 C. L. J. 199 : 1925 Cal. 1.

—S. 25—Decree obtained on mis-representation as to jurisdiction—Interference.

Where by false recitals in a plaint a court gets clothed with jurisdiction and passes a decree, it can be set aside in revision. (*Pullan, A. J. C.*). G. I. P. RY. COY. v. MATHURA DAS
80 I. C. 569 : 1925 Ouch 103.

—S. 25—Error of law.

Gross errors of law are not revisable under S. 115 Civil P. C. though they are revisible under S. 25 Sm. C. C. Act. (*Sulaiman, J.*) MATHURA PRASAD v. B. B. AND C. I. RAILWAY.

L. R. 5 A. 252 : 78 I. C. 434 : 1924 All. 691.

—S. 25—Finding of fact—High Court's power of revision.

Where a Small Cause Court records a finding that the alteration in a pronote was not made subsequent to its execution and further holds that the suit should be decreed even if the alteration is subsequent, its finding does not amount to a clear finding of fact and the High Court is entitled to interfere under S. 25 of the Small Cause Courts Act (*Dalal, J. C.*) ZULFIKAR AHMAD v. ROBERT ELLIOT.

1 O. W. N. 605 : 10 O. & A. L. R. 1008

—S. 25—Interference—Mistake of law.

If a mistake of law committed by the Court below is such as is not shown to have affected the result of the suit, it is not sufficient to justify interference in revision. (*Macpherson, J.*) LUTHER SAHU v. DOMAN RAM 1924 Pat. 793. (1).

—S. 25—Return of plaint for want of jurisdiction—Order, whether open to revision.

An order returning a plaint on the ground that the Court has no jurisdiction amounts to the Court having 'decided' the case within the meaning of section 25 Prov. Small Cause Courts Act and is open to revision. 13 C. W. N. 403 dissented from. 15 C. W. N. 666 referred to and 41 A. 42 followed. (*Dalal, J. C.*) DHANI RAM v. MAIKOO LAL.

1 O. W. N. 937.

—Sch. II, Cl. 4—Suit for price of manure—Interest in immoveable property.

A suit by a Zemindar for the recovery of the price of the manure which he alleged belonged to him because of his interest in the village is for the recovery of an interest in immoveable property and as such exempted from the cognizance of a Small Cause Court under Sch. II, cl. 4 of the Prov. S. C. C. Act. (*Dalal, A. J. C.*) SRI RAGHU-NATH v. ANTOO.

10 O. & A. L. R. 208 :
80 I. C. 740 (2) : I. R. 5 O. 87.

PROV. SMALL CAUSE COURTS ACT Sch. II
Art. 8.

—Arts. 4 and 11—Suit of Small Cause nature—Suit for sum of money payable under a covenant in a sale deed.

Plaintiff's predecessor in title sold certain lands to the defendant's predecessor-in-title and the latter agreed to pay the former and his descendants a sum of Rs. 20 annually for worship of God. The defendant purchased the lands from a purchaser from the original vendee. In a suit by the plaintiff to recover the amount due on the covenant, *Held*, that the suit was of a nature cognizable by the Small Cause Court. (*Rajnik and Ghose, JJ.*) MOHINI MOHAN RAI v. RAMDAS.

28 C. W. N. 271 : 80 I. C. 210 : 1924 Cal. 487 :
39 C. L. J. 532.

—Sch. II, Art. 8—Bhagdar—Suit for paddy and straw or their value—Suit if cognizable by Small Cause Court.

Plaintiff sued for the recovery of a sum of Rs. 49 alleged to be due as price of bhag paddy and straw. The plaintiff alleged that the land had been settled with the defendant and that the latter had stipulated to deliver to the plaintiff in Falgun month every year a half share of the paddy that would be grown on the land and in case of default would be liable to deliver 25 per cent. more as *bridhi* or interest in accordance with usage; that the debt, in accordance with the aforesaid promise or stipulation, after having taken settlement of the land, cultivated the land and grew paddy and straw of which the quantities were stated and the price of half thereof was claimed with interest. *Held* that the suit was cognizable by a small cause court, there being nothing in the contract showing a tenancy conclusively. (*Mukerji, J.*) JADAB CHANDRA SANTRA v. GOPAL CHANDRA DEB NATH.

28 C. W. N. 848 : 82 I. C. 94 :
1924 Cal. 837.

—Sch. II, Art. 8—Grazing land—fixed rate for cattle—Suit to recover rent if cognizable.

The plaintiff obtained a lease of some grass-land situated in the Cawnpore Cantonment from the Cantonment Committee. He sub-let that land for grazing purposes to another person at a fixed rate per cattle. The present suit was filed by him for the recovery of the rent payable by the latter. *Held*, that the suit was clearly one for the rent of the grazing area let to the defendant; and it was excluded from the cognizance of the Small Cause Court by Clause 8 of Schedule 2 of the Provincial Small Cause Courts Act (No. IX of 1887) (*Kanhaiya Lal, J.*) AUSERI LAL v. MULL-HAN.

L. R. 5 A. 217 : 22 A. L. J. 339 :
78 I. C. 345 : 10 O. & A. L. R. 454 :
46 All. 369 : 1924 A. 557.

—Sch. II, Art. 8—Rent—what is—Damages for use and occupation—If excluded.

Rent in Art. 8 is used in the ordinary sense of a return in money or kind for the enjoyment of specific property held by one person from or under another. A suit for damages for use and occupation of land held by defendant as trespasser is not a suit for rent and is not excluded from the cognizance of the Court of Small Causes. (*Moti Sagar, J.*) GAJJAR v. GURU SURDUL SINGH.

78 I. C. 383 : 1925 Jah 196 (1).

PROV. SMALL CAUSE COURTS ACT, Sch. II,
Art. 8.

—Sch. II, Art. 8—*Suit for rent—Suit for recovery of a share of the produce payable by Bhargdar.*

A suit for recovery of a share of the produce payable by a Bhargdar or its price is not rent "Bhargdar" would ordinary mean a cultivator who is a servant or labourer under the holder of land 14 C W. N. 629 Ref (N. R. Chatterjea, J.) RAHIMUDDIN MOLLAH v. NIROD BARANI DEBI. 40 C. L. J. 197 : 1924 Cal. 1036 (1).

—Sch. II, Art. 8—*Suit for rent—Homestead land—Second appeal.*

A suit for rent of homestead land is excepted under Art. 8 of Sch. II from the cognizance of a Small Cause Court and even if the value is less than Rs. 500, there is a right of second appeal. (Suhrawardy and Cholsner, JJ.) SHEBAITS OF IDOL SRIDHAR JIN v. NALINAKSHA RAI

79 I. C. 557.

—Sch. II, Art. 11—*Questions of title—Decision on—How far binding.*

A Small Cause Court has no jurisdiction to decide question of title and any decision thereon is not a binding adjudication. (Baker, J. C.) RAMBUX v. MOTI. 20 N. L. R. 70 : 78 I. C. 872 : 1924 Nag. 256.

—Sch. II, Art. 15—*Suit for recovery of purchase money on refusal to perform the contract—Jurisdiction of Small Cause Court.*

A suit for the recovery of purchase money on the defendant's failure to fulfil the performance of a contract is cognisable by a Court of Small Causes.

Held also, that if there was a contract and defendants refused to perform it, plaintiff was at liberty under S. 39 of the Indian Contract Act to put an end to it and in his doing so defendants were bound to restore the sum paid to him. Held also, that the Plaintiff is not entitled to interest, on the purchase money paid, either under the Interest Act or under any other principle which can be applied 5 M. L. T. 296 not relied upon. (Reilly, J.) SUNDARA THEVAN v. ANANTHAN KALADI. 35 M. L. T. 116 (H. C.) : 20 L. W. 656 : 1924 Mad. 903.

—Sch. II (15)—*Suit for specific performance—Suit on awards.*

Where a plaintiff sues for compensation in pursuance of an award of arbitrators made without reference by a Court is in substance a suit for specific performance of a contract and is therefore exempt from the jurisdiction of a Small Cause Court. 29 C. W. N. 66 Foll. (Pratt, J.) MA HAL GYI v. MAUNG SEIK PO. 1 R. 700 : 79 I. C. 718 (1) : 1924 Rang. 192.

—Sch. II, Art. 19—*Suit to recover articles from stake holder—If of a small cause nature.*

A suit to recover articles in the possession of a stake holder who does not set up title in himself but is willing to hand them over to the true owner, and the other rival claimants are also defendants in the suit is one of a declaratory nature which is expressly exempted under Art. 19 (Sulaiman, J.) SITAL PRASAD v. DUKHI LAL.

80 I. C. 409.

PROV. SMALL CAUSE COURTS ACT, Sch. II,
Art. 35.

—Sch. II, Art. 28—*Scope of.*

Art. 28 contemplates a suit between rival claimants when the relief claimed is to recover a share of the estate and not only an item of the estate as against a third party. (Sulaiman, J.) SITAL PRASAD v. DUKHI LAL. 80 I. C. 409.

—Sch. II, Arts. 35 and 43—*Landlord and tenant—Trees—Dispute as to—Suit for value of trees appropriated by tenant—Suit if triable by Small Cause Court*

A landlord sued for the recovery of a mango tree or its value alleging that the defendants (tenants) had no right to sell the fallen wood and appropriate its price.

Held, that the allegation of the plaintiff amounted to a charge of criminal misappropriation of the wood and Cl. 35 of Sch. II of the Prov. Sm. C. C. Act excluded it from the jurisdiction of a Small Cause Court Cl. 43 (A) of the Schedule would be similarly applicable. (Kanhaiya Lal, J.) MAN SINGH v. MADHO SINGH.

22 A. L. J. 70 : L. R. 5 A. 34 (Rev),
79 I. C. 599 : 1924 All. 430.

—Art. 35—*Suit for compensation for wrongful removal of trees—Not exempted from cognizance of Small Cause Court* MIRZA DILBAR HOSSAIN v. SADARUDDIN CHOUDHURI. 77 I. C. 77.

—Sch. II, Art. 35 (2)—*Detention of property by borrower—Suit to recover.*

A borrower who merely detains property lent to him beyond the period within which he was expected to return it, cannot be held to be guilty of the offence of criminal breach of trust. Consequently a suit for the recovery of the property or its price is not excluded from the jurisdiction of the Small Cause Court. (Walsh, A. C. J. and Neave, J.) LALA MAKHAN LAL v. LALA BIHARI LAL. L. R. 5 A. 422 : 46 A. 688 : 80 I. C. 627 : 1924 A. 571.

—Sch. II, Art. 35 (ii)—*Dispute as to crops Possession of trustee—Removal of crops from trustee—Suit for compensation.*

On a dispute arising as to the title to certain crops, they were placed with a trustee. One of the disputants took them away and the other sued him for the price. Held, the act of removal would not amount to theft and hence the suit would not fall within Art. 35 (ii) and the court of Small Causes had jurisdiction to try the case. (Dalal, J.) SHIAM SUNDAR RAM v. RAM HET.

81 I. C. 1029 (1) : L. R. 5 A. 648.

—Sch. II, Art. 35 (ii)—*Misappropriation of silver—Suit for value—If maintainable in Small Cause Court.*

Where silver given for making into ornaments is mis-appropriated, a suit for recovering its value is not cognizable by a Small Cause Court as it is exempted under Sch. II Art. 35 (ii) of the Pro. Sm. Cause Courts Act. (Lumsden, J.) RAGHBIR SINGH v. SINGH RAM. 1924 Lah. 668.

—Sch. II, Art. 35 (ii)—*Trees cut and removed—Suit for damages—If cognizable by Small Cause Court.*

Where defendant cuts and removes trees belonging to another it amounts to mischief or

PROV. SMALL CAUSE COURTS ACT, Sch. II, Art. 35.

theft and hence a suit for damages falls under Sch. II, Art 35 (ii) and is outside the cognizance of a Court of Small Causes. (*Martineau J.*) **SUNDAR MAL v. KAMAL LIN.** 79 I. C. 138.

——— **Sch. II, Art. 35 (g)—Suit for return of money and ornaments given in anticipation of marriage—If maintainable.**

A suit for return of ornaments and moneys expended in consequence of a marriage which had been arranged but which fell though is not cognisable by a Court of Small Cause. (*Boys, J.*) **RAGHURAJ SINGH v. MT. SHAM DEI.**

81 I. C. 370 (1) : L. R. 5 A. 685 : 1925 A. 51.

——— **Sch. II, Art. 35 (j)—Suit for value of trees cut and removed—If cognisable by Small Cause Court.**

Where in execution of a decree against a tenant trees belonging to the landlord are sold in auction and the purchaser cuts and removes the trees, a suit by the landlord for the value of such trees is excluded from the cognizance of the Small Cause Court. (*Lindsay, J.*) **GANESH DAS v. RAJA SURAJ PAL SINGH.**

1924 A. 537 : 78 I. C. 371 : 46 A. 233.

——— **Sch. II, Art. 41—Payment of Government Revenue in excess of his share by one co-sharer—Suit for contribution—Jurisdiction of Small Cause Court.**

Plaintiff and defendants were joint co-sharers of property in certain villages. Imperfect partition was effected and a jamaphant of the revenue allotting separate liability to each of the co-sharers was prepared. The plaintiff paid more of the revenue than was due for his share and sued to recover the excess payment from the other sharers. *Held*, that the suit was not one for contribution but for re-imbursement and that the suit was maintainable in the Small Cause Court. (*Neave, A. J. C.*) **MOULA BAKHSI SINGH v. AHBARAN SINGH.** 10 O. & A. L. R. 1056.

——— **Sch. II, Art. 41—Suit for contribution—Jurisdiction of Small Cause Court.**

A joint owner of joint property sued his co-owners for contribution in respect of a sum that he had paid to the proprietor on their account. The suit was tried by a Small Cause Court without any objection to jurisdiction. The Court dismissed the suit because the respective specific liabilities of the defendants could not be determined. *Held*, on revision that the suit was not cognisable by a Small Cause Court, being excluded by Art. 41 of Sch. II of the Prov. Sm. Cause Courts Act. Under the circumstances of the case the High Court was justified in interfering under S. 25 of the Act. (*Kendall, A. J. C.*) **SHIAM NARAIN PANDE v. HUBDAR KHAN.**

81 I. C. 566 : 10 O. & A. L. R. 364 : 1925 Oudh 88.

PUBLIC GAMBLING ACT, Ss. 4, 5 and 8—Forfeiture—Money found in possession of person in a gaming house.

25 Cr. L. J. 321 : 71 I. C. 177 : 1924 P. 42.

——— **S. 5—Powers of Superintendent—Warrant for search of house—Omissions corrected by sub-Inspector—Legality of arrest.** 1924 A. 128.

PUNJAB COURTS ACT, S. 41.

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900)—Notification under—Kureshi tribe—Notification if retrospective. **MIRAN BAKSH v. MILKHI RAM.** 76 I. C. 135.

——— **Ss. 2, Cl. 3 and 15—Sale of trees growing on agricultural land—Whether a sale of land—Burden of proof.**

Trees growing on agricultural land are not "land" within the meaning of S. 2, Cl. 3, of the Punjab Alienation of Land Act and it is for those who assert it to prove that the Act prohibits the sale of trees. Where an agreement is made under which standing trees are sold with a covenant entitling the purchaser to cut them at any time within ten years, there is nothing in S. 15 of the Act which prohibits such a transfer. S. 15 applies to the sale of trees which might be produced on the vendor's land for a period of more than one year. (*Scott-Smith and Fford, JJ.*) **ACHHRU MAL v. MAULA BAKHSI.**

5 Lah. 385 : 1925 Lah. 29.

PUNJAB COURTS ACT—Sale of land—Duty of Civil Court to enforce sale—Benefit of third person.

A Civil Court has no power to decline to enforce a contract which is legal and binding in every respect and on the face of it as between the parties, on a mere assumption that in reality it is intended for the benefit of a third person against whom a statutory prohibition to enter into such a contract exists under the Punjab Land Alienation Act. (*Moti Sagar, J.*) **SHAMS-UD-DIN v. ALLAHA DAD KHAN.**

6 Lah. L. J. 351 : 1925 Lah. 29.

——— **S. 41 (3)—Custom—Right of respondent to question—Certificate.** 1924 Lah. 368.

——— **S. 44—No revision lies from interlocutory orders.**

An interlocutory order cannot constitute a "case" within the meaning of S. 44, Punjab Courts Act and C. P. Code, S. 115. The High Court has no jurisdiction to entertain an application for the revision of an interlocutory order. 60 P. R. 1897 Dissented from. (*Shadi Lal, C. J., Le Rossignol, Broadway, Abdul Raoof and Martineau, JJ.*) **FIRM OF LAL CHAND MANGAL SAIN v. FIRM OF BEHARI LAL MEHRCHAND.**

5 Lah. L. J. 288 : 1924 Lah. 425.

——— **(VI OF 1918), S. 39—Pre-emption suit—Valuation for jurisdiction less than Rs. 5,000—Decree for more—Appeal—Forum.**

Where a pre-emption suit was valued at less than Rs. 5,000, being 30 times the land revenue, but a decree was given on paying a sum larger than Rs. 5,000, the appeal lies to the District Court and not the High Court. (*Scott-Smith and Moti Sagar, JJ.*) **MALHA v. BISHAN SINGH.**

76 I. C. 196 : 1925 Lah. 41.

——— **Ss. 41 and 44—Custom—Question of Certificate.**

Where a question of custom is involved in a case in appeal, the court should consider if a certificate should be granted for purposes of appeal. (*Abdul Raoof and Harrison, JJ.*) **HAR PHUL v. BHAGMAL.** 79 I. C. 488 : 1925 Lah. 82.

PUNJAB COURTS ACT, S. 41.

———S. 41, Cls. (1), (a), (b), (c) and (3)—*Custom—Finding as to—Certificate—Necessity for.*

Whether, rightly or wrongly, the lower appellate court has held that a custom exists, applicable to the parties, by which collaterals, no matter how remote, succeed in preference to a sister's son, the decision about the existence of a custom cannot be attacked in second appeal on any of the ground set forth in S. 41 (1) (a) (b) (c) of the Punjab Courts Act without the Lower Appellate Court's certificate in terms laid down in S. 4 (3) of the Act. (*Campbell and Zafar Ali, JJ.*) UTTAM SINGH v. MUNSHI.

6 Lah. L. J. 261 : 80 I. C. 527 :
1925 Lah. 145.

———S. 41 (3)—*Appeal without certificate—Question of custom.*

The question raised in appeal was the existence of a custom by which a Jat could contract a valid marriage with a Chhimbi woman whose first husband though alive, had repudiated her. Held, the words "notwithstanding anything in sub-section (1) of this section", with which sub-section (3) of S. 41 of the Punjab Courts Act commences preclude a Court of second appeal in the absence of a certificate from going into the question of whether the first appellate Court had erred in law or procedure. (*Campbell, J.*) LEHNA SINGH v. JAGAT RAM.

1923 Lah. 377.

———S. 41 (3)—*Custom—Finding as to—Objections in second appeal—Certificate.*

All that is laid down in S. 41 of the Punjab Courts Act is that no appeal lies to the High Court regarding the validity or existence of any custom without a certificate by the Judge of the Lower Appellate Court. There is no provision that when once an appeal has been properly filed, a certificate should be required at any subsequent stage of the hearing. The proviso to sub-sec. (3) lays down that an application under sub-sec. (3) shall not be received after the expiration of thirty days from the date on which the decree of the Lower Appellate Court was passed and this proviso, clearly shows that the provision as to a certificate was only intended to apply as a condition precedent to the filing of an appeal and not as a condition precedent to the challenging of a finding on a question of custom remanded to the Lower Appellate Court. Once an appeal has been legally instituted in the High Court the appellant can contest at the hearing any findings of the Lower Appellate Court as regards custom which are against him so long as he has taken exception to them in his grounds of appeal. This is his right and we do not think that it should be taken away from him unless there is a clear provision of the law to this effect. (*Scott-Smith and Harrison, JJ.*) RAM MEHR v. PALI RAM.

78 I. C. 404 : 6 Lah. L. J. 145 :
5 Lah. 268 : 1924 Lah. 455.

———S. 41 (3)—*Order of District Judge granting certificate—Separate certificate not necessary.*

A separate certificate is not required by S. 41 (3) of the Punjab Courts Act apart from the order granting the same. To meet the requirements of the section the application for the certificate can

PUNJAB LAND REV. ACT, S. 44.

be read along with the order. (*Martineau and Motisagar, JJ.*) BASHU RAM v. PIARA CHAND.
75 I. C. 938.

———S. 44—*'Case' meaning of.*

The word case, as was held in 60 P.R. 1897, does not necessarily mean the whole case, but it must at least mean a particular branch of a case for which an independent remedy or different procedure is provided by the Code. An order that the suit can be brought in its present form, i.e., as a suit for administration and rendition of accounts is not open for revision, (*Brasher, J.*) ABDUL HAFIZ v. MT. RASHIDA KHATUM.

75 I. C. 662 : 1923 Lah. 288 (1).

PUNJAB CUSTOM ACT (II OF 1920), Ss. 5, 6—*Scope of—Appointment of heir—Suit contesting.*

Under S. 5 of Punjab Act II of 1920, nothing in the Act is to apply to any appointment of an heir by a female. S. 6 deals only with the case of an allegation that the appointment of an heir is contrary to custom. (*Campbell, J.*) RICHPAL v. MULA.

1924 Lah. 675 (1).

PUNJAB EXCISE ACT (I of 1914)—*Possession of country liquor—Terms of the license.*

1924 Lah. 73.

PUNJAB LAND ALIENATION ACT—*Applicability.*

The Land Alienation Act does apply to a case where the service of notice of foreclosure is effected within one year before the Act came into operation. The proceedings for the enforcement of foreclosure of mortgage comprising a stipulation of conditional sale remain pending until the year of grace has expired. (*Le Rossignol and Harrison, JJ.*) BAJRANGDAS v. GHANI RAM.

1923 Lah. 299 (2).

PUNJAB LAND REVENUE ACT (XVII OF 1887) S. 31 (2)—*History of District—If part of, Record of Rights.*

The History of a district attached to a Settlement Record does not form part of the Record of Rights as it is not one of the documents specified in S. 31 (2) Punjab Land Revenue Act. (*Martineau and Moti Sagar, JJ.*) MUHAMMAD KHAN v. SULTAN AZAM.

1924 Lah. 639.

———S. 44—*Record of Rights—Entries—Weight due to—Extraneous matter—Pedigree—Record of.*

An entry in a Record of Rights is not necessarily conclusive. It is an entry to which the presumption of correctness attaches under S. 44 of the Punjab Land Rev. Act until the contrary is proved by legal evidence. If the entries themselves are inconclusive or appear on the face of them to be erroneous, a Court would be justified in not accepting them. Where the lower appellate Court has held on evidence that the presumption of correctness attaching where entries in the Record of Rights has been relied on this is a question of fact which cannot be examined in second appeal. It is doubtful whether the presumption of correctness extends to entries in a pedigree and with reference to an extraneous matter, (*Broadway and Fforde, JJ.*) WALI MAHOMED v. MAHOMED BAKHSI.

5 Lah. 84 :
80 I. C. 998 : 1924 Lah. 444.

PUNJAB LAND REV. ACT, S. 117.

—S. 117—*Revenue officer's order on title—Appeal—Forums.*

An appeal from an order by a Revenue officer under S. 117 (2) of the Punjab Land Revenue Act lies to the District Court or High Court according to the value of the subject matter. Where the value is Rs. 1500 the appeal lies to the District Court. (*Broadway and Abdul Raoof, JJ.*) MT. BHAGWANI v. NET RAM.

82 I. C. 243 (1).

—S. 158—*Suit for declaration that lands are Shamilat—If cognisable by Civil Court.*

A suit for declaring that certain lands were Shamilat and were liable to partition on that basis is cognisable by a Civil Court. (*Martineau and Zafar Ali, JJ.*) GELA LAM v. SOHNA RAM

78 I. C. 68.

—S. 158—*Civil Court—Jurisdiction—Partition—Excess area allotted—Suit for.*

Where on a partition of *shamilat*, more than the proper share is allotted to the defendant, a suit for recovery of the excess is not excluded from the jurisdiction of a civil court. (*Moti Sagar, J.*) KHANU v. RAJA. 78 I. C. 1029: 1925 Lah. 97.

—S. 158 (2) (xviii)—*Civil Court—Jurisdiction—Suit for land wrongly allotted to defendant on partition.*

Where a suit is filed for possession of land which is alleged to have been wrongly allotted to the defendant in partition proceedings, it falls within S. 158 (2) (xviii) of the Punjab Land Revenue Act and is not cognisable by a civil court. (*Abdul Raoof and Moti Sagar, JJ.*) AMIR KHAN v. HOWNA RAM. 76 I. C. 6: 1925 Lah. 37.

PUNJAB LIMITATION ANCESTRAL LAND ALIENATION ACT (I OF 1900), Sch. 1—*Heir—Meaning of—Suit by remote reversioner for possession.*

77 I. C. 274.

PUNJAB LIMITATION CUSTOM ACT, (I OF 1920)—*Suit on behalf of minor reversioner instituted at date when suit by major reversioner would be barred. See CUSTOM.* 6 L. L. J. 339.

PUNJAB MUNICIPAL ACT (III OF 1911), S. 3 (2)—*Definition of building—Moveable wooden shed on wheels—Whether a "building"*

The petitioner constructed on his own land, a wooden shed, which was not fixed to the ground, but was mounted on wheels. No notice of an intention to erect was given to the Municipality under S. 189 of the Punjab Municipal Act. The petitioner was prosecuted for having disobeyed the notice of the committee to demolish the shed under S. 195 of the Act. *Held* on revision, (1) That the shed in question was intended to be a permanent fixture to his site and would come within the wide definition of a 'building' in S. 3 (2) of the Act. The fact that its structure permitted it to be moved from one place to another did not render it inapplicable to the description "of hut or shed" (2) That structures not affixed to the soil should be held to be buildings in spite of the fact that they were not let into the ground. *Stevens v. Guntay* 1859 L. J. C. P. 1. and *Richardson v. Brown*. 49 J. P. 661 followed. (*Campbell, J.*) NANDU MAL v. MUNICIPAL COMMITTEE SIMLA. 5 Lah. 543.

PUNJAB MUN. ACT (III OF 1911), S. 175.

—S. 3 (13)(a)—*Scope.*

'Accessible to the public' means open to all the public in fact, whether by right or permission. (*Shadilat, C. J. and Fforde, J.*) ABDUL HUSSAN KHAN v. THE MUNICIPAL COMMITTEE, DELHI. 1923 Lah. 417.

—Ss. 33, 152 and 428—*Powers of Municipal Committee—Delegation to President—Prosecution for offences under the Municipal Act.* MT. GULZAR JAN v. EMPEROR. 1924 Lah. 60.

—Ss. 56 (4), 131—*Private well—User by public—If vests in Municipality—Powers of latter.*

The mere fact that the owner of a well allows the public to draw water from his well does not make it a public well and vest it in the Municipality. If it is kept in a state which would be injurious to the health or offensive to the neighbours, the Municipality can ask the owner to clear it or repair it. (*Abdul Raoof and Lumsden, JJ.*) NUR AHMAD KHAN v. MUNICIPAL COMMITTEE, AMRITSAR. 1924 Lah. 511.

—Ss. 84 and 86—*Scope of—Appeal against taxation—Right to contest legality—Jurisdiction of civil court*

Sec. 84, Punjab Municipal Act, lays down the procedure to be adopted when a person wishes to contest the levy of any tax. Sec. 86 does not deprive persons of their ordinary remedies under Common Law such as by testing the legality of the action in a court of law. (*Broadway, J.*) THE MUNICIPAL COMMITTEE, PIND DADAN KHAN v. BHAGWAN SINGH. 1924 Lah. 619.

—S. 152—*Keeping a brothel—Inmate of house committing prostitution—Owner if brothel keeper.*

Where a person who lives in the house of another commits prostitution, the owner cannot be called a brothel keeper or the house a brothel. (*Martineau, J.*) MT. RAHTO v. EMPEROR. 25 Cr. L. J. 634: 81 I. C. 122: 1925 Lah. 146.

—S. 155—*Scope of—Notice under.*

No notice is necessary as a condition precedent for prosecuting those who violate ordinary rules of sanitation, but S. 155 contemplates only recent and temporary breach of the rules and the person prosecuted thereunder can successfully plead that he had been using the premises for the purpose objected to for a long period. (*Zafar Ali, J.*) ALLAH BAKSH v. EMPEROR. 77 I. C. 495. 25 Cr. L. J. 415: 1924 Lah. 670.

—S. 175—*Encroachment—Order for removal—When court can question.*

Where a municipal committee acting *intra vires* and without malice or dishonesty orders the removal of a structure as being an encroachment in a street, a civil court cannot question the same. (*Harrison and Moti Sagar, JJ.*) MUNICIPAL COMMITTEE, JHANG v. DEVI DAL. 1924 Lah. 699.

—S. 175—*Notice of removal of projection—Tender of compensation.*

1924 Lah. 89.

PUNJAB MUNICIPAL ACT (III OF 1911), S. 189.

—Ss. 189 (3) & 193—*Building not abutting a road—No conditions enforceable*

The committee has no power to enforce conditions regulating the line of frontage unless the intended building abuts on a street. S. 193 empowers the committee to refuse sanction to build or grant sanction either absolutely or subject to such modification as it may deem fit in respect of all or any of the matters specified in sub-section 3 of S. 189. That is to say, the Committee may refuse permission to build at all, but if permission is granted it can only impose such conditions as are provided for in the sub-section. (*Shadi Lal, C.J. and Fforde, J.*) *ABDUL HASSAN KHAN v. THE MUNICIPAL COMMITTEE, DELHI.*

1923 Lah. 417.

—S. 214—*Prohibiting prostitution being carried on within a specific area—No time fixed—Order of Secretary fixing time—Ultra vires.*

A Municipal Committee passed a resolution prohibiting prostitution within a certain area, but did not fix a specific time after which it would be carried out. The Secretary fixed a period of 7 days for the coming into force of the prohibition. Held it was invalid. (*Martineau J.*) *MT. RAHTO v. EMPEROR.*

25 Cr. L. J. 634 : 81 I. C. 122 : 1925 Lah. 146.

—Ss. 219, 172 and 195—*Composition order. THE MUNICIPAL COMMITTEE, MULTAN v. MOTI RAM,*

25 Cr. L. J. 373 : 77 I. C. 421.

—S. 242—*Powers of Local Government—Imposition of taxes—Notified Areas. NOTIFIED AREA COMMITTEE, UNA v. AMAR SINGH.*

1924 Lah. 361.

—S. 242 (1) (a)—*Notification under—Profession tax—Naib Tahsildar liable to pay. PALA RAM v. THE NOTIFIED AREA COMMITTEE KOT-TADU.*

1924 Lah. 147.

PUNJAB PRE-EMPTION ACT (II OF 1905), S. 3.

—*Gopalpur Tea gardens are agricultural lands.*

Tea gardens of Gopalpur Tea Estate are agricultural lands within the meaning of S. 3, Sub-S. 1 of the Pre-emption Act. (*Lord Sharn*) *KAJU MAL v. SALIG RAM.*

3 M. L. T. (P.C.) 470 : (1924) M. W. N. 172 : 1924 P. C. 1 : 10 O. & A. L. R. 261 : L. R. 5 P.C. 55 : 51 I. A. 11 : 79 I. C. 946 : 1 O. W. N. 242 : 22 A. L. J. 40 : 46 M. L. J. 536.

—S. 15 (b)—*Widow—If can pre-empt—Co sharer—Shamilat land. MT. AMER NISHAN v. KANSHI RAM.*

1924 Lah. 333.

—S. 16 (2)—*Scope of—Building or structure—What is—Owner's right of pre-emption.*

1924 Lah. 172 : 5 L. J. 548.

—S. 22—*Market value—Determination of*

In a suit for pre-emption where the plaintiff impugns the price mentioned in the sale deed the onus is on the vendee to prove the price stated in the sale deed was actually paid apart from a mere public transfer before the sub-registrar. The price actually proved to have been paid is the best test of market value; but failing that, capitalisation of the rent fixed in a year affords a good basis. Records and rules do not afford a good test. (*Pipon, J. C.*) *AHMADJI KHAN v. GULMIR.*

75 I. C. 271.

PUNJAB PRE-EMPTION ACT (I OF 1913), S. 16.

—(I OF 1913) S. 3 (1)—*Agricultural land—What is.*

The question whether land is agricultural land for the purposes of the Punjab Pre-emption Act is one of law. The test to be applied is the use to which the land is put at the time of the sale. When it has not been used for agricultural purposes for more than 6 years preceding the sale, it is not agricultural. (*Shadi Lal, C.J. and Le Rossignol, J.*) *GOPI MAL v. MUHAMMAD YASIN.*

1924 Lah. 657 (1).

—S. 3 (2)—*Village—What is.*

The expression "village" connotes ordinarily an area occupied by a body of men mainly dependant on agriculture or occupations subservient thereto. (*Shadi Lal, C.J. and Le Rossignol, J.*) *DIWAN CHAND v. NIZAM DIN.*

1924 Lah. 662 (1).

—S. 5 Cl. (a)—*Sale of a shop and a house—Right of pre-emption.*

A property consisting of a shop and a house was sold for 2,700 Rupees. The question arose whether the property sold consisted of two units a shop and a house, or of one unit comprising both the shop and the house. The sale deed covered both properties but the properties were regarded as separate by the municipal committee who had given separate numbers to the two properties. They were also regarded as separate properties by the vendor inasmuch as a separate price was fixed in the deed for each property. There was a door of communication between the shop and the house but each property had a separate entrance. There was a common staircase leading to the roof of both properties and a common latrine on the roof of the shop. Held, that the properties consisted of two units and that the plaintiff's suit for pre-emption was maintainable only in respect of the house and not in respect of the shop. (*Le Rossignol and Harrison, JJ.*) *NARAIN SINGH v. MUL SINGH.*

6 Lah. L. J. 345 : 82 I. C. 596 : 1925 Lah. 126.

—S. 16—*Applicability of—Sale of undivided share in joint urban property—Co-sharer—Ownership of joint wall.*

There is no definition of co-sharer in the Punjab Pre-emption Act and it is not a term ordinarily used in statutes. Looking to the context of its appearance in other portions of the Act the intention of the Legislature was that the 1st clause of S. 16 should apply only to the sale of an undivided share or sharers in joint urban immoveable property and that the expression "co-sharer" should signify person owning a share or shares in the whole of the property or properties of which another share or other shares were the subject of sale. There is no authority for the proposition that a person who is a part owner of a small portion of one of the walls of a house, but has no rights of any kind in any other part whatsoever either of the building or of the site is entitled to call himself a co-sharer in the whole property within the meaning of S. 16 of the Act. The framers of the Act did not contemplate that when a house with a stair in a common stair-case was sold, the other owners of the stair-case should be regarded as co-sharers in the property

PUNJAB PRE-EMPTION ACT (I OF 1913), S. 22.

sold and there is no reason for supposing that they intended ownership rights in a common wall to confer a higher status upon a pre-emptor than such rights in a common stair-case. (*Broadway and Campbell, JJ.*) *RAJENDRA SINGH v. UMRAO SINGH.* 5 Lah. 298.

—S. 22, Sub-S. (4)—*Time fixed for payment—Default—Security—Acceptance of—Extension of time—C. P. Code, S. 99.*

In a suit for pre-emption instituted on 3-11-1919 the court ordered on 11-11-1919 the deposit of 1/5th of the purchase money into Court by 2-12-1919. On 2-12-1919 the case was adjourned because it was found that the process fee for summoning the defendants had not been paid. The purchase money was not paid till 23-2-1920 when the plff. put in a security bond which the Court ordered to be put on record. Subsequently the defendant applied to reject the plaint but the trial Court refused to do so and decreed the suit. *Held*, though the court had received and placed on record the security bond on 23-2-1920, that did not raise any inference that the Court had altered its previous order or extended the time within the meaning of S. 22 Sub-S. (4) of the Punjab Pre-emption Act. The provisions of the section requiring the rejection of the plaint are mandatory and the trial Court's omission to comply with the terms is not an irregularity which could be cured by S. 99, C.P. Code. Consequently the plaint was rejected on second appeal by the High Court. (*Scott Smith and Eforde, JJ.*) *BAHADUR SHAH v. AHMAD SHAH.* 5 Lah. 492.

—S. 22, Sub-S. (5), Cl. (a) and Sub-Ss. (2) and (1)—*Deposit withdrawn after decree—Pre-emptor's claim is not liable to dismissal.*

The word "so" in clause (a) refers to the preceding section and in the case of an appeal obviously relates to an action taken by an appellate Court under Sub-S. (2). The object of an order under S. 22 (1) is to guarantee vendees against frivolous proceedings on the part of possible pre-emptors. The deposit is a token of good faith and once the pre-emptor has obtained a decree the need for a deposit no longer exists so far as the trial Court is concerned. No doubt such deposits are available for the discharge of costs [S. 22 (3)] but such satisfaction is not the *raison d'être* of the deposit and there is nothing to suggest that a vendee appellant is entitled to any advantage of the kind. (*Lumsden and Abdul Raoof, JJ.*) *SANWAL DAS v. JAIGO MAL.* 1924 Lah. 68.

—S. 25—*Debt—Meaning of.*

Where the sale price represents mainly old debts which greatly exceed the market value of the property the Courts should fix the market value as the price and may put the vendee to the option specified in the proviso. The word "debt" in the proviso includes a mortgage debt. (*Scott-Smith, J.*) *JUG LAL v. GANGA RAM.* 1924 Lah. 716.

—S. 30—*Report to patwari—If amounts to physical possession—Cultivated land—Nature of possession necessary.*

In the case of uncultivated land physical possession can be taken even symbolically but there

PUNJAB TENANCY ACT, S. 59.

must be evidence of the same. Where lands sold were in the possession of a mortgagee and in the cultivating possession of tenant, they are incapable of being taken into physical possession. In such a case the mere reporting to the *patwari* that the vendor has relinquished possession and that the vendee has assumed it is no proof of the giving and taking of physical possession within the meaning of S. 30 of the Punjab Pre-emption Act. (*Le Rossignol, J.*) *THAKUR SINGH v. KARAM SINGH.* 82 I. C. 203 (2).

—S. 30—*Sale to lessee in possession—Suit for pre-emption—Physical possession.*

It is impossible for a person to take physical possession of property of which he has already got physical possession *e. g.* as a lessee and limitation for a pre-emption suit when the land is sold to the lessee runs from the date of mutation under S. 30 pre-emption Act. (*Moti Sagar, J.*) *SHEO RAM v. INDIRAJ.* 78 I. C. 57 : 1925 Lah. 152 (2).

—S. 30—*Vendee in possession as lessee—Suit for pre-emption—Limitation—Mutation.*

Where land in the physical possession of a lessee is sold to him, limitation for a pre-emption suit will run not from the date of sale but from the date of mutation under S. 30 of the Punjab Pre-emption Act. (*Martineau, J.*) *DHANNA v. LEKH RAM.* 1924 Lah. 690.

PUNJAB REDEMPTION OF MORTGAGES ACT (II of 1913), Ss. 9 and 12—*Dismissal of application for redemption—Effect.*

Where an application for redemption is rejected by a Collector under Punjab Act II of 1913, the order becomes final unless it is challenged in the civil court. (*Moti Sagar, J.*) *RAM CHAND v. KAURA.* 1924 Lah. 690.

PUNJAB TENANCY ACT (XVI OF 1887), S. 5 (1) (d) —*Jagirdar if includes muafidar—Occupancy rights.*

A *muafidar* is included in the term *Jagirdar* in S. 5 (1) (d) of the Punjab Tenancy Act and when he has occupied the land for more than 20 years, he cannot be ejected at the mere pleasure of the proprietors. (*Campbell, J.*) *DESU v. CHUHAN SINGH.* 1924 Lah. 606.

—Ss. 50 (b) and 77 (3) (g)—*Suit by tenant—Ejectment by Landlord—Revenue or Civil Court.*

An occupancy tenant who is wrongly dispossessed by his landlord can maintain a suit or possession only in a Revenue Court even if he sues after the period of one year fixed in S. 50 (b) of the Punjab Tenancy Act. The Civil Court has no jurisdiction to try such a case. (*Abdul Raoof and Campbell, JJ.*) *MAHINDAR SINGH v. ALLAH DITTA.* 1924 Lah. 539.

—S. 59—*Succession to occupancy tenancy—Collaterals—Whole blood and half blood.*

Succession to an occupancy tenancy is governed by S. 50, Punjab Tenancy Act, but the rights of collaterals *inter se* is governed by custom and the whole blood relations exclude the half blood ones. (*Broadway and Zafar Ali, JJ.*) *PHOLO RAM v. SURJAN.* 78 I. C. 450.

PUNJAB TENANCY ACT, S. 77.

—Ss. 77 and 98—*Revenue Court—Suit by mortgagee for ejectment—Relationship of landlord and tenant.*

Where a mortgage with possession is followed by a lease in favour of the mortgagor, a suit in ejectment by the mortgagee is cognisable by a Revenue Court. In such cases the court has to see from the plaint, the mortgage and the plaintiff's evidence if he is actually a landlord. If it comes to the conclusion he is not a landlord and dismisses the suit, it does not bar the plaintiff from suing in a Civil Court on the mortgage, as the finding does not operate as *res judicata*. (*Pipon, J. C.*) MIAN FEROZE SHAH v. SOHBAT KHAN. 78 I. C. 423.

—S. 77 (3) Proviso 1—*Suit for ejectment—Trespasser—Occupancy rights set up—Suit triable by Revenue Court.*

In a suit in ejectment on the ground the defendants were trespassers, the plea of occupancy rights was set up in defence. *Held*, under proviso 1 to S. 77 (3) of the Punjab Tenancy Act the suit was cognizable only by a Revenue Court. (*Abdul Raouf, J.*) PARABH DAYAL v. MT. RADHO.

1924 Lah. 636.

PARDANASHIN—*Deed by—Burden of proof.*

In the case of deeds executed by *pardanashin* ladies, law casts the onus of proof on the person taking under the deed to show that the deed was not only executed but explained to them and that they understood the same. (*Kinkaid, J. C. and Raymond, A. J. C.*) MT. BHAGBHARI v. MT. KHATUN. 80 I. C. 118.

PARDANASHIN LADY—*Gift to her nephew—Suit to set aside—Undue influence—Burden of proof.*

Where a lady was in the habit of transacting business, conducting monetary transactions and appearing in the public before strangers, the rule as to the presumptive incapacity of *pardanashin* woman does not apply to her. If she sues to set aside a gift deed executed by her in favour of her nephew, the burden of proving that she was in a weak state of intellect and subject to undue influence is upon her. Even if the onus was on the donee, it was amply proved by the evidence in the case that the donor was perfectly aware of the nature and consequences of her act when she executed the deed of gift and that it was a gift made by her of her own initiative and not in any way induced by undue influence or pressure from the donee or persons acting on his behalf. (*Scott-Smith and Fforde, J. J.*) SRI RAM v. NAND KISHORE. 5 Lah. 465 : 1925 Lah. 196 (2).

—*Settlement—Independent advice—Proof of—Person in fiduciary position.*

Where it is sought to rely on a settlement deed executed by an old *pardanashin* lady, the presence or absence of independent advice is a very important element to be taken into consideration in determining whether or not the court ought to countenance the execution of such a document. The possession of independent advice or the absence of it is a fact to be taken into consideration and well-weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended

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and deliberately and of her own free will, carried out the transaction. The burden of proof in such a case rests not with those who attack, but those who found upon, the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only not executed by, but was explained to and was really understood by the party. Where there is a fiduciary relationship between the parties to the document, it is essential that there should have been independent advice or that at the time when the deed was executed, the lady should have been emancipated from the influence which attached to the position of special confidence which was possessed by the other party to the deed. (*Saunderson, C. J. and Walmsley, J.*) BHOLA NATH SEAL v. BHUTH NATH SEN. 40 C. L. J. 393 : 1925 Cal. 239.

RAILWAY—*Liability of Railway Company—Package booked under Risk Note Form B—Loss of consignment—Wilful neglect of or theft by Company's servants—Finding based on absence of evidence—Second Appeal.*

It is extremely difficult, nay, impossible for a consignor to prove wilful neglect or theft by the Railway Company's servants and the evidence afforded by the Company's servants must always be received in favour of the consignor.

Where a package booked under the Risk Note Form B. was put into a wagon at a certain station and a seal was fixed on that wagon before starting which was found broken at an intermediate station and another seal was discovered at the destination where the package was found missing.

Held, that the loss of the package was due either to the wilful neglect of duty by the Company's servants or to theft by one of them.

If there is an absence of evidence, the finding can be set aside in second appeal as defective on a ground of law. (*Dalal, J. C.*) SHIV NARAYAN v. G. I. P. Ry. Co. 1 O. W. N 763 : 10 O. & A. L. R. 1069.

—*Negligence—Duty to ensure safety of passengers and property—Extent of.* See DAMAGES. 51 C. 861.

—*Risk note Form B.—Damages for unreasonable delay.* 1924 A. 8.

—*Risk-note B—Liability for loss*

Where a consignment of goods sent under Risk-Note B is lost, the Railway Company is liable only for the loss of a complete consignment or of one or more complete packages and not for damage due to exposure to rain. (*Suhrawardy, J.*) EAST INDIAN RAILWAY CO. v. KUSHABRAM GOPIRAM. 78 I. C. 413.

—*Risk rates and ordinary rates—Destruction of goods—Liability—Burden of proof.*

22 A. L. J. 1 : 46 A. 161 : 78 I. C. 892 : 1924 A. 254.

RAILWAYS ACT, S. 3 (7)—*Railway servant—Person employed to pass sleepers—Position of.*

Where a person is engaged by a Railway Company for passing sleepers and he is paid by results partly by the Railway Company and partly by a private contractor who supplies the sleepers, he is an employee of the Railway within S. 3 of

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the Railways Act. (*Carr. J.*) A. V. JOSEPH v. J. L. LAMMOND. 3 Bur. L.J. 147 : 1924 Rang. 373 (2)

———S. 42 (2)—Delivery of railway wagons to a colliery—Allotment of excess wagons by a Railway company's servant—Injury to reputation of the Railway Company—No offence. See PENAL CODE, Ss. 415, 417 and 420. 51 Cal. 250.

———Ss. 42 (2), 47 and 109—Railway compartment—Reservation of, for Europeans—Legality of—Refusal to vacate—Offence—Conviction.

It cannot be said that the act of the Railway Company in reserving a compartment in trains carrying passengers for Europeans only is illegal, unauthorised and *ultra vires* of the statutory power conferred on the railway company by law. The accused was found seated in a compartment of a third class Railway carriage marked for Europeans with some other passengers all of whom were attired in Indian dress. A ticket examiner asked the accused to vacate the compartment but he refused saying that he had a right to occupy the compartment. He was convicted and fined Rs. 5. On revision. *Held* that the conviction was legal and valid.

A railway company has an inherent right to regulate its own traffic in its own way and the reservation of a compartment for a particular class of persons or passengers is not undue preference 45 B. 1324 : 47 B. 465 : 45 M. 215 : 42 A. 327 Ref. (*Suhrawardy and Cuming, JJ.*) BHUPENDRA KUMAR DUTT v. EMPEROR 51 Cal. 168 :

81 L. C. 788 : 25 Cr. L. J. 1012 : 1924 Cal. 687 : 39 G. L. J. 107 : 28 C. W. N. 388.

———S. 72—Burden of proof. 1924 P. 315.

———Ss. 72 and 76—Consignment of goods—Risk note—Suit for compensation for loss—Onus NARAYANA AIYAR v. SOUTH INDIAN RAILWAY CO. 1924 Mad. 388.

———Ss. 72 and 76—Consignment—Risk-Note B—Loss of—Suit for damages—Loss by theft admitted—Negligence.

In a suit for compensation for loss of goods consigned to a Railway Company under Risk Note B, it is enough if the latter pleads loss and not let in evidence that the goods are not in its possession. An admission by the Company that goods were lost by theft does not amount to proof of wilful neglect. (*Macpherson, J.*) SRI NEWAS SITARAM v. EAST INDIAN RAILWAY COMPANY. 78 I. C. 479.

———Ss. 72 and 76—Delay in delivery—Damages—Liability for—Risk Note B.

Where goods consigned under Risk Note B are unreasonably delayed in delivery, the consignor is entitled to damages for such delay and the company is not exempted by anything in the Risk Note. What is unreasonable delay would depend on the circumstances of each case. (*Kinkhele, A.J.C.*) EAST INDIAN RAILWAY COMPANY v. MURADALI. 1924 Nag. 425.

———S. 72—Endorsee can sue for short delivery.

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Title of the consignor can be conveyed to another person by an endorsement on the railway receipt. The endorsee of such a receipt has sufficient interest in the goods covered by it, to maintain an action for damages against the Railway Company, the carrier of the goods. 38 Bom. 659. Dist. (*Dalal, J.*) PEARE LAL GOPI NATH v. THE E. I. R. COMPANY. 46 A. 691 :

22 A. L. J. 663 : 82 I. C. 351 : 10 O. & A. L. R. 883 : 1924 A. 574 : L. R. 5 A. 483.

———Ss. 72, 77 and 140—Goods consigned by railway—Loss—Liability of Railway—Notice of suit—Notice to agent.

In a suit for the value of a consignment of ghee sent by the defendant railway and lost, it was found that the wagon containing the ghee was sealed but not locked. The train halted for several hours at a particular station and there were no chaukidars keeping watch on the train during the period. *Held* that under these circumstances the loss must be attributed to the wilful neglect of the Railway Co. & that it was therefore liable in damages under the risk-note. The loss was not due to theft from a running train within the meaning of the risk-note and therefore the Railway company could not escape liability. Where notice of the claim is addressed to the Secretary to the Government of India, Railway Department, instead of the Agent of the Railway but the addressee acknowledged receipt of the notice and informed the claimant that it had been sent to the Agent of the Railway. *Held* that there was a sufficient notice under Ss. 77 and 140 of the Railways Act. 26 B. 669 Rel. (*Martineau, J.*) SECRETARY OF STATE FOR INDIA v. CHARANJIT LAL. 6 Lah. L.J. 237 : 79 I. C. 428 : 1924 Lah. 594.

———S. 72—Liability of company.

The liability of a Railway Company under S. 72 of the Railways Act is that of a bailee under Ss. 151, 152 and 161 of the Contract Act. The company is bound to take such care of the goods bailed to them as a man of ordinary prudence would of his own goods and in the absence of any special contract they are not under an obligation to do more. (*Baker, J. C.*) THE ROHILKHUND AND KUMAON RY. CO. v. ZIHRUS SYED ALVI. 1924 Nag. 358.

———S. 72—Loss of goods—Liability of Railway—Risk Note Form B—Loss in warehouse.

A railway company, when entrusted to carry goods from one station to another had, under S. 72 of the Railways Act, the liability of a Bailee. The company however can contract itself out of that liability by a special contract in one of the forms recognised by Government. Under Risk Note (B) the consignor holds the company harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to the said consignment, from any cause whatever, except for the loss of a complete consignment or of one or more complete packages forming part of a consignment, due either to the wilful neglect of the railway administration or to theft by or to the wilful neglect of its servants during and after transit over the said railway for the carriage of the whole or any part of the said consignment,

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provided the term "wilful neglect" be not held to include fire, robbery, from a running train or other unforeseen events or accidents. Where therefore all the bags consigned under a risk-note in that from arrived at the station of destination and none of the bags were missing, the railway company cannot be held liable even though it is found that some of the bags had become damaged owing to the wilful neglect of the railway company or its servants. Till the delivery of the consignment to the consignee the liability of the railway company continues to exist and in the interval between the arrival of the consignment at the station of destination and its delivery to the consignee, the liability of the railway company is not that of a warehouse man. (*Sulaiman and Kanhaiya Lal, JJ.*) EAST INDIAN RY. CO. v. LAL JANKI PRASAD. L. R. 5 A. 586.

80 I. C. 737 : 1924 A. 603.

—S. 72—Loss of goods—Suit for damages—Risk Note Form B—Onus of proof.

46 A. 125 : 79 I. C. 341 : 1924 A. 177.

—S. 72—Loss of goods—Risk Note B—Suit for damages—Burden of proof.

Where goods consigned under Risk Note B are not delivered and a suit for damages is filed, the plaintiff has to prove how the loss occurred. He must prove wilful neglect or theft by Railway servants and the mere fact the Company sets out to prove a case of robbery from a running train does not shift the onus from the plaintiff. (*Odgers, J.*) MADRAS AND SOUTHERN MAHRATTA RY. CO. v. KRISHNASWAMI CHETTY.

79 I. C. 137 : 1925 Mad. 133.

—S. 72—Loss of goods—Wilful neglect—Burden of proof.

In a suit for a damages for loss of goods consigned for carriage, the burden is on the plaintiff to prove wilful neglect on the part of the Railway. Where in spite of frequent thefts on its lines, the company did not lock the van in which the goods were placed and they were lost, it is sufficient proof of wilful neglect. (*Sulaiman and Mukerjee JJ.*) B. N. W. RAILWAY v. MANORATH BHAGAT DHIAN RAM.

22 A. L. J. 1035 : 1925 A. 172.

—S. 72—Loss—What is—Onus of proof.

The loss referred to in S. 72 and other sections of Chapter VII Railways Act is the loss suffered by the consignor or the true owner where such loss occurred by reason of misdelivery or non-delivery. The word "loss" in a Risk-note is not confined to the case of involuntary or unwilling parting with the things with reference to which the word is used. Where loss of packages consigned is admitted by the plaintiffs, the onus is on them to prove wilful neglect on the part of the railway or theft or negligence on the part of the servants or agents. (*Kulwant Sahay, J.*) EAST INDIAN RAILWAY CO. v. NETRAM GANESH LAL.

1924 Pat. 812.

—S. 72—Loss—Meaning of—Risk Note B—Onus of proof of loss.

The term "loss" as used in the Risk Note Form B and Chapter VII of the Railways Act does not mean pecuniary or other loss suffered by the owner of the goods though being wrongfully

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deprived of the possession, use and enjoyment thereof, but means loss of the goods by the Railway Company while in transit, and such "loss" occurs whenever the Railway Company to which the goods have been consigned for conveyance, involuntarily, or through inadvertence, loses possession of goods, and for the time being is unable to trace them. The term denotes a fact and not a cause of action. It is inaccurate to affirm that goods, which are not duly delivered or misdelivered are lost or are not lost. The true view is that in either case the goods may or may not be lost and proof of non-delivery or misdelivery is by no means conclusive evidence as to whether or not a loss has occurred; from such evidence alone an inference cannot reasonably be drawn that goods have been lost. (*Suhrawardy and Page, JJ.*) EAST INDIAN RY. CO. v. JAGPAT SINGH.

51 Cal. 615 : 28 C. W. N. 1001 : 79 I. C. 126 : 1924 Cal. 725.

—S. 72—Railway—Consignment of goods—Risk Note Form B.—Protection under when available to Railway Company—Liability of consignor—Ratification.

1924 P. 25.

—S. 72—Railway—Risk Note Form B—Loss of goods—Meaning of.

1924 A. 7.

—S. 72—Risk Note Form B—Agreement limiting liability of railway—Form of—Estoppel—Representation.

S. 72 of the Railways Act requires that an agreement limiting the responsibility of the railway shall be in writing. To sign a blank paper on which an agreement is afterwards written is not the same thing as executing an agreement in writing. Neither is it sufficient to sign a printed form in which no details relating to the particular consignment are recorded. Where the consignor's agent represented to the railway that he was booking the goods at owner's risk subject to the conditions embodied in the contract in Risk Note Form B and the railway accepted the goods on the strength of that representation and conveyed them at a lower rate than it would have charged otherwise. Held that the consignor was thereafter estopped from denying that he agreed that the goods should be conveyed under the condition contained in the risk-note. (*Daniels and Neave, JJ.*) FIRM OF RAGHUNANDAN RAM GOPI RAM v. G. I. P. RAILWAY. L. R. 5 A. 396 : 22 A.L.J. 645 :

81 I. C. 1 : 46 A. 649 : 10 O. & A. L. R. 718 : 1924 A. 692 (2).

—Ss. 72 and 76—Risk Note B—Goods despatched diverted off the ordinary track—Suit for damages.

Goods were sent under Risk Note B Form from one station to another. By a mistake the goods were taken entirely off the route expressly or impliedly indicated and reached the consignee late. In a suit for damages for delay and deterioration, held, the company was not protected by the Risk Note B, as the diversion from the route was not "in transit" as contemplated by the note. (*Boys, J.*) JANKI DAS GOVIND RAM v. SECRETARY OF STATE FOR INDIA.

22 A. L. J. 1020 : 1925 A. 10.

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—S. 72—'Risk note'.—Scope of—Whether delay in transit and consequent fall in price constitutes 'deterioration' or 'loss'.

Owing the misdirection in transit 125 bags of sugar booked on 28-10-1920 were delivered to the plaintiffs three months after the due date. Owing to fall in the price of sugar in the meantime, plaintiff sued the Railway Company for damages for late delivery. The Ry. Company contended that it was exempt from liability under the Risk Note Form B under which the goods were booked. Under the Risk Note, the company was to be free from responsibility for any loss or deterioration of the consignment.

Held, on appeal, that the fall in the market price of goods was not a 'deterioration' of the consignment. That the term 'loss' was not meant to include delay in delivery.

Wilson v. The Lancashire and Yorkshire Ry. Co. (1861) 3 O. L. J. C. 232. *Hill, Sanyas & Co. v. Secy. of State* referred to *Madras Ry. Coy. v. Govinda Rao*, 21 M. 172 dissented from. Held, also that S. 72 of the Railways Act would not be a bar to suit for damages. (*Martineau and Moti Sagar, JJ.*) *E. I. Ry. Company v. Diano Mal Gulab Singh*. 5 Lah. 523.

—S. 72—Railway—Risk Note Form B—Compensation for non-delivery—Refusal to reweigh. 1924 P. 39.

—S. 72—Risknote—Signature by agent—Consignor if bound. 1924 P. 315.

—S. 72—Scope and object of.

Per *Page, J.*—The object and effect of S. 72 of the Railways Act was to limit the liability of Railway Companies during the transit of goods consigned to them for carriage and to substitute the obligations of a bailee for the obligations of an insurer of such goods, which, prior to the passing of that Act, were imposed upon them under the common law. The section was enacted to confer a benefit on Railway Companies and except in cases where the plaintiff admits that the goods have been lost, a Railway Company is not entitled to rely upon the provisions of the Risk Note which *pro tanto* exempt it from liability unless and until evidence has been adduced which satisfies the Court that a loss has occurred. The object and effect of the section was not to provide compensation for pecuniary losses suffered by the owners of goods consigned for conveyance to a Railway Company but to lessen the burden of the obligation which, prior to the passing of S. 72, had laid on Railway Companies as insurers of such goods. (*Suhrawardy and Page JJ.*) *The East Indian Railway Company v. Jagpat Singh*. 51 Cal. 615 : 28 C. W. N. 1001 : 79 I. C. 126 : 1924 Cal. 725

—S. 72—Suit for damages for loss of goods—Strike of Railway employees—If exonerates from liability—Risk-note.

In a suit for damages for loss of goods consigned, it is an unjustified inference to draw from the fact that there was a strike on the railway then that loss must have been due to that.

Where a risk-note is relied upon to exonerate the company from liability, it must have been

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signed by the consignor or some person on his behalf. (*Foster, J.*) *Arjun Das Gulab Rai v. E. I. Railway Co.* 1924 P. 811.

—S. 72 (2) (a)—Protection from liability—Agreement signed by person who delivers goods.

Under S. 72 (2) the Railway Company is protected by an agreement signed either by the person sending the goods or the person delivering the same to the company. (*Greaves and Chakravarty, JJ.*) *Hari Shankar Raj Chandra Dalal v. East Indian Railway Company*. 80 I. C. 705 (2) : 1925 Cal. 308.

—S. 72 (2) (a)—Risk Note B—Agreement signed by broker employed by the consignor's servant, whether valid—Suit for damages for loss of package in transit—Burden of proof.

S. 72 (a) of the Indian Railways Act (IX of 1890) provides for the signing of the agreement by the person actually delivering the package to the Railway Administration. Therefore a Risk Note B signed by a broker who had been employed by the servant of the consignor to deliver the package would be valid and binding on the consignor and the consignee.

In a suit for damages against a Railway Company for loss of the consignment despatched under Risk Note B, the burden of proof that the loss was caused by the wilful negligence of the Railway Administration or the wilful negligence of or theft by its servants lies on the consignee. (*Dalal, J. C.*) *Badri Narayan v. Agent B. N. W. Ry.* 1 O. W. N. 760.

—S. 75—Gold and silver—Mixed in medicine—Declaration.

Where gold and silver were used in their metallic form in making certain pills used as medicine, it cannot be said that they are "gold and silver coined or uncoined manufactured or unmanufactured" within the meaning of S. 75 of the Railways Act. Consequently the omission of a consignor of the medicines to declare that the consignment contained gold and silver did not disentitle him from suing the Railway Company for damages for loss of the consignment. (*Page, J.*) *Narendra Nath Sew v. East Indian Ry. Co., Ltd.* 51 I. C. 929 : 1925 Cal. 115.

—Ss 76 and 72—Applicability—Risk Note Form B—Loss of goods—Suit for damages—Burden of proof.

S. 76 of the Railways Act does not apply to contracts limiting the liability of the Railway Company under S. 72 of the Act. Where goods are consigned under Risk Note B and are lost, in a suit for damages the plaintiff has to prove the loss was due to wilful negligence of the Company. (*Suhrawardy, J.*) *East Indian Railway Co. v. Sib Prosad Dutt Rai*. 78 I. C. 449 : 1925 Cal. 306.

—S. 76—Risk Note Form B—Consignment of goods by railway—Deviation from prescribed route—Shortage—Liability for.

The plaintiff delivered seven bags of miscellaneous goods to the defendant Railway Company for carriage from Bombay to Dhulia via Chaisgaon. He signed Risk Note in Form B. Six bags were correctly delivered at Dhulia. One bag, instead of

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being taken out at Chalisgaon, was carried on to Jalgaon, and some days afterwards was brought back and delivered to the plaintiff. Plaintiff complained of a shortage in the contents. The defendant Railway Company admitted the shortage, but claimed exemption from liability on the strength of the risk note. *Held*, that there was a clear deviation from the route originally intended when the goods were delivered for transit and that in these circumstances the onus would lie upon the Railway Company, if they claimed exemption under the Risk Note, to prove that the shortage had not occurred during the deviation. 33 M. 120 Dist., 24 Bom. L. R. 316 followed. (*MacLeod, C. J. and Shah, J.*) LAXMINARAYAN BIJRAM v. G.I.P. RY. CO.

26 Bom. L. R. 285 : 80 I. C. 256 : 1924 Bom. 386.

S. 76—Risk Note—Liability under.

The ordinary liability under S. 76 Railways Act. is limited by the special agreement entered into by and between the parties under a Risk Note in Form B. (*Kulwant Sahay, J.*) EAST INDIAN RAILWAY COMPANY v. NETRAM GANESH LAL.

1924 F. 812.

S. 76—Suit for damages—Risk Note B—Plaintiff's admission of loss—Plaintiff to prove neglect.

In a suit for damages for non-delivery of goods consigned under Risk Note B, where the plaintiff admits the loss, the onus is on the plaintiff to prove that the loss is due to the neglect of the Railway Administration, etc. Where loss is not admitted, the Railway Company has to prove the same. (*Suhrawardy and Chotzner, JJ.*) GANESH LAL v. EAST INDIAN RAILWAY COMPANY.

80 I. C. 426 : 1925 Cal. 299 (1).

Ss. 77 and 140—Claim for — Compensation—Loss of goods—Notice to Traffic Manager—If sufficient.

In the case of a claim for compensation for goods lost in transit, notice of the claim must be sent to the Agent of the company within six months of the delivery. Service on a subordinate official is not service upon the Agent, unless it is shown on evidence that the Agent had invested the subordinate with authority to receive service on his account. (*Moti Sagar, J.*) PARAS DAS MANU LAL v. EAST INDIAN RAILWAY COMPANY.

1924 Lah. 504.

S. 77—Consignments of different dates—One notice and one suit—If sufficient.

In respect of different consignments made on various dates which were all lost in transit, it is open to the consignor to issue one notice in respect of all the claims. In such a case he cannot maintain separate suits in respect of the several claims. (*Das and Ross, JJ.*) EAST INDIAN RAILWAY CO. v. AHMADI KHAN.

78 I. C. 415 : 1924 Pat. 175 : 1924 P. 596.

S. 77—Goods consigned to railway not delivered to consignee—Remedy of Consignor—Notice to Railway Company.

A cask of methylated spirit was consigned from Cawnpore to the plaintiff at Roorkee on 25-7-1921. The consignment never reached its destination and was perhaps lost in transit. In June 1922

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the plaintiff was given delivery of a cask which on being opened was found to contain water. He thereupon brought a suit for damages against the Railway Company and the latter pleaded S. 77 of the Railways Act in bar of the claim. *Held*, that the plaintiff's remedy was when the six months were about to expire and the goods had not been delivered to him, to give notice to the agent under S. 77 and so preserve his right of suit. Not having done so, plaintiff's claim was barred. (*Dalal, J.C.*) MOTI LAL v. AGENT O. R. RAILWAY.

L. R. 5 A. 334 : 79 I. C. 893 : 1924 A. 617.

S. 77—Loss of goods—Carried by railway—Risk Note form B—Liability of—Railway company—Burden of proof.

Where in a suit for damages for loss of goods conveyed by a railway under the terms of a risk-note in form B, the plaintiff depends for his cause of action on wilful neglect on the part of either the railway administration or any of its servants, he cannot succeed if it is shown that the loss of the goods was due to theft from a running train. (*Daniels and Neave, JJ.*) FIRM OF GOPAL RAI PHUL CHAND v. G. I. P. RY.

L. R. 5 A. 575 : 82 I. C. 313 : 1924 A. 621.

S. 77—Loss—Meaning of—Notice—When necessary—Period of limitation.

The term "loss" in S. 77 means loss to the Company and not simply loss to the consignor. When the burden of the notice is laid on the consignor, the words of the section must be construed strictly. Unless the company alleges and proves the article has been lost, no notice is necessary in a case where the defence of the company is that no such article was given for carriage.

In cases where notice is necessary, such notice must be given within 6 months of the date of consignment. (*Dalal, J.*) BADRI PRASAD v. G. I. P. RAILWAY.

22 A. L. J. 897 : L. R. 5 A. 665 : 80 I. C. 725 : 1925 A. 144.

S. 77—Notice of claim—Nature of proof.

It is not necessary that the claimant against a Railway Company should give the notice of claim personally to the Agent. If he gives it to any subordinate official, he must prove that the notice reached the proper authority in time. (*Kennedy, A. J. C.*) FIRM OF BIRDICHAND POONAMCHAND v. SECRETARY OF STATE AND B. B. C. I. RY.

78 I. C. 735 : 1925 Sindh 62.

S. 77—Notice—Suit for compensation for non-delivery.

1924 F. 315.

S. 77—Railway—Consignment of goods Risk Note Form A—Loss of goods—Delay in transit—Liability of Railway in damages.

In a risk-note in Form A in respect of goods consigned by a railway, the special contract contained in the document is merely intended to protect the railway from responsibility for any loss or damage that may result to the goods from defective packing and consequent leakage or wastage in transit. A railway company is bound to deliver goods within a reasonable time and is liable to pay compensation for loss caused by delay which it is unable to explain. A risk-note in Form A does not protect the railway company

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against the consequences of delay in transit. 20 A. L. J. 114; 20 A. L. J. 973; 21 A. L. J. 220; 21 A. L. J. 448, referred to. (*Neave, J.*) B. N. W. RAILWAY v. MUNNA LAL BISHAMBHAR NATH.

22 A. L. J. 769; L. R. 5 A. 579; 80 I. C. 19; 1924 A. 760.

—Ss. 77 and 140—*Railway—Goods entrusted for transport—Loss in transit—Damages for—Suit for—Limitation—Starting point—Limitation Act, Art. 31—Applicability—Onus of proof in such suit—Entrustment under Owner's risk note—Effect—Theft from running train—Meaning Subordinate officer like District Traffic Superintendent—Notice to—Validity—Conditions.*

Where goods are entrusted for transport to a Railway Company under an agreement providing that, in consideration of the carriage of the goods at a lower rate, the consignee has no right to compensation for loss of the goods except in the event of wilful neglect of the railway administration or theft by or wilful neglect of its servants during transit, and that a robbery from a running train does not constitute wilful neglect, the consignee suing the Company for damages for the loss of the goods in transit is under a duty to prove neglect on the part of the Company. It will be open to the Company to say that the goods were lost by theft while the train was running, in which case, they will, as a matter of course, be exempted from liability but the burden of proof on this point lies on the Railway Company. Theft of goods from a wagon during transit is theft from a running train even if the theft got into the wagon before the train started.

The article of Limitation Act applicable to a suit by a consignee for damages for the loss of goods in transit is Art. 31, the starting point being the date when the Railway Company finally says that the goods cannot be delivered.

A notice under Ss. 77 and 140 of the Railways Act of 1890, given to a Subordinate officer like the District Traffic Superintendent, is not valid unless there is evidence (1) either that the power of the Agent to receive notices under S. 140 had been delegated to the subordinate officer who actually received the notice, or (2) that the Company by its rules or course of business, had held out to the public that notices might be given to such an officer instead of to the Agent and thus estopped itself from raising a technical defence. (*Waller, J.*) THE SOUTH INDIAN RAILWAY COMPANY v. NARAYANA IYER 34 M. T. (H.C.) 303.

1924 Mad. 567; 77 I. C. 511; 46 M. L. J. 302.

—S. 77—*Risk Note B—Loss of consignment—Negligence—Liability of Railway.*

Risk Note in Form B protects the Railway Company in case of loss of goods even if the loss of goods was due to their negligence unless there was loss of a complete consignment or one or more complete packages. (*Daniels, J.*) JAGANNATH PRASAD v. EAST INDIAN RAILWAY CO.

L. R. 5 A. 355; 1924 A. 521.

—S. 77—*Suit for damages for short delivery—Notice if necessary.*

S. 77, Railways Act, does not require a notice of claim to be served on the Railway Company

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in cases of suits for damages for short delivery of goods. (*Kinkhede A.J.C.*) SETH MULCHAND v. G. I. P. RY. 1924 Nag. 288.

—S. 77—*Suit for damages—Short delivery—Onus of proof of loss—Wilful neglect—Risk note.*

In a suit for damages for short delivery of goods, the Company must prove loss before relying on the exemption clause in a Risk note and then the plaintiff should prove wilful neglect in order to hold the company liable. (*Kinkhede, A. J.C.*) SETH MULCHAND v. G. I. P. RY.

1924 Nag. 288.

—S. 80—*Goods carried over two railways—Right of suit for loss of goods.*

Where goods are consigned to one Railway company for transit, but loss occurs while it is being actually carried over the lines of another Railway Administration, the latter is the agent of the former for the purpose of transit and a suit for damages will be against either. (*Foster, J.*) ARJUN DAS GULAB RAI v. E. I. RAILWAY CO. 1924 P. 811.

—S. 101—*Railway servant—Breach of rule—Offence—Proof of.*

The accused was convicted by a Magistrate of an offence under S. 101 in that while on duty he endangered the safety of railway passengers by disobeying a General Rule 247 (vii) made by the Company and sanctioned, published and notified as required by the Railways Act IX of 1890. Held setting aside the conviction, that it was incumbent on the prosecution before it could obtain a conviction to prove (1) that the accused committed a breach of the rule and (2) that he endangered the safety of passengers thereby. A mere breach of rule is not sufficient to support a conviction under S. 101 of the Railways Act but it must be shown that the breach of this particular rule actually endangered the safety of passengers. (*Dalal, A. J. C.*) PARBHU DAYAL v. EMPEROR. 26 O. C. 363; 81 I. C. 917; 25 Cr. L. J. 1093; 1924 Oudh 250.

—S. 101—*Station-master—Omission endangering human safety—Liability of station master.*

Where a station master after giving a signal that the railway line was clear for a train to pass omitted to set the points, a precaution which would prevent the train from running into another train he must be deemed guilty of an act which endangered the safety of the persons in the trains. The station master is not merely bound to give the proper orders but also to see that they are properly carried out. (*Waish and Kyves, JJ.*) EMPEROR v. SHEO BARAN SINGH

22 A. L. J. 20; L. R. 5 A. 105 (Cr.); 81 I. C. 705; 25 Cr. L. J. 993; 1924 All. 438.

—S. 120 (b)—*Conviction under—Words of abuse not in evidence—Effect.*

A conviction under S. 120 (b) cannot be sustained when the particular words used are not in evidence. A mere statement of witnesses that words of abuse were used cannot be the basis of a conviction. (*Campbell, J.*) BUDHA SINGH v. THE CROWN. 6 Lah. L. J. 459; 1925 Lah. 151.

RAILWAYS ACT, S. 140.

———S. 140—Notice to Traffic Manager—If notice to Agent—Proof of authorisation to receive notice. See RAILWAYS ACT, SS. 77. AND 140.

76 I. C. 1.

RANGOON MUNICIPAL ACT (VI OF 1922), S. 80 (3)

—Gross annual rent—What it includes.

For the purpose of municipal assessment the gross annual rent does not include what are known as occupier's taxes such as lighting, water or conservancy charges and as such the latter must be excluded. (*Young and Baguley, JJ.*) THE SURATEE BARA BAZAR CO. v. MUNICIPAL CORPORATION OF RANGOON.

3 Bur. L. J. 221 : 1925 Rang. 115.

———S. 2—Requirements of business—Landlord's motive—Materiality of—Determination of tenancy.

1924 Rang. 64.

RANGOON RENT ACT (BURMA ACT II OF 1920), S. 10—Partnership business—Removal of—Premises not required for personal use—Mainly required for partner's separate business and landlord's own business.

Where the premises sought to be recovered in ejectment are not required for the residence of the landlord or any other member of his family but for the landlord's and the separate business of his managing partner and his family and partly for the partnership business of the landlord the premises cannot be said to be reasonably and bona fide required by the landlord within the meaning of S. 10 of the Rangoon Rent Act. (*Heald and May Oung, JJ.*) LIM. CHWE HTAW v. LU TYAW TAT.

3 Bur. L. J. 67 : 1924 Rang. 277.

———S. 10—Requiring property for purposes of supervision—If sufficient.

1924 Rang. 164.

———S. 10—Guardian of minor—If can sue in ejectment. MAUNG PE THEIN v. S. BOON KYAN.

1924 Rang. 163 : 79 I. C. 505 : 1 Rang. 772.

———(Amended) S. 10—Tenant on daily rent letting to sub-tenant—Whether tenant is landlord and entitled to recover premises in ejectment from sub-tenant.

A tenant on daily rent is a transferee for valuable consideration within the meaning of amended S. 10 of the Rangoon Rent Act, 20, and may maintain a suit to recover the demised premises in ejectment from his sub-tenant. Where such premises are required for the use of the tenant's workmen for the purpose of his business it is equivalent to an occupation by himself. (*Lentaigne and Carr, JJ.*) AZEE MEAH v. JEEWA.

3 Bur. L. J. 36 : 82 I. C. 381 : 1924 Rang. 278.

———S. 18—References under—Limitation Act, S. 5—Applicability of.

References from the order of the Rent Controller to the Chief Judge of the Small Cause Court under S. 18 of the Rangoon Rent Act are not governed by S. 5 of the Lim. Act; such references are not in the nature of appeals. (*Young and Baguley, JJ.*) MIERS v. R. R. KHAN.

3 Bur. L. J. 157 : 1924 Rang. 377.

RECEIVER—Appointment of—Execution against property—Leave of court—Necessity for—Omission to obtain leave.

76 I. C. 241.

REGISTRATION ACT, S. 2.

———Discharge of—Receiver appointed in pursuance of decree in scheme suit—Appeal against decree—Affirmance of decree on appeal—Effect on receivership.

A suit brought on the original side for a scheme to be framed in relation to a temple was decreed and a scheme framed. An appeal was lodged against that decree; but before the case came on in appeal, an application was made to a Judge sitting on the original side for the appointment of a receiver, and an order was made appointing a receiver. The appellate Court affirmed the decree of the Court below with slight modifications, with the result that the scheme framed by the trial Judge stood in operation as from the date fixed by his order with the modifications decreed by the Court of appeal. After the order in appeal, a Judge's summons was taken out on the original side for the discharge of the receiver on the sole ground that the effect of the order of the Court of appeal was to put an end to the receivership. Held, that the effect of the order of the Court of appeal was not *ipso facto* to discharge the receiver, and that the summons was therefore taken out on entirely wrong ground and must be dismissed. (*Schwabe, C. J. and Waller, J.*) DORAIVELU MUDALIAR v. AUDIKESAVALU NAIDU.

19 L. W. 388 : 1924 Mad. 557:

(1924) M. W. N. 235 : 34 M. L. T. (H. C.) 90 :

78 I. C. 133 : 46 M. L. J. 343 :

———Mortgage suit—Final decree—Subsequent appointment of receiver of the properties of the mortgagors—Receiver proper party to execution proceedings—Refusal to add—Revision—C.P. CODE, S. 115.

47 Mad. 47

RECORDS—Re-construction of—Evidence necessary, See DECREE.

77 I. C. 258.

RECORD OF RIGHTS—Entries in—Correctness of—Suit challenging—Parties.

In a suit wherein the correctness of entries in the Record of Rights is challenged and for possession of lands, persons recorded therein as being in possession are necessary parties. (*Jwala Prasad and Macpherson, JJ.*) GOPAL OJHA v. RAMADHAR SINGH.

82 I. C. 204 : 1925 P. 228.

———Entries in—Presumption of correctness.

A plaintiff who wants to challenge the correctness of entries on the Record of Rights has the onus heavily on him. (*Jwala Prasad and Macpherson, JJ.*) GOPAL OJHA v. RAMADHAR SINGH.

82 I. C. 204 : 1925 P. 228.

REFORMATORY SCHOOLS ACT, S. 4—Applicability.

1924 Rang. 16.

REGISTRATION ACT, S. 2 (7)—Agreement to execute lease—Conditional—If requires registration.

It is only when a present demise is contemplated that an agreement to execute a lease would amount to an agreement to lease within the meaning of S. 2 (7) Registration Act. An agreement to execute a lease under certain circumstances does not fall within this category and is not compulsorily registrable. (*Kennedy, J. C. and Raymond, A. J. C.*) AMIRBUX v. JANIMAL.

78 I. C. 71 : 1925 Sindh 54.

REGISTRATION ACT, S. 3.

—Ss. 3 and 49—*Lease Amalnamah—Unregistered—Admissibility in evidence.*

An amalnamah is neither a lease nor an agreement to lease within the meaning of S. 3 of the Registration Act and it is consequently admissible in evidence without registration. 33 C. 502; 7 C. 703 Rel. But an amalnamah authorising the grantee to take possession of property and intended to be followed by a formal kabuliyat, if unregistered, is inadmissible under S. 49 of the Regn. Act as evidence of a transaction affecting the immoveable property comprised therein. (*Mookerjee and Suhrawardy, JJ.*) LAKSHAN CHANDRA MANDAL v. TAKHIM DHALI.

39 C.L.J. 90 : 28 C.W. N. 1033 : 1924 Cal. 558.

—S. 7 (2)—*Sub-Registrar—If authorised can exercise powers of District Registrar.*

Where the office of Sub-Registrar has been amalgamated with that of the Registrar, the Sub-Registrar may be authorised to exercise and perform, in addition to his own powers and duties, all or any of the powers and duties of the registrar to whom he is subordinate. But the mere fact that the Sub-Registrar had in fact authority to register the document, does not necessarily justify the inference that the document was validly registered by him as District Registrar. The Sub-Registrar must be given the opportunity to exercise the discretion which it would be incumbent upon him to exercise under S. 30 if he were called upon to register a document in respect of land not situated in his sub-district. (18 Cal. 556, *Foll.*) *Mookerjee and Chotzner, JJ.* KEDAR NATH DAS v. BIDHU BHUSHAN GUHA.

1924 Cal 348.

—S. 17—*Amalnamah—Registration.*

An amalnamah which is neither a lease nor an agreement to lease which authorises the grantee to take possession and is intended to be followed by a formal *Kabuliat* is not compulsorily registrable and is admissible in evidence. (*Mukerjee and Suhrawardy, JJ.*) LUKHAN CHANDRA MONDAL v. TAKIM DHALI.

80 I. C. 357.

—S. 17—*Award—If compulsorily registrable.*

An award is not compulsorily registrable. (*Baker, J. C.*) KHETSINGH v. MANMODSINGH.

1924 Nag. 383.

—S. 17—*Bahi—Entry as to family settlement.* NARSINGH DAS v. UTTAM CHAND.

76 I. C. 852.

—S. 17—*Co-mortgagors—Redemption by one—Assignment of right to recover contribution.*

Where one co-mortgagor redeems the whole property, and assigns his right to recover contribution from his co-mortgagor, it is in law an assignment of a charge on immoveable property and if it is above Rs. 100, the deed requires registration. (*Baker, O. J. C.*) PARASHRAM v. BONDRUSA.

1924 Nag. 238.

—S. 17—*Partition deed—Registration—Status of parties.*

A document recited that up to that date properties were joint, that with the consent of parties before *panchas* they were divided and

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items allotted to each and that it would be registered after being stamped. There was no provision to execute another document. *Held* it was a partition deed and required registration. Even if unregistered, it was admissible to prove the status of the parties. (*Kotval, A. J. C.*) BHANGAJI v. PANDURANG.

1924 Nag. 395.

—Ss. 17 and 49—*Usufructuary mortgage for over R. 100—Absence of registration—Nature of possession.* NADAPENA APPANNA v. SARIPALLI VENKATASAMI.

47 Mad. 203 : 19 L. W. 37 : 79 I. C. 510 : (1924) M. W. N. 292.

—S. 17 (1) (a)—*Gratuitous surrender of immovable property—If requires registration.*

Where immoveable property is surrendered without consideration, it is in effect a deed of gift which under S. 17 (1) (a) of the Registration Act requires registration. (*Campbell, J.*) HIRA SINGH v. PUNJAB SINGH.

78 I. C. 113.

—S. 17 (1) (b)—*Mortgage money—Receipt of not compulsorily registrable.*

Receipts showing that the whole of the Mortgage money was paid do not require registration. If however it had been mentioned that thereby the mortgage had been extinguished then the receipts would have required registration under S. 17 (b) of the Regn. Act. (*Macleod, C. J., and Shah, J.*) SHRIDHAR SHABAYA v. JANAK SHANKAR.

26 Bom. L. R. 486 : 80 I. C. 415 : 1924 Bom. 447.

—S. 17 (1) (b) and (2)—*Compromise suit—Document not registered—Decree—Effect.*

75 I. C. 461.

—S. 17 (1) (b)—*Endorsement—Receipt of payment—Necessity for registration.*

1924 Cal. 379.

—S. 17 (1) (b)—*Family arrangement—Relinquishment of share—If requires registration—Acting of parties—Effect.*

If a family arrangement is a mere admission or acknowledgment of title already in existence it does not require registration. But if it purports to limit or extinguish the rights of any one and vest them in others it is compulsorily registrable.

Where a document requiring registration is not registered, it is not admissible in evidence. But where it has been acted upon, the agreement embodied therein may still be valid. (*Pullan, A. J. C.*) NAND KUMAR v. BABU RAM.

1 O. W. N. 397 : 10 O & A. L. R. 775 : 11 O. L. J. 574 : 1925 Oudh 168.

—S. 17 (1) (b)—*Mere acknowledgment of antecedent title need not be registered.*

Where petitions are clearly of a nature which purports or operates neither to create, assign or extinguish any right, title or interest in present or in future in immoveable property nor had they "declared" any such right, title or interest.

Held the true nature of such a settlement was an acknowledgment of an antecedent title. Where all the parties were entitled to inherit the disputed estate and the only question in controversy was as to their respective shares.

Held that the petitions of compromise defining the shares need not be registered. 3 Agra H. C.

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R. 84: 33 All. 356; Foll. (*Wazir Hasan, A. J. C.*)
 SWAMI DAYAL v. TRIBHUWAN. 11 O. L. J. 213;
 78 L. C. 878: 1924 Oudh 397.

—S. 17 (1) (b)—*Agreement to transfer—If requires registration.*

Where a person agrees to transfer a certain land to another in case he succeeded in a certain pre-emption suit it is a document of title and falls within the purview of S. 17 (1) (b) and requires registration before it can be admitted into evidence. (*Moti Sagar, J.*) *IDA v. MAHAMMAD DIN.* 1924 Lah. 78.

—S. 17 (1) (b)—*Petition of compromise—Registration.*

A petition of compromise purporting to declare the rights of the parties to property worth more than Rs. 100, is compulsorily registrable. (*Mukerji, J.*) *BISHUNATH OJHA v. SHEOPRAGASH OJHA.* 1924 A. 842.

—S. 17 (1) (b)—*Registration—Necessity for—Order issued to village officers directing them to continue lands in inam in lieu of service.*

An order issued by an inamdar to his village officers directing them to continue certain lands to be enjoyed by the grantees in lieu of their rendering some service, is not compulsorily registrable and can be received in evidence though unregistered. (*Shah, A. C. J. and Fawcett, J.*) *RAM CHANDRA PANDURANG v. YELLANA.* 26 Bom. L. R. 1203.

—S. 17 (1) (b)—*Styling petitions of compromise as family settlements—If exempt from registration.*

Merely describing compromise petitions as family settlement or merely holding that in their nature they are family settlement would not exempt them from the provisions of Section 17 (1) (b) if they fall within the terms of that section. 33 All. 344, Foll. (*Wazir Hasan, A. J. C.*) *SWAMI DAYAL v. TRIBHUWAN.* 11 O. L. J. 213: 78 L. C. 878. 1924 Oudh 397.

—S. 17 (1) (b)—*Surrender of reversionary rights—If requires registration.*

Where reversionary rights in immoveable property of more than Rs. 100 is given up in writing, the document is compulsorily registrable under S. 17 (1) (b) of the Registration Act. (*Abdul Raouf, J.*) *GURBHAI v. LACHMAN.* 1924 Lah. 641.

—S. 17 (1) (b) & (c) and 2 (xi)—*Mortgage—Receipt given in full discharge—Registration—Necessity for.*

Where in full satisfaction of the amount due under a mortgage a certain sum of money is received and a receipt is given therefor, the receipt does not require registration inasmuch as it does not extinguish the mortgage. 7 L. W. 229 dist. (*Venkatasubba Rao and Sriniaasa Aiyangar, JJ.*) *GOPALASWAMI IYER v. KACHI KALYANA RENGAPPA.* 20 L. W. 931.

—S. 17 (2)—*Agricultural lease—Lease reduced to writing—Registration necessary—Other evidence if admissible—Evidence Act, S. 91.*

Though a lease for agricultural purposes for more than a year can be made orally, still if the

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lease is in fact reduced to writing, it cannot be received in evidence under S. 17 of the Registration Act unless registered. The document itself being inadmissible, S. 91 of the Evidence Act shuts out other evidence of the transaction. (*Miller, C. J. and Mullick, J.*) *MAHARANI JANKI KUJER v. BIRJ BHIKHAN OJHA.*

3 Pat. 349: 79 I.C. 26: 1924 P. H. C. C. 185;
 5 Pat. L. T. 541: 1924 P. 641.

—S. 17 (2) and 49—*Mortgage of trees—Necessity for registration.*

Where an usufructuary mortgage of palmirah trees worth Rs. 100 merely created a mortgage in respect of the trees and did not impose any limitation on the right of the owner to enjoy the land on which the trees were standing held that the mortgage did not require registration. 38 M. 883 foll: 20 M. 58. dist. (*Odgers and Hughes, JJ.*) *GNANAMUTHU NADAN v. VEILUKANDA NADATHI.* 19 L. W. 494: (1924) M.W.N. 451: 79 I.C. 2: 1924 Mad. 542.

—S. 17 (2) and 49—*Partition lists—Allotment of properties to various sharers—List not registered—Admissibility in evidence.*

At a partition among the members of a joint Hindu family certain properties were allotted to each of the sharers and lists were prepared of the properties so allotted. The lists however, were not registered but they were signed by all the sharers and attested. The lists themselves did not contain any provision whereby a division of status was created among the members of the family. Held that the lists were admissible in evidence without registration. 16 L. W. 714 followed. (*Odgers and Hughes, JJ.*) *GNANAMUTHU NADAN v. VEILUKANDA NADATHI.* (1924) M.W.N. 451: 79 I.C. 2: 19 L.W. 494: 1924 Mad. 542.

—S. 17 (2) (vi)—*Compromise—Disputed claims—Registration if necessary.*

Where a compromise of disputes between parties litigating before a Revenue Court does not itself purport to convey or to create or declare any interest in immoveable property, but merely recognises or confirms an antecedent title, which was till then involved in dispute, it at best amounts only to an intimation to the Revenue Court of the settlement of disputes and does not require registration. (*Kanhaiya Lal, J.*) *GANGA RAM v. LACHMAN SINGH.*

L. R. 5 A 736: 1925 A. 176.

—Ss. 17 (2) (vi) and 49—*Compromise—Registration—Withdrawal of criminal prosecution—Exchange of rooms—Rights of parties.*

Two of the rooms or buildings in an enclosure were the subject-matter of a suit. In a portion of this enclosure, the defendants and their predecessors were living. The parties, quarrelled and fought over the possession of the defendants and one of the parties on the side of the defendants sustained grievous hurt. There was a criminal case and a compromise was arrived at on the 5th of June 1918. It was embodied on a paper bearing stamp duty of eight annas and was not registered. It was stated in the compromise deed, that room No. 126 was given up by the

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defendants and that they were given room No. 129 in lieu of the same. It was further stated and agreed that the defendants would continue in possession of room No. 128 as before. *Held* that the compromise was really a document by which the plaintiff transferred his title to the property in favour of the defendants. The value of the property having been found roughly by the Court below, to be about Rs. 500, such a transfer could only be effected by means of a registered document under the provisions of S. 17 of the Registration Act, and S. 54 of the Transfer of Property Act. The document being unregistered it really conveyed no title to the defendants and, therefore, the plaintiff was entitled to get back what was really his own property.

But the plff. must also put the defendants in the same position in which they would have been if there had been no compromise. The compromise was to the effect that they would have a certain consideration for dropping the prosecution. If the consideration had been a certain sum of money there would have been no difficulty in putting the plaintiff to terms. He could have got his decree for possession on payment of the sum of money which was the consideration. In this case the prosecution was dropped in consideration of the two houses which have been found to have been the absolute property of the plaintiff. The plaintiff would therefore be entitled to recover the houses only on payment of an equivalent in money of the same. (*Mukerji, J.*) *RAM SARUP v. HARDEO.*

L. R. 5 A. 186 : 10 O. & A.L.R. 431:
79 I. C. 429 : 1924 A. 396.

— S. 27—*Legality of registration—Inclusion of property not intended to be conveyed—Effect of.*

Where a certain property existing and belonging to the vendor is included in a sale deed with a view to give jurisdiction to the Registrar to register the document, the registration of the document is perfectly valid even though the property in question was not intended to be conveyed. (*Mukerjee and Dalal, JJ.*) *DURGA PRASAD SAHU v. TAMESHAR PRASAD NAIK.*

L. R. 5 A. 509: 82 I. C. 243 (2):
46 A. 754: 1924 A. 897:

— S. 28—*Mortgage—Item of property within registration district not belonging to mortgagor.*

The fact that the item of property within the jurisdiction of a registration district where a document of a mortgage was registered did not belong to the mortgagor would invalidate the registration of the mortgage as a fraud on the registration law, unless it is shown that the mortgagor and the mortgagee colluded to insert the item in the mortgage deed with the knowledge that the mortgagor had no title to it. (*Odgers and Hughes, JJ.*) *SRI RAJAH DANTULURI DEVI PRASADA SATYANARAYANA VEERABHADRA VENKATALAKSHMIKANTARAJUGARU v. PEDA VENKATA JAGANNATH RAJU GARU.*

(1924) M.W.N. 125: 33 M. L. T. (H.C.) 243:
1924 Mad. 281: 77 I. C. 464: 46 M. I. J. 12.

— S. 28—*Place of registration—Small area included to give jurisdiction to Registrar—Effect*

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Where in a sale deed a small bit of property is included to give jurisdiction to the Registrar to register the document, but there was no doubt about the land having been purchased, there is no fraud on the registration law and the document is valid. (*Miller, C. J. and Mullick, J.*) *UCHIT KOPRI v. ADHIK MANDAL.*

78 I. C. 492 : 1925 P. 194.

— S. 28—*Property not belonging to mortgagor included by him in mortgage deed—No collusion on the part of mortgagee—Effect.*

Where a mortgagor intentionally includes in the deed for purposes of registration property which does not belong to him, but there is no collusion by the mortgagee to assist the fraud on registration law, the registration is not invalid, at least so far as the interests of the mortgagee are concerned. (*Wallace, J.*) *MAMMILLAPALLI VEERASALINGHAM v. KONDAYYA.*

79 I. C. 869.

— S. 28 — *Property not existing or not belonging to mortgagor—If included to get registrations done—If invalidates registration.*

If a property which has either no existence or does not belong to the mortgagor has been introduced in a mortgage bond, with a view to secure registration of the document in a particular office the registration must be deemed to be futile. (*Mookerjee and Chotzner, JJ.*) *KEDAR NATH DAS. v. BIDHU BHUSHAN GUHA.*

1924 Cal. 948.

— S. 28 — *Property within jurisdiction—Duty of Registrar—Question of title.*

If any portion of the property to which the document relates is situate within the jurisdiction of the Sub-Registrar where the deed is registered, that is sufficient to give him jurisdiction. It is not his province to enquire if the mortgagor or vendor had title and to refuse registration on the ground of want of title. Even where both parties knew of the defect of title, the validity of the deed is not affected, and such title as the mortgagor or vendor has will pass. (*Kinkhede A.J.C.*) *TULSIRAM v. TUKARAM,* 1924 Nag. 363.

— S. 28—*Registration—Inclusion of land not belonging to mortgagor—Effect of.*

Where a piece of grove land included in a mortgage deed, did exist and both the mortgagor and the mortgagee had reason to believe that it belonged to the mortgagor and there was no collusion between the mortgagor and the mortgagee the mere fact that the grove did not actually and legally belong to the mortgagor does not invalidate the registration. It is not a case of a fictitious property being entered with a view to obtain registration in an office where it would otherwise not have been possible. 41 C. 972 dist. (*Mukerjee and Dalal, JJ.*) *MD. ABDUL HASAN v. FIDA HUSSAIN.*

L. R. 5 A. 419: 82 I. C. 736:
1924 A. 473.

— S. 28—*Registration — Validity of—Inclusion of property which did not exist—Ignorance of mortgagee—Legality of registration.*

To give the Sub-Registrar jurisdiction, the property included in a deed of mortgage or a part of it, must be situated within the jurisdiction of that officer. No question of fraud by one party

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or the other enters into the language of the law. The question of fraud may be pleaded only to stop a party from raising a plea, but the jurisdiction of a registering officer cannot come into play simply because one of the parties to a transaction has been guilty of fraud. Where there was no property within the jurisdiction of the Sub-Registrar who registered a particular mortgage it follows as clearly as possible that he had no jurisdiction to register the deed.

Even though the mortgagee was absolutely innocent in the matter, that fact would not give the Sub-Registrar jurisdiction to register the deed, nor make the deed operative. (*Mukerji, J.*) *BISAL SINGH v. ROSHAN LAL*. 22 A.L.J. 241 : L. R. 5 A. 182 : 73 I. C. 265 : 1924 A. 373.

—Ss. 32 and 33—Presentation of document—*Pardanashin lady*—Document handed over to Sub-Registrar by husband—Registration at the house of the lady.

Where the husband of a *pardanashin* lady who had executed a document took it to the office of the Registrar and handed it over to him and asked the Registrar to go to the house of the lady to get it registered and the Registrar did accordingly: Held that the handing over of the document by the husband to the Registrar did not amount to presentation and that the deed must be deemed to have been presented at the house. The registration was therefore valid. (*Walsh, A. C. J. and Ryves, J.*) *YASIN BIBI v. SYED MUNAWAR HUSAIN*. 22 A. L. J. 700: L. R. 5 A. 524 : 46 A. 743 : 1924 A. 799.

—Ss. 32 (b) and 35 (1) (c)—Executant of document—Death of—Presentation by some or one of the heirs at law—Validity of.

In so far as the provisions of S. 32 (b) of the Registration Act can be applied at all to the case of a deceased executant, it is sufficient if the document is presented for registration by a person who is a representative of the estate of the deceased and it is not necessary for the entire body of persons, who between them represent the whole estate, to join in making the presentation. Even if there is an irregularity in the registration owing to the omission of the other executants to join in the registration, it is cured by S. 87 of the Registration Act. (*Mears, C. J. and Piggott, J.*) *RAFAT-UN-NISSA BEGAM v. HUSAINI BEGAM*. 22 A. L. J. 1112.

—S. 33—Execution of document by person having power of attorney—Presentation for registration. *MT. AISHA BIBI v. CHHAJU MAL*. 1924 A. 148.

—S. 35—Signature of agent—Registrar's endorsement—Contradictory statements—Presumption.

Where the writing at the foot of a document showed that the person who presented the document was only an agent and was directly opposed to the official statement signed by the Registering officer that the document was presented for registration by the mortgagee. Held that there was no provision in the Regulation or Rules that requires the signature of the person presenting the document for registration. The

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correctness of this Official endorsement is to be presumed and the signature for which there was no legal sanction, cannot operate to contradict it. Where any party to a document is unable or refuses to appear, Rule 5 of Burma Regulation (II of 1897) requires a note of the circumstances to be made, but the omission is one for which the person presenting the document cannot be held responsible. It is at most a defect in procedure which did not vitiate the registration made as it was on a proper presentation. (*Sir Lawrence Jenkins.*) *BAUNATH SINGH v. JAMAL BROTHERS*. 51 Cal. 354 : 19 L.W. 345 : 34 M.L.T. (P.C.) 50 : (1924) M.W.N. 196 : 10 O. & A.L.R. 288 : L. R. 5 P.C. 73 : 2 R. 99 : 51 I.A. 18 : 79 I. C. 940 : 28 C. W. N. 1029 : 22 A. L. J. 42 : 1924 P. C. 48 (P. C.).

—S. 49—Admissibility of unregistered document to prove final discharge of mortgage.

When the defendant (mortgagor) pleaded that a portion of the mortgage amount had been remitted, by virtue of an agreement between the mortgagee and co-mortgagor, which was unregistered. Held, that the agreement embodied an writing is inadmissible as it would require registration under the T. P. Act, and that the fact that it also purported to be a discharge would not render it admissible as evidence of the agreement and if it is not evidence of the agreement in which case it will be admissible as a receipt 7 L. W. 1229 relied on. (*Phillips, J.*) *VISHNU CHOTLA KULLATUSUBBIAH v. TALLAPRAGADU LAKSHMIPATHI*. 20 L. W. 801.

—S. 49—Lease unregistered—Admissibility in evidence for collateral purpose.

A lease which is unregistered and therefore inadmissible under S. 49 of the Registration Act may nevertheless be admitted for a collateral purpose, to explain the character of a person's possession of the property. 42 C. 801 : 26 C. W. N. 605 : 39 A 696. 43 M. 244 Ref. (*Miller, C. J. and Mullick, J.*) *MAHARANI JANKI KUER v. BIRJ BHIKHAN OJHA*. 1924 P. 641 : 3 Pat. 349 : 79 I.C. 26 : 5 Pat. L. T. 541 : 1924 P. H. C. C. 185.

—S. 49—Unregistered document—Inadmissible in evidence—Estoppel.

Even though an unregistered mortgage is invalid for the purpose of creating a charge on the land, it is obviously inequitable that the person who has benefited by it should be helped by the court to repudiate that transaction. Where it was admitted that the plaintiff was in possession on account of money advanced by him to the defendant the latter is estopped from ejecting him until the money is re-paid. (*Fremantle, S. M. and Burn, J. M.*) *RAM NARAIN v. FANGREY*. L. R. 5 O. 131 : 10 O. & A. L. R. 803.

—S. 49—Unregistered document—When admissible in evidence.

An instrument which is compulsorily registrable may be used in evidence to prove a collateral fact; but to be collateral, the fact must be independent of or divisible from the purpose to effect which the law requires registration. (*Baker, J. C.*) *JANARDHAN v. WASUDEO*. 1924 Nag. 315

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—S. 49—*Unregistered usufructuary mortgage—Personal Covenant—Failure to give possession.*

In a usufructuary mortgage deed there was a clause providing that the mortgagee in the event of his losing possession of the mortgaged property could require the mortgagor to repay the loan out of his assets. The deed was unregistered and therefore inoperative as mortgage. In a suit to recover the money held that the deed was inadmissible in evidence and the plaintiff was not entitled to recover the money in the absence of a distinct personal covenant by the mortgagor to repay. (*Ashworth, A. J. C.*) JAFAR KHAN v. MT. QUADIRAN.

10 O. & A. L. R. 1193.

—S. 49 (c)—*Scope of—Partition to document—Absence of registration.*

Where a document which requires registration is not registered, it is inadmissible only as evidence affecting immovable property comprised therein, but it can be used as evidence as to the parties between whom it was executed. (*Mookerjee and Suhrwardy, JJ.*) LUKHAN CHANDRA MONDAL v. TAKIM DHALI.

80 I. C. 337.

—S. 52—*Sale of land—Presentation for registration by vendee—Refusal of vendee to sign registration endorsement.*

The refusal of a vendor to sign the registration endorsement does not affect the validity of the registration where the document is presented for registration by the vendee and he has conformed to the provisions of S. 52, Registration Act. (*Kanhaiya Lal, J.*) MT. ISLAM FATIMA v. TAMIZ ALI.

1924 A 938.

—Ss. 73 and 77—*Suit under—Preliminaries for—Enquiry before Registrar—Technical defects in application—Effect of.*

In a suit under S. 77 of the Registration Act to compel registration the Court has simply to determine the fact of execution and, if a *prima facie* case of execution is made out and the requirements of the law complied with to order registration of the document. It cannot go into other considerations. An enquiry by the Registrar under S. 73 of the Registration Act is a necessary preliminary to a suit under S. 77 of the Act and no suit will lie unless the provisions of S. 73 are substantially complied with. A technical defect in describing the application as an appeal would not affect the rights of parties. (*Baker, O. J. C.*) IBRAHIM v. MT. SUGRABAI.

7 N. L. J. 4 :

20 A. L. R. 158 : 75 I.C. 664 : 1924 Nag. 77.

—S. 77—*Scope of enquiry by Court—Duty of Registration Officer when documents are presented.*

Where a document is presented to a Registrar of Assurances for registration and it bears on its face signs of having been tampered with, he has only to see whether the document is in the state in which it was executed by the parties to it. He would be exceeding his functions if he went into a roving enquiry to guess at the probabilities of its provisions, and in a suit under S. 77 of the Registration Act, the same considerations should guide the Court

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which should guide the Registrar in considering his duty to Register or to refuse registration. (*Coutts Trotter, C. J. Ramasami and Wallace, JJ.*) BOLLA GURUVAYYA v. C. VENKATARATNAM.

47 Mad. 833 : 1924 Mad. 310 : 82 I. C. 483 : 20 L. W. 977 : 47 M. L. J. 271.

—S. 77—*Scope of suit under—Claim for possession and mesne profits—Effect of.*

A claim for possession and mesne profits cannot be joined with a prayer to enforce registration of a document in a suit under S. 77 of the Registration Act. 9 M. L. J. 107 Ref. Although the scope of an enquiry in a suit under S. 77 of the Regn. Act may be of a restricted character and the court is concerned not with the validity but with the genuineness of the document sought to be registered, still the findings in the suit would operate as *res judicata*. (*Mookerjee and Suhrwardy, JJ.*) DWIJENDRA NARAYAN ROY v. JOGES CHANDRA.

39 C. L. J. 40.

79 I. C. 520 : 1924 Cal. 600.

—S. 77—*Suit for compulsory registration—Decree in—Appeal—Power of Appellate Court to direct stay of registration.*

Where in a suit under S. 77 Registration Act, the plaintiff gets a decree directing the Registrar to register a particular document within 30 days after the passing of such decree, the section does not prevent a Civil Court which has power to hear an appeal against the same from staying the execution of the decree under the Civil Procedure Code. In such case if the appeal ultimately fails the document can be presented for registration within 30 days from the disposal of the appeal. 33 C. 1021. followed. (*Devadoss, J.*) RAMASUBBA NAYAKAR v. DORAI RAJ.

20 L. W. 966 : 47 M. L. J. 735.

—S. 77—*Suit under—What court has to determine—Application—Essentials of—Scope of suit.*

It is settled law that in a suit to compel registration under the Registration Act, the Court has simply to determine the fact of execution and if a *prima facie* case of execution is made out and the requirements of law complied with, to order the registration of the document. It cannot go into other considerations.

Where registration is refused on a document being presented before the Sub-Registrar, the aggrieved party is bound to make an application to the Registrar under S. 73 in order to establish his right to have the document registered. Such an application must be in writing and must be accompanied by a copy of the reasons recorded under S. 71 and the statements in the application should be verified by the applicant in the manner required by law for the verification of plaints.

Where an appeal is wrongly filed under S. 72, it can be treated as an application under S. 73 in order to give the basis for a suit for compulsory registration. (*Baker, A. J. C.*) IBRAHIM v. MT. SUGRABAI. 7 N. L. J. 4 : 75 I.C. 664 : 1924 Nag. 77 : 20 N. L. R. 158.

—S. 77, 72 and 21—*Suit to compel registration—Maintainability of—Refusal to accept document for registration—Refusal to register—Difference between—Description of property—Sufficiency of.*

REGISTRATION ACT, S. 82.

The expression "Refusing to admit a document to registration" in S. 72 of the Registration Act includes not merely a refusal to register but also to accept a document for registration. The latter in effect amounts to a refusal to register the document and a party aggrieved may institute a suit under S. 77 of the Registration Act. Under the terms of a lease the property demised was described in these terms. "We have taken from you on rent a godown bearing No. 3. The Port Trust No. of which is in the New Rice Market at Carnac Bunder Port Trust, Bombay. We have taken the same on rent by fixing the rent thereof at Rs. (601) six hundred and one per month." Held that this was a sufficient description of the property for the purposes of S. 21 of the Registration Act. (*Shah, A. J. C. and Kincaid, J.*) **HUSSAIN ABDUL REHMAN & CO. v. LAKMICHAND KHETSEY.**
26 Bom. L. R. 934 : 1925 B. 34

— S. 82 (a)—Enquiry before sub-registrar—Truth or falsity of the recitals in the deed—No jurisdiction.

The proceeding or enquiry referred to in S. 82 of the Registration Act must be a proceeding or enquiry as prescribed by the Act. The Act nowhere prescribes any enquiry by the Registration officer as regards the truth or falsity of any recital in a deed. All that the Registering Officer is required to enquire into is as to whether the document presented before him for registration was or was not executed by the person by whom it purports to have been executed. The enquiries are those provided for in Ss. 34 and 35 of the Act and the Sub-Registrar has no jurisdiction to enquire as regards the truth or falsity of any recital in the deed. Consequently no offence is committed under S. 82 of the Act if an incorrect statement is made regarding the recitals in the deed. (*Kulwant Sahay, J.*) **MT. GOBINDIA v. EMPEROR.**
5 Pat. L. T. 372:

2 Pat. L. R. 162 (Gr.). : 1924 P. H. C. C. 199 :
81 I. C. 124 : 25 Gr. L. J. 636 : 1924 P. 754.

RELEASE—Effect of—Not a conveyance. **MUNSHI GOBIND PRASAD v. LALA JUGDIP SAHAI.**
1924 Pat. 185.

RELIGIOUS ENDOWMENTS—Debutter property Family trust—Right of beneficiaries to put an end to the trust. **MONMOHAN GHOSE v. SIDDESWAR DUBEY.**
76 I. C. 213.

—Dedication to idol—Registration and writing unnecessary.

A dedication of a small plot of lands to an idol is valid if made orally, and writing and registration are unnecessary. 42 M. 440 Ref. (*Prideaux, A. J. C.*) **VITHALDAS v. GOMA.** 20 N. L. R. 60 :
79 I. C. 173 : 1924 Nag. 254.

—Dedication—Essentials of—Divesting of donor's right—Registration of deed.

The dedication to a deity and the creation of a trust for religious purposes no doubt find favour in Hindu law just in the same way as it does in other communities and the essential ingredient that constitutes gift whether of moveable or immoveable property in the Hindu law is the *San-*

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kaip and the *Samarpan* whereby the property is completely given away and the owner completely divests himself of the ownership in the property. There must be a real *Sankalp* and *Samarpan*. The registration of a deed of gift will only affect the onus so far as the execution thereof is concerned but will in itself be no proof of the real dedication of the property or the divesting of the ownership therein by the donor. The onus of proving real dedication *viz.*, the *Sankalp* and the *Samarpan* of the properties in favour of the donee rests upon those who claim under the gift. (*Jwala Prasad and Kulwant Sahay, JJ.*) **DEO SARAN BHARTHI v. DEOKI BHARTHI**
5 Pat. L. T. 305 : 3 Pat. 842 : 83 I. C. 980 :
1924 P. 657.

—Dedication—Idol—Family idol—Not installed—Dedication of properties.

Certain properties were purchased in the name of a deity. The family had obtained idols to be set up bearing the name borne in the sale-deed, and the income derived from the village purchased in its name was used for the purposes of worship of the idol and other charitable purposes. No temple was however built. Held that the actual installation of idols or the construction of temple is not absolutely necessary for validating a deed of dedication made for such purpose. There was a good dedication of the properties to the idol in the present case.

The principle of Hindu Law which invalidates a gift other than to a sentient being capable of accepting it, does not apply to a bequest to trustees for the establishment of an image and the worship of Hindu deity after the testator's death, nor does it make such a bequest void. The name given to a deity is only a sacred convention. The deity is supposed or believed to exist from eternity. The idol is virtually treated as a visible symbol of the deity in whose favour the dedication is made or by whom the purchase is to be effected; and the mere fact that the installation takes place afterwards, does not affect the validity of the dedication or of the purpose for which the purchase is made. (*Lindsay and Kanhaiya Lal, JJ.*) **SARAB SUKH DAS v. RAM PRASAD.**
46 All. 130 : 78 I. C. 1018 :
1924 All. 357.

—Mahant—Powers of alienation—Duty of alienee—Sradh of deceased mahant—If necessity.

In order to perform the *sradh* of a deceased mahant, it is within the power of a mahant to alienate trust property, if he has no funds with him. But if a portion of the income is sufficient for the purpose, he cannot alienate. In a case of alienation, the duty is cast on the alienee to inquire and satisfy himself that there are no funds available for the purpose. (*Miller, C. J. and Kulavnt Sahay, J.*) **RAM NARAZAN DASS v. OPAL DAS.**
5 Pat. L. T. 339 : 76 I. C. 68 : 1924 P. 611.

—Public temple—Legal position of—Shambait—Powers of.

A public temple is a religious institution and is recognized in law as a juridical person, but it can act only through persons who have authority to act for it and they can act for the temple only

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within the scope of their authority. The position of the manager or trustee is analogous to that of the Mahant of a Mutt. He can sell or mortgage temple lands if there is an actual, special and unavoidable necessity which must be proved to have existed by those who allege it. He cannot impair the endowed property by creating or granting in favour of any one rights of occupancy in the same, (*Sir John Edge.*) *NAINA PILLAI MARAKAYAR v. RAMANATHAN CHETTIAR*,

47 Mad. 337 :

34 M. L. T. (P. C.) 10 : 1924 M. W. N. 293 :

L. R. 5 P. C. 33 : 10 O. & A. L. R. 464 :

28 C. W. N. 809 : 51 I. A. 83 :

19 L. W. 259 : 1924 P. C. 65 :

82 I. C. 226 : 22 A. L. J. 130 : 46 M. L. J. 546.

— *Public temple in Madras—Sudras may be pujarees.*

There is no rule that unless a person belongs to a particular class (caste) he should not perform worship in a temple. Even Sudras may be Pujaries. (*Sir John Edge.*) *PUJARI LAKSHMANA GOUNDAN v. SUBRAMANIA AYYAR*,

33 M. L. T. (P. C.) 466 : (1924) M. W. N. 278 :

22 A. L. J. 169 : 10 O. & A. L. R. 606 :

L. R. 5 P. C. 125 : 81 I. C. 518 :

29 C. W. N. 112 : 19 L. W. 253 : 1924 P. C. 44.

— *Public temple—Teste of.*

The facts as found were that the founder of the temple dreamt that he should instal at his house an idol of the God Subramaniaswami and that the god would come to his house and enable him to foretell events. He did instal that idol at his house, and allowed Brahmins and other Hindus of various castes to worship the idol as if it was a public idol. He acted as the *pujari* of the idol, and received as the *pujari* offerings made to the idol by worshippers and fees which he charged in respect of processions and other religious services. The number of Hindu worshippers increased and with the offerings and fees he purchased some jewels for the idol, built for himself another house in the village to which he and his family removed, and he extended the house in which the idol was and added to it covered rooms for the accommodation of the worshippers during the ceremonies of worship. He also built in the village a rest house for the use of worshippers of the idol. On certain days in each week the Hindu public were admitted by him free of charge to worship in the greater part of the temple, to one part only on payment of fees, and to the inner shrine apparently not at all. With the income which he derived from offerings and fees at the temple he efficiently maintained the temple as if it were a public temple and discharged all the expenses connected with the temple and the worship of the idol there. He applied the balance of the income he so obtained to the support of himself and his family and in acquiring for his own benefit and that of his family some immoveable property which he possessed before he died.

Held, that the founder held out and represented to the Hindu public that the temple was a public temple at which all Hindus might worship and that the inference is that he had dedicated

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the temple to the public. (*Sir John Edge.*) *PUJARI LAKSHMANA GOUNDAN v. SUBRAMANIA AYYAR*,

33 M. L. T. (P. C.) 466 : (1924) M. W. N. 278 :

22 A. L. J. 169 : 10 O. & A. L. R. 606 :

L. R. 5 P. C. 125 : 81 I. C. 518 :

29 C. W. N. 112 : 19 L. W. 253 :

1924 P. C. 44.

— *Public trust — Inam — Devadayam — Meaning of—Inam register—Entries in—Value of.* See C. P. CODE, S. 92. 46 M. L. J. 245.

— *Shebait — Appointment of successor— Formalities for—Deed and seal.*

Where under a will an executor was given power to appoint a successor to the shebaitship under his hand and seal, the appointment of a shebait otherwise duly made (though not under seal) is a valid appointment. (*Page, J.*) *ADMINISTRATOR GENERAL OF BENGAL v. BALKISSEN MISHRA*, 51 Cal. 953 : 1925 Cal. 140.

— *Shebait—Gift to unborn persons— Rule i applies.*

The principle of law enunciated in *Tagore v Tagore* and extended to hereditary officers in 27 I. A. 69 i. e., that a gift to an unborn person is invalid and contrary to Hindu Law applies to the office of *Shebaitship*. For this purpose there is no difference between a bare trusteeship and one carrying emoluments.

A Hindu by his will appointed certain persons shebait and after their death said that the seniormost among their heirs was to be *shebait*. *Held* the provision in favour of the seniormost of the heirs, after the death of the last of the persons born before the testator's death would fail and the *shebaitship* would revert to the heirs of the founder. (*Suhrawardy and Duval, JJ.*) *PROMOTHO NATH MUKERJEE v. ANUKUL CHANDRA BANERJEE*, 29 C. W. N. 17 : 40 C. L. J. 564 : 1925 Cal. 225.

— *Shebaitship—Right to.*

It is well settled that when worship of an idol, has been founded, the shebaitship is vested in the founder and his heirs, unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different conclusion. (*Das and Macpherson, JJ.*) *DEOKINANDAN v. BRIJ NANDAN JHA*, 5 Pat. L. T. 231 : 76 I. C. 89 : 1924 P. 502.

— *Succession to Guru—Presumption as to dedication.* 75 I. C. 94 : 6 Lah. L. J. 89.

— *Succession—Chela—Right to succeed.*

The constitution of the particular shrine in question must govern the succession and the mere fact that a certain *Chela* has succeeded to one of the shrines enjoyed by his Guru does not *ipso facto* entitle him to succeed to another. The history of this particular shrine showed that the proprietary body were entitled to nominate the *Mahant*, this being established by their having done so on the last two occasions without any challenge or objection during a period of 20 years. (*Harrison and Jafar Ali, JJ.*) *KESHWANAND v. MOHAN PURI*, 5 Lah. L. J. 543 : 80 I. C. 496 : 1924 Lah. 170.

— *Temple Committee—Vacancy not filled up—Notice—Order if appealable.*

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Where a vacancy in a Temple Committee remained unfilled for a period contemplated by the scheme, and thereafter some worshippers issued a notice to the Committee that they would apply to Court to have the same filled up the notice is valid even if it does not state the consequences of non-compliance.

An order filling up the vacancy is not appealable. (*Phillips and Odgers, JJ.*) *SETU AIYAR v. SUNDARAM PILLAI*. 80 I. C. 615 : 1925 Mad. 175.

— Temple—Right of trusteeship—Usage. *NARAYANAN CHETTI v. ELAYAPERUMAL*.

19 L. W. 221 : (1924) M. W. N. 281 : 1924 Mad. 400 (2).

— Trustee—Lease for 21 years—Option to renew at enhanced rates of rent—Legality of the transaction.

Where the trustee of a temple grants a lease of temple lands for building purposes for a term of 21 years with an option to the tenant to renew it for a like period at an enhanced rent it is a transaction which any prudent man is entitled to enter and as such the lease with the option to renew is valid. The position under the Indian Trusts Act considered. (*Schwabe, C. J. and Wallace, J.*) *KANNIAPPA CHETTIAR v. RAMACHANDRA AIYAR*. 19 L. W. 587 : (1922) M. W. N. 386 : 1924 Mad. 731 : 79 I. C. 92 : 46 M. L. J. 407.

RELIGIOUS ENDOWMENTS ACT, S. 18—Leave to sue—Allegations to be specific—Choice of defendants—Judge if can delegate powers.

Leave to sue under S. 18, Religious Endowments Act, should not be granted on the basis of vague and indefinite allegations nor should sanction be given against all or any of the respondents without specifically mentioning the party against whom the right to sue is sanctioned. The District Judge cannot delegate to another the function of reporting on the allegations, unless it be to make a local investigation as Commissioner. (*Spencer and Devadoss, JJ.*) *SUBRAMANIA MUDALIAR v. PARASURAMIER*. 1924 Mad. 644.

— S. 18—Refusal to grant leave to sue—Appeal—If lies.

The order of a District Judge refusing to grant leave to sue under S. 18 of the Religious Endowments Act is not appealable. (*Miller, C. J. and Foster, J.*) *BIBI WASHIKHAN v. MIR NAWAB ALI*. 3 Pat. 1018 : 1925 P. 138.

RES-JUDICATA—Unnecessary finding in a previous suit whether operates as.

Where a previous suit is decided on a finding that a certain property was bequeathed to a female by a will, a finding in that suit to the effect that females were not excluded from succession being a finding not necessary for the determination of that suit cannot operate as *res-judicata*, in a subsequent suit between the parties. (*Pullan and Kendall, A. J. Cs.*) *ABADI BEGAM v. AHMAD MIRZA BEG*. 1 O. W. N. 433 :

82 I. C. 691 : 11 O. L. J. 757 : 1925 Oudh 180.

RESTITUTION OF CONJUGAL RIGHTS—Refusal of relief—Grounds for—Reasonable apprehension of bodily injury—Order for maintenance.

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REVISION.

In a suit for restitution of conjugal rights it was found that the plaintiff, a Brahmin, turned his wife out of doors many years ago stating that he suspected her chastity. The woman went to live with her uncle who supported her. She then applied to the Criminal Court for a maintenance order and obtained an order awarding her sufficient maintenance. It was found that when the maintenance proceedings were in progress before the Magistrate the plaintiff even then refused to take his wife back stating that at the time he suspected her chastity. When the woman endeavoured to obtain the money that was due to her the husband refused to pay it and she had to attach his property and to arrest him and place him in custody to execute the order. At the end of this the husband applied for restitution of conjugal rights with the object, if he succeeded, of going to the Criminal Court and saying that the wife was refusing to live with him without sufficient reason and getting the order of maintenance cancelled. *Held*, that in the circumstances the wife had a reasonable apprehension of bodily injury if she returned to her husband and that the suit for restitution should be dismissed. (*Stuart and Mukerjee, JJ.*) *BABU RAM v. MR. KOKLA*. 46 A 210 : 10 O & A. L. R. 204 : 22 A L. J. 68 : L. R. 5 A. 43 : 79 I. C. 634 : 1924 A. 391.

— Suit by husband—Defence to the suit—Cruelty—What is—English Law—Applicability of. 1924 Mad. 49.

— Confirmation of— Authority of Collector—Final—Deputy Collector exercises only delegated authority. See TRUSTS ACT, S. 90. 47 M. L. J. 755.

REVISION—Interference by High Court on a technical ground when substantial justice done to parties—Discretion to be exercised.

The plaintiff having stood surety for M, deposited the amount of the decree, on behalf of the judgment-debtor under S. 17, Provincial Small Cause Courts, Act in order to obtain a review of the decree. The review was dismissed and the creditor withdrew the money on 21st April 1920. Subsequently on 20th April 1923, the plaintiff (surety) sued the judgment-debtor and a plea of limitation was raised by the latter under Article 81 of the Limitation Act.

Held, relying on, (*Ragunath Sahai v. The Liquidator of Himalayan Bank, Ltd.*) 15 A 139, (1) that the High Court should not interfere in Civil Revision on a technical point, where substantial justice has been done between the parties in the proceedings of the lower Court, (2) that the debt sued for was undoubtedly due from the principal to the surety, and that the High Court would not interfere with the lower court's decision, whether the period of limitation began to run from the date of the rejection of the review petition, or from the date when the creditor withdrew the money. (*Boys, J.*) *MOHAMMAD NAQI v. HARGU LAL*. L. R. 5 All. 694 (Civil) :

82 I. C. 1011 : 1925 A. 164.

RIPARIAN RIGHTS PORAMBOKE.

RIPARIAN RIGHTS PORAMBOKE—*Jungle stream passing through survey field—Patta granted—If includes water channel—Liability of pattadar to pay water-cess—Riparian rights—Mixed question of fact and law.*

A jungle stream passed through a certain survey field which were the patta lands of the plaintiff and then emptied itself into a Government irrigation source. The stream was Government property prior to the grant of the patta but in the patta channel was not separately demarcated and specified as Government poramboke. The plaintiff dammed the stream and used the water for raising wet crops on his dry lands, and the Government levied water cess for the same. *Held*, the grant of the patta for the fields did not automatically carry with it the grant of any Government poramboke already existing within the fields and the Government was justified in levying water-cess. 31 C. 982 distinguished: Madras Act III of 1905 and case-law thereunder referred to.

Per Odgers, J.—Where a party claims to have riparian rights, it is a mixed question of fact and law which cannot be raised for the first time in Second Appeal.

Per Wallace, J.—A patta is not a document of title or deed of grant but merely a record of demand by Government of a certain amount as land revenue on a certain area. (*Odgers and Wallace, JJ.*) SECRETARY OF STATE FOR INDIA *v.* RAGHAVACHARIAN. 47 Mad. 861:

20 L. W. 815; 1924 Mad. 913:
(1924) M. W. N. 820; 47 M. L. J. 503.

RIWAJ-I-AM—*Entries in—Value of—Mother—If includes grandmother.*

Entries in the *Riwaj-i-am* even when unsupported by instances are an important piece of evidence on which courts can act. The term mother does not include "grandmother". (*Abdul Raouf and Campbell, JJ.*) *MT. TABI v. SAUDAGAR SINGH.* 1924 Lah. 693.

SALE WITH AGREEMENT FOR RE-PURCHASE—*Registered deed—Amount of purchase price omitted—Suit for rectification of deed or cancellation—Evidence as to purchase price admissible under S. 92 (4), Evidence Act.*

Where a deed of sale had been executed and registered containing an agreement for re-purchase but leaving the amount of purchase money blank, and the respondent brought a suit for specific performance and rectification of the deed or in the alternative for cancellation thereof.

Held, that under the provision of S. 92 (1), Evidence Act oral evidence was admissible as to the amount agreed upon on the ground of fraud or mistake of law or fact, that the omission to enter the price was either due to the fraud of the appellant or to a mutual mistake and that the document could be rectified by the Courts under S. 31, Specific Relief Act, so as to bring it into accord with the real intention of the parties.

Held, also that the respondent was entitled to treat the document as a mortgage by conditional sale as defined in S. 58 (e), Transfer of Property Act, and could therefore redeem the Property on payment of the mortgage money under S. 60 of

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the Act. (*Lentaigne and Carr, JJ.*) MAUNG PE GYI *v.* HAKIM ALLY.

2 R. 113; 3 Bur. L. J. 44; 80 I. C. 759;
1924 R. 235.

SALE OF GOODS—*Contract for—Numbers on packages—Description—Numbers not material or of the essence of the contract unless descriptive of the quality of the contents. See CONTRACT ACT, Ss. 106 AND 118.* 46 M. L. J. 655.

—*Duty to give notice of arrival of goods—Failure—Effect.*

Where under a contract of sale there was a duty on the part of the vendor to give notice to the vendee of the arrival of the goods and it was not done it amounts to a breach of the contract (*Phillips and Venkatasubba Rao, JJ.*) ALAGIRISAMY AIYAR *v.* RUNA CHEENA MANA NAVANNA ONA & BROS. 78 I. C. 326 (2); 19 L. W. 654.

SALT ACT, Ss. 15, 18 AND 118—*Information not recorded by Salt Inspector—Search—Failure to call policemen or neighbours to witness—Effect of.*

Before searching the premises of the accused the Salt Inspector made no record of the information received. He did not summon respectable neighbours as search witnesses and no police officer was obtained to attend the search. *Held*, the search was illegal as the provisions of S. 118 of the Salt Act had not been complied with.

Section 15 of the Salt Act is confined to the search of a place in which any article is manufactured or refined under the license or any rule made under the Act. Where salt is unlawfully manufactured at an authorised place the proper section applicable to a search of the place is S. 18 and not S. 15. (*Sulaiman, J.*) RAMDIN *v.* EMPEROR. L. R. 5 A. 88 (Cr.); 77 I. C. 815;
25 Cr. L. J. 463; 1924 A. 437.

SECOND APPEAL—*Issue as to non-joinder framed, but not pressed—No mention in the grounds of appeal—Effect of.*

Where in an ejectment suit, two issues were framed, as to whether the land was Sir or not, and whether the plaintiff had the right to sue alone, the lower Court without passing orders on the second issue decided against the plaintiff on the first issue, the appellant on second appeal insisted on the second issue to be decided.

Held, that it was too late to take the plea in second appeal before the Board of Revenue. (*Fremantle, S. M.*) HAKIM SINGH *v.* MO ALU JAFAR. L. R. 5 All. 285 (Rev.).

SETTLEMENT ENTRIES—*Compromise proceedings Recorded by Settlement Court—If amounts to a mortgage.*

In a suit for redemption of mortgage, and no deed of mortgage was exhibited in support of the case, the plaintiff prayed for an alternative relief in the event of mortgage not being proved, that a decree for redemption might be given from the date of a fresh contract of mortgage. The mortgagor relied upon certain compromise proceedings which were entered in the Settlement Records, on the application of the mortgagee for entering the terms of a compromise between the mortgagor and mortgagee.

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Held, that the compromise amounted to a fresh contract of mortgage between the parties and that the Plaintiff is entitled to redeem the properties. (*Wazir Hasan, A. J. C.*) **BALAK DASA-UNDRI v. DEPUTY COMM. OF FYZABAD**

10 O & A. L. R. 886 : 12 O. L. J. 60 :
L. R. 5 O. 161 (Rev.).

SETTLEMENT RECORD.

See also (1) EVIDENCE.

(2) EVIDENCE ACT, S. 35.

SHAMILAT—Rights of proprietor—Nature of.

The rights of a proprietor in the *shamilat* of a village are not a mere accessory to the land separately held by him and a sale of the latter does not *ipso facto* convey any rights in the former to the purchaser. (*Marlincan and Zafar Ali, JJ.*)

SHAHADAT v. GANESH DAS. 78 I. C. 368 :
1925 Lah. 105.

SHIPPING—Jettisoning goods carried on the deck—Right to contribution for general average.

It is a general rule that a jettison of goods which were on deck does not entitle their owner for contribution. But this rule does not apply on voyages where the carrying of goods on deck is permitted by the established custom of navigation or where the other cargo owners have consented that the goods jettisoned should be carried on the deck of the ship. (*Aston, A. J. C.*) **DHARAMDAS THAWERDAS v. PERSIAN GULF STEAM NAVIGATION CO., LTD.** 78 I. C. 972 : 1925 S. 76.

SIND COURTS' ACT (BOM. XII OF 1886), S. 98—Judges differing in revision—Reference should be made to Full Bench—Sind, J. C. Courts Rules, R. 4.

On a difference of opinion between two Judges differing in a revisional application the matter cannot be referred to a third Judge. S. 93 only confers that power in appeals and not in revision applications. The matter in such cases should be referred to a Full Bench under R. 4. (*Kincaid, J. C., Aston and Madgavkar, A. J. Cs.*) **GUNNIS & CO., LTD. v. AMANMAL TULSIDAS.**

1924 S. 75.

SIND ENCUMBERED ESTATES ACT (XX OF 1896), S. 19—Applicability—Execution proceedings.

The Sind Encumbered Estates Act applies to execution proceedings as well as suits. (*Raymond and Madgavkar, A. J. Cs.*) **MURAD v. DAYARAM.**

78 I. C. 49 : 1925 S. 156.

SIND J. C. COURTS' RULES, R. 4—Judges differing in revision—Reference to be made to the Full Bench.

When a revision application has been heard by a Bench of two Judges and judgments delivered but no final order passed in application because of difference of opinion the Judicial Commissioner has the power to refer the matter to a Full Bench under Rule 4. (*Kincaid, J. C., Aston and Madgavkar, A. J. Cs.*) **GUNNIS & CO., LTD. v. AMANMAL TULSIDAS.**

1924 S. 75.

—R. 28—Execution—Judgment debtor if can set up to be agriculturist—Procedure.

Under R. 28 of the Rules of the Court of the Judicial Commissioner, Sind, it is open to a judgment debtor to raise a plea of his being an agri-

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culturist in execution proceedings even if no such plea had been raised at any earlier stage. The executing court is bound to enquire into the status of the judgment debtor and if found to be an agriculturist, transfer the decree for sale of the property to the collector for execution. (*Kennedy, J. C., Raymond and Bilaram, A. J. Cs.*) **HIRIOMAL v. HAZARISINGH.**

78 I. C. 53 : 1925 S. 49.

SIR LAND.

See Co-SHARER.

LOCAL ACTS.

SOCIETIES REGISTRATION ACT (XXI OF 1860), Ss. 9, 10 and 18—Rules framed before registration—Penalty—If recoverable.

Where certain rules were framed by a society before it was registered under Act XXI of 1860, but a copy of the same was lodged with the Registrar, they do not get legal force. A penalty for contravening the provisions of such rules cannot be recovered in a court of law. (*Daniels, J. C.*) **THE PRESIDENT, ZARDOZI UNION, LUCKNOW v. BASHIR KHAN.**

80 I. C. 556 :
10 O. & A. L. R. 117.

SOUTH CANARA—Waste lands—Presumption of ownership.

There is an undoubted presumption that forest tracts and old wastes in South Canara belong to the Government unless that presumption is displaced by positive evidence that the right has in any particular tract or piece of land, been granted by the sovereign power to any individual or bodies of individuals or rights have been consciously allowed to grow up adversely to the Government. 3 Bom. 452 and 28 Mad. 257 Affirmed. (*Mr. Ameer Ali.*) **KODOTH AMBU NAIR v. SECY. OF STATE.**

47 Mad. 572 :
26 Bom. L. R. 639 : 20 L. W. 49 :
35 M. L. T. (P. C.) 128 : (1924) M. W. N. 572 :
1924 P. C. 150 : 80 I. C. 835 :
47 M. L. J. 35.

SPECIFIC PERFORMANCE—Agreement to grant lease—Sanction of Board to be obtained—Time not fixed—Effect.

In the case of an agreement to grant a lease, where both parties intended the contract to be concluded only after the sanction of the Revenue Board was obtained, a suit for specific performance will not lie unless the sanction was given concluding the contract.

In the case of an agreement to lease for 2 years, where no time is fixed for the commencement of the lease, a suit for specific performance will lie. Even where time is of the essence of the contract, but conditions are not fulfilled within the time fixed, a court of equity can direct specific performance. (*Jwala Prasad and Kulwant Sahay, JJ.*) **RUDRAS DAS CHAKRAVARTHY v. KUMAR KAMAKHYA NARAYAN SINGH.**

3 Pat. 968.

—Bankruptcy of plaintiff—Effect of.

In a suit for specific performance, if the plaintiff becomes bankrupt before the institution of the suit he cannot enforce the contract. But where the bankruptcy takes place after the suit is decreed and the money deposited by the purchaser

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that principle does not apply. (*Chatterjee and Cuming, JJ.*) KAMAL KRISHNA KUNDU CHOWDHURY v. CHATOORBHUI DASSA.

78 I. C. 962 : 1925 Cal. 324.

—Contract of sale—Contract by Manager of a Joint Hindu family to sell property—Specific performance of Contract against minor members after death of manager.

A contract by a manager of a Joint Hindu family to sell immoveable properties which is entered into by him on behalf of the family and for purposes binding on the family, can be specifically enforced against the surviving members of the family after his death, even though some of them may be minors, 23 M. L. J. 610 : 44 M. L. J. 226 at p. 228 approved, 39 Cal. 232, 21 M. L. J. 1156 (P. C.) distinguished, (*Ramesam and Jackson, JJ.*) NARAYANAN CHETTY v. MUTHIAH CHETTY.

34 M. L. T. (H. C.) 350 :

(1924) M. W. N. 432 :

20 L. W. 103 : 80 I. C. 658 : 47 Mad. 692 :

1924 Mad. 680 : 46 M. L. J. 575.

—Damages—Assignment of decree—Agreement to take—Insolvency of judgment-debtor—Effect of.

Where the defendant has agreed to take an assignment of a decree for a particular amount, the subsequent insolvency of the judgment-debtor does not exonerate him from taking the assignment, 43 Cal. 999 dist. The insolvency of the judgment-debtor did not render the decree unenforceable and the plaintiff is entitled to recover the price agreed upon for the assignment, The remedy of the plff. is not confined to a mere claim for damages, 42 C. 612 dist. (*Krishnan, J.*) KRISHNAN AIYAR v. NYNADIKKAM PILLAI.

20 L. W. 328 : (1924) M. W. N. 693 :

82 I. C. 78 : 1924 Mad. 801.

—Decree for—Appeal—Extension of time to deposit money—Withdrawal of deposit—Effect.

In an appeal against a decree directing specific performance the court cannot go into the question whether the court below had power to extend the time for depositing money or as to the effect of withdrawing the money deposited. (*Chatterjee and Cuming, JJ.*) KAMAL KRISHNA KUNDU CHOWDHURY v. CHATURBHUI DASSA.

78 I. C. 962 : 1925 Cal. 324.

—Delay—If a good defence.

Delay by itself is no defence to a suit for specific performance unless it amounts to waiver or abandonment of the contract or to laches on the part of the person seeking relief. It does not by itself amount to waiver or abandonment. Short of limitation, it does not disentitle a person from enforcing his rights. Ordinarily a plea of delay is discouraged if the circumstances are such that the parties have not by words or conduct or express stipulation made time of the essence of the contract. (*Kinkhede, A. J. C.*) ABDUL MAJID KHAN v. BALAPPA, 82 I. C. 105 : 1925 Nag. 58.

—Grave delay in answering requisition—Relief.

Where vendor took too much time in answering defendant's requisitions.

Held, he was not entitled to specific relief but he was entitled to costs of agreement of sale and

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forfeiture of vendee's earnest money, (*Fawcett, J.*) SHAMSUDDIN TAJBHAI v. DAHYABAL MAGANLAL.

48 Bom. 368 : 26 Bom. L. R. 105 :
1924 Bom. 357.

—Suit for—Laches—Effect.

75 I. C. 743 (2).

—Time when essence of the contract.

75 I. C. 421.

SPECIFIC RELIEF ACT, S. 9—Suit on title—Converted into one for possession—Legality of.

A mortgagee of an occupancy holding executed after the passing of the Agra Ten, Act was dispossessed by the mortgagor. The mortgagee sued for possession on the strength of the title, Held, that the mortgage being illegal, the mortgagee, had no title and that the suit for possession based on title could not be converted into a suit under S. 9 of the Sp. Rel. Act, (*Sulaiman and Kanhaiya Lal, JJ.*) GANESH RAI v. BHUSI RAI.

L. R. 5 A. 273 (Rev.) : 82 I. C. 324 :

1925 A. 69.

—Ss. 12 and 21—Contract for sale of land—Breach—Specific performance—Damages.

The word "adequate" in section 21 of the Sp. Rel. Act must be adequate in the mind of the Court, for some reason found as a fact and stated by the Court for holding it to be adequate, in spite of the opinion of the plaintiffs that it is inadequate.

The Legislature did not intend that persons who entered into contracts to transfer or lease immoveable property should be allowed to escape from them to suit their own convenience by alleging that the person in whose favour the contract was made, could be compensated in money, because that explanation requires the Court to presume that such compensation cannot be adequate unless and until the contrary is proved. (*Walsh and Kanhaiya Lal, JJ.*) BEIJ BALLABH DAS v. MAHABIR PRASAD.

L. R. 5 A. 180 : 10 O & A. L. R. 394 : 78 I. C. 167 :
1924 A. 529.

—S. 16—Contract if divisible—Specific Performance as to part.

75 I. C. 421.

—S. 18—Contract to sell land—Suit for specific performance—Vendee imposing new terms—Time if of the essence of contract.

The vendee under a contract to sell, knowing that what he agreed to buy was a share of joint property in the hands of tenants, gave a notice to the vendor to get a partition by metes and bounds within 24 hours and complete the sale deed. Thereafter when this impossible condition was not fulfilled, he failed to pay the balance of the purchase money. Held, in a suit for specific performance, the default was on the part of the vendee. In the case of contracts for sale of land time as a rule is not of the essence of the contract, but it is open to parties to make time of the essence of the contract. (*Devadoss, J.*) KANCHINADAM SURYANARAYANAMURTHI v. SATYANARYANAMURTHI. 20 L. W. 832 : 48 M. L. J. 150

—S. 19—Damages not prayed for can be granted even along with specific performance—Specific performance.

SPECIFIC RELIEF ACT, S. 19.

Court can award damages in a suit for specific performance though not specifically prayed for. It ought to award damages when it thinks that damages should be awarded. This principle applies even in cases where specific performance is decreed. (*Shadi Lal, C. J. and Malan, J.*) *THE ARYA PRADISHAK PRATINIDHI SABHA THROUGH LALA HANS RAJ v. CHAUDHRI RAM CHAND.* 5 Lah. 509 : 1924 Lah. 713.

—Ss. 19, and 21—*Suit for specific performance—Damages if can be awarded.*

A plaintiff is not obliged in a suit for specific performance to pray specifically for damages whether in addition or in substitution. He has a choice of remedies open to him to apply for and the Court has always a discretion to award damages if it is of opinion that damages are the appropriate remedy. (*Harrison and Moti Sagar, JJ.*) *SKINNER v. SKINNER.* 80 I. C. 712 : 1925 Lah. 132 (2).

—S. 20—*Contract for sale of land—Agreement by one of two persons entitled to the land—Provision for other sharers joining in conveyance—Sale by both the persons to a stranger—Specific performance.*

Two brothers who were jointly entitled to a particular property were anxious to sell the same. The elder of the two brothers acting with the authority of the younger agreed to sell the property to the plaintiff, stipulating among other things—the younger brother was to join in the conveyance and that if he defaulted to do so, the advance of Rs. 200 paid under the agreement should be returned with interest and also that a sum of Rs. 200 should be paid as damages. After this agreement the brothers sold the property to a stranger who purchased with notice of the agreement. In a suit for specific performance by the plaintiff the subsequent purchaser set up that the agreement in favour of the plaintiff was an incomplete one for want of the concurrence of the younger brother and that the plaintiff was only entitled to damages. *Held*, that elder brother had authority from the younger to negotiate for the sale of the properties and that the agreement in favour of the plaintiff was perfectly valid. The mere fact that the contract contained a provision for payment of damages did not disentitle the plaintiff to specific performance. (*Krishnan, J.*) *SANYALI SOLAGAN v. NAGAMUTHU MULANADI.* 20 L. W. 523 : (1924) M. W. N. 857 : 1925 Mad. 227.

—S. 20—*Minor—Contract for sale of property by guardian—Subsequent sale to a third person for higher price—Specific performance of contract.*

Where for the purpose of discharging debts binding on a minor's estate his guardian contracts to sell the minor's property for a reasonable price, it is open to the court to decree specific performance of the contract of the sale as against the subsequent purchaser of the sale property even though such purchaser has paid a higher price 42 M. 185 F : 29 All. 213 Ref. 16 C W. N. 297 R. (*Devadoss, J.*) *KASIVASA CHIDAMBARA SWAMIGAL v. RAMAKRISHNA REDDIAR.*

20 L. W. 559 : (1924) M. W. N. 878 : 35 M. L. T. (H.C.) 110 : 82 I. C. 926 : 1924 Mad. 863 : 47 M. L. J. 683.

SPECIFIC RELIEF ACT, S. 22.

—S. 21—*Specific performance—Mortgage—Agreement to lend money.*

A suit to enforce an agreement to lend money on a mortgage does not lie. The plaintiff may obtain compensation or damages against the defendant but such a right is not transferable. 34 M. L. J. 342 : 43 C. 59 foll. (*Venkatasubba Rao, J.*) *YADAVENDRA BHATTA v. SRINIVASA BABU.*

20 L. W. 17 : 47 Mad. 698 : 80 I. C. 5 : 1925 Mad. 62 : 20 L. W. 548 : 47 M. L. J. 435.

—S. 22—*Contract—Specific performance—Non-disclosure of material facts—Effect of—Restrictive covenant on property sold—Breach of covenant by vendor—Right of purchaser to rescind contract.*

On 8-9-1922 plaintiff and two others agreed to sell their house in a street in Bombay to the first defendant for Rs. 66,000. At the same time, an adjoining house was sold to the father of the first defendant. The two houses stood on plots of land which lay contiguous to each other. Of the two houses, the house in dispute stood on a plot of land marked C. This plot C formed part of a large estate belonging to R and K. To the south-west of plot C was another plot, described as plot No. 12, which also belonged to the same owners. When plot C was sold on 24-9-1918 the buyer agreed to keep free a strip of land 7½ feet in depth all along the 40 feet facing the south-west of the plot. No building permanent or temporary was to be built on the said strip of land for a distance of 7½ feet. The above covenant was repeated in another document of 14-6-1920 with the following additions:—"It is hereby agreed between the vendors and the purchasers so as not to bind or impose on themselves any personal liability under this covenant after they have parted with the said plot but so as to bind all persons in whom the said plot of land shall for the time being be vested and we do hereby covenant with the vendors as follows." Notwithstanding the covenant, the owners of Plot C built in 1921 the present house which encroached upon the covenanted piece of land to a depth of five feet all along the south-west boundary. Neither the restrictive covenant nor its breach was disclosed to the buyer. *Held*, that omission of the vendors to disclose the existence of the covenant or of its breach was a serious breach of their duty as vendors and entitled the purchaser to repudiate the contract on discovering the true facts. The existence of the restrictive covenant and its breach constituted a material defect in their title. The mere fact that the purchaser gave a chance to his vendors to procure the consent of their original vendors to the erection of the building does not operate as a waiver of the purchaser's right of rescission. A purchaser's right to repudiate the contract is an equitable right arising from want of mutuality and may be a defence to an action for specific performance, but in order to avail himself of that defence he must repudiate the contract as soon as he finds that the vendor cannot make a good title. If the purchaser continues in negotiation as to the title, and thus treats the contract as subsisting, he cannot repudiate at any subsequent moment he

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may choose, but must give the vendor a reasonable time to remedy the defect. (*Marten and Kinkaid, JJ.*) *BAI DOSIBAI v. BAI DHANBAI.*
26 Bom L. R. 107 1 : 1925 Bom. 85.

———S. 22—*Co-sharers—Partition—Land given on perpetual lease falling to a co-sharer other than the lessor—Suit for possession of other land—Executory contract.*

A co-sharer in possession of specific plots of land granted a perpetual lease of them to plaintiff and one of the conditions of the lease was that if the lands leased were allotted to the share of any co-sharer other than the lessor, the plaintiff was entitled to take possession of land similar to the land leased in any other village allowed to the lessor. The contingency contemplated having happened, the plaintiff sued for possession of the substituted properties. *Held*, that the suit was not one for the specific performance of an executory contract but one for possession. S. 22 of the Specific Rel. Act did not apply to the case. (*Dalal, J. C.*) *BIBI BATUL KHANAM v. SULTAN BAHADUR KHAN.* 26 C. C. 393 : 10 O. L. J. 420; 80 I. C. 796 : 1924 Oudh 165.

———S. 22—*Delay in completing sale—Right to make time essence of contract—Earnest money—Return of.* 1924 Bom 232.

———S. 22—*Discretion of Court—Abandonment of claim for specific performance—If allowed—Time if essential.* 48 Bom. 259 : 77 I. C. 275 : 1924 Bom. 119.

———S. 24—*Promisee's default not going to root of contract—If disentitles him to right to specific performance.*

Where the promisor had no right to independent possession for beyond 9 days after the contract after which the right was in another person and such person made no complaint on the subject and there was no default on the part of the promisee going to the root of the contract or any omission that could not have been amply compensated by directing him, on repurchase and by way of addition to the stipulated purchase price, to account for any rents and profits received by him from the properties.

Held, that the promisee was entitled to specific performance of the promisor's agreement to reconvey the property to him though he (the promisee) might have failed to deliver possession of the property to the promisor according to his (promisee's) covenant to do so. (*Lord Blanesburgh.*) *MA SA BON v. MA DA TWE.*

20 L. W. 884 : 1924 P. C. 233.

———S. 27—*Specific performance—Contract by guardian to sell minor's property—Transferee with notice of Contract—Specific performance—Mutuality—Compensation—Specific performance of part of the contract.*

There is no distinction between a contract for the sale and a contract for the purchase of property on behalf of a minor. In either case it is not possible to decree specific performance against a minor. Where the *de facto* guardian of a minor has entered into a contract with a third party for the sale of the minor's property, to direct the contract to be carried into effect as

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against the minors is to sanction a plain breach of trust on the part of the *de facto* guardian and this the Court will not do.

The operation of S. 27 (b) of the Sp. Rel. Act is confined to cases where the contracts are in the first instance enforceable as against the parties to the contract. The liability of a person claiming under a party to the contract rests upon the antecedent liability of a party to the contract and arises by reason of the fact that as such transferee he takes subject to the transferor's pre-existing contractual obligation; and where there is no pre-existing contractual obligation, the case entirely fails against the transferee. Notice of the original contract must mean notice of an existing obligation under the contract; and where the contract itself is unenforceable it is impossible to hold that it can be enforced against the subsequent transferee.

The Court will not, as a general rule, compel specific performance of a contract unless it can execute the whole contract. A contract for sale of property in one lot will generally be considered indivisible for the reason that there is obvious injustice in compelling the purchaser of the property in its entirety to take undivided parts or shares of the estate. (*Das and Foster, JJ.*) *ABDUL HAQ v. MAHOMED YEHIA KHAN.*

2 Pat. L. R. 181.

———S. 27—*Suit for specific performance—Contract for sale—Subsequent purchase from vendor—Bona fide purchase without notice—Burden of proof on subsequent purchaser. See BURDEN OF PROOF.* 40 C. L. J. 184.

———S. 35—*"In the same case"—Meaning of—Object of Legislature.*

The words "In the same case" in the last para. of S. 35 are not happily chosen. They are not restricted to the previous para alone, but apply to cases of both vendor or vendee being in possession. The object of the Legislature was to legalise in India the English practice under which the party not in default can obtain rescission not merely by a separate suit but also by application in the suit. (*Madgavkar, A. J. C.*) *RAMJI HANSRAJ v. CHINAI.* 82 I. C. 73 (2) : 1925 S. 40.

———Ss. 36 and 42—*Private award—Suit to set aside—Law applicable.*

A suit to set aside a private award is entertainable under S. 39 of the Sp. Rel. Act. If the suit in the present case, comes under Section 39, there is obviously no warrant for engrafting on it a proviso on the lines of that annexed by the Legislature to section 42, and for insisting on the plaintiff combining other reliefs with the prayer for cancellation. The Court has of course, a discretion to grant or to refuse to grant that prayer; but that discretion has to be exercised in the light of the circumstances of each case. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) *SHA MOGANLAL VELCHAND SAI v. SINGRI NANJAPPA.* 2 Mys. L. J. 55.

———S. 39—*Suit to stay arbitration because of there being no contract at all—If maintainable—Specific Relief Act, S. 56—Arbitration Act, S. 14.*

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A suit for a declaration that a certain contract entered into between plaintiffs and defendants is not binding on the plaintiff inasmuch as they did not enter into such contract and for an injunction to restrain arbitration in respect of breach of the alleged contract, is maintainable if the plaintiff reasonably apprehends serious injury to result from the arbitration. In such a case the remedy under S. 14 of the Arbitration Act is not his sole remedy and does not take away the remedy open to him under the provisions of S. 9, Civil Procedure Code, of bringing an action to set aside the award on the ground that no contract providing for a reference to arbitration was made or that the contract if made was not enforceable by reason of fraud or misrepresentation. S. 39 of the Specific Relief Act confers the right of suit in such cases and Ss. 42 and 56 are no bar to the suit. 1922 P. C. 374, 1922 Lah. 369 Foll. (1920) 47 Cal. 733 Dist. (*Raymond, A. J. C.*) TYEBALLY ABDUL HUSSAIN v. MRS. JAMES FINLAY & CO.

17 S. L. R. 15 : 80 I. C. 969 : 1924 S. 105 (2).

———S. 41—Lease by minor—Cancellation—Compensation to lessee.

A minor, purporting to act as manager of a family, granted a perpetual lease of certain land to the defendants who erected houses and raised fruit gardens thereon. Subsequently at a partition the lands fell to the predecessors-in-title of the plaintiffs who sued for cancellation of the lease and ejectment of the defendants. Held, that the lease must be cancelled and that under S. 41 of the Specific Relief Act, the defendants were entitled to revenue or have the houses created by them on the land valued and also to have any bunds erected by them and any fruit garden raised by them valued and the proceeds paid to them, such value in all cases being the estimated value at the time of eviction. Further if they have planted or sown on the property crops which are growing at the time of eviction, they are entitled to such crops when ripe and free ingress and egress to gather, and carry them. (*Young, J.*) DOO DOO MEAH v. KASIM ALI.

3 Bur. L. J. 76 : 80 I. C. 250 : 1924 Rang. 288.

———S. 41—Minor—Sale—Refund of purchase money.

76 I. C. 261.

———S. 42—Consequential relief—Nature of—Plaintiffs in physical possession—Nature of possession.

L. R. 5 A. 324.

———S. 42—Consequential relief—Status of tenant—Record of rights—Entry as thekadar—Suit for declaration that tenant was a yearly tenant—No prayer for ejectment.

In the record of rights an entry was made to the effect that the defendants were holding the suit village as permanent thekaders not liable to ejectment. The plaintiff (landlord) thereon sued for a declaration that the defendants were in possession of the village as temporary thekaders on a yearly tenancy and liable to ejectment on proper notice to quit. There was no prayer for ejectment or any other relief. Defendants pleaded S. 42 of the Sp. Rel. Act as a bar. Held, that the suit was maintainable as laid and no consequential relief by way of ejectment could be

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asked for at the time when the plaint was filed. (*Mullick and Jwala Prasad, JJ.*) TEKAIT HAR-NARAYAN SINGH v. DARSHAN DEO. 3 Pat. 403 : 1924 P. 560.

———S. 42—Declaration of title to property—Unknown and uncertain share in property.

A Court will not grant a declaration of plaintiff's right to an unknown and uncertain share in joint property. (*Mookerjee and Rankin, JJ.*) HASIM ALI v. ABJAL KHAN. 40 C. L. J. 30 : 82 I. C. 392 : 1924 Cal. 1046.

———S. 42—Declaration—Discretionary relief—Grant of.

The relief of declaration is more or less a discretionary relief and Courts are not ordinarily prepared to grant such relief where it would only be by way of anticipation or where the main heads of complaint have failed. (*Prideaux and Kinkhede, A.J.Cs.*) JUMILAL v. MT. HALKI. 1924 Nag. 387.

———S. 42—Hindu female—Limited interest in property—Alienation by certificated guardian of female without permission of Court—Suit by reversioners for declaration of the invalidity of alienation See GUARDIAN AND WARDS ACT, Ss. 18 AND 30.

51 C. 101.

———S. 42—Possession with Receiver appointed under S. 146, Cr. P. C.—If prayer for possession necessary.

Where a court acting under S. 146, Cr. P. C., appoints a Receiver for the suit properties and refers parties to a Civil suit to establish title, a suit for mere declaration of title is not vitiated by the fact there is no relief claimed regarding possession. (*Krishnan, J.*) DEVARAJULU NAIDU v. KONDAMMAL. 80 I. C. 929 : 20 L. W. 754.

———S. 42—Subsisting interest, proof of.

In a suit for a declaration the court ought to be satisfied that the plaintiff has a valid and subsisting interest in the property in respect of which the declaration is asked for, even though the defendant may have no *locus standi* to call it in question. (*Miller, C. J. and Mullick, J.*) BHUKARI BEHERA v. SITAMONI DEVI. 1924 P. 706.

———S. 42—Suit for declaration—Cause of action—Person not a party to litigation and not affected thereby—Suit to declare decree fraudulent—Parties—Injunction—Consequential relief.

MOHESH CHANDRA MISRA v. NISTARINI DASSYA. 77 I. C. 576.

———S. 42—Suit for declaration—Consequential relief—Necessity for.

Plaintiff was the widow of a deceased Mahomedan and was in possession of his estate. She was also the administratrix of the estate as such widow. No probate had been taken of the will of the deceased Mahomedan. She sued for a declaration that the properties of which she was in possession were not liable to be sold in execution of a mortgage decree obtained by the defendants against third persons. The defendants set up the plea that the plaintiff's deceased husband had validly bequeathed the properties in his life-time to their mortgagors. The court

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below dismissed the suit holding that in a suit for a mere declaration the validity of the alleged will and its existence at the death of the testator could not be questioned. *Held*, that it was not incumbent on the plaintiff to ask for any further relief beyond the declaration asked and the court was bound to try the question as to the existence of the will. (*Duckworth and Godfrey, JJ.*) *MA NYUN v. CHITHAMBARAM CHETTIAR*.

1925 Rang, 132 : 2 Rang, 572.

—S. 42—Suit for declaration with consequential relief—Refusal of consequential relief—Form of decree. See C. P. CODE, S. 11.

20 L. W. 63.

—S. 42—Suit for declaration—Consequential relief—Nature of—Suit when liable to be dismissed for want of consequent relief.

While the proviso to S. 42 of the Sp. Rel. Act forbids the making of a declaration where the plaintiff omits to seek the further relief if any available, it does not require the Court to dismiss the suit where the prayer is not limited to a mere declaration but embraces some relief to which the plaintiff can make out a claim. Nor, does it compel a plaintiff to sue for all the reliefs which could possibly be granted, or debar him from obtaining a relief which he wants unless at the same time he asks for a relief which he does not want. It is further material to note that the relief which the plaintiff must ask for if available is, not *other relief*, that is, additional relief or relief independent of the cause of action on which the suit for declaration is based, but *further relief*: that is to say relief in relation to the legal character or right as to property involved in the suit, arising out of the cause of action on which the suit is based, and flowing directly and necessarily from the declaration sought. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) *SHA MOGANLAL VELCHAND SAIT v. SINGRI NANIAPPA*.

2 Mys. L. J. 55.

—S. 42—Suit for declaration—Plaintiff out of possession—Bar.

Where a person is out of possession of property a suit for a bare declaration of title is incompetent under S. 42, Specific Relief Act. (*Doss and Ross, JJ.*) *TIKAIT THAKUR NARAYAN SINGH v. DILDAR ALI KHAN*.

80 I. C. 544 : 3 Pat. 915.

—S. 42—Suit for declaration of status—No reference to property—Maintainability.

A suit wherein the relief claimed is a declaration of status is one for a substantial relief and is maintainable though the claim has no reference to any right as to any property. (*Wazir Hasan, J. C.*) *NAQI HUSAIN v. MT. CHHAJI BEGAM*.

80 I. C. 808; 10 O. & A. L. R. 908.

—S. 42—Suit for declaration—Future right of indemnity—Cause of action.

Where the plaintiff has made certain payment which the defendants were liable to pay and brings a suit for reimbursement and for a declaration of his right to reimbursement in the future. *Held*, that there was no cause of action for a declaration in respect of a future right of

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indemnity under S. 42 of the Sp. Rel. Act. (*Pratt and Fawcett, JJ.*) *ACHAL SINGH v. DALAT SINGH*.
26 Bom. L. R. 678 : 1924 Bom. 470.

—S. 42—Transferee—Suit for possession—Requisites of gift—Cause of action.

A plaintiff suing under S. 42 of the Sp. Rel. Act must be entitled to some legal character or to some right as to the property. A person claiming under an invalid gift is not entitled to a declaration of his title. (*Foster, J.*) *RAM PRAGSH LAL v. MT. BHIKHNA KUER*.

2 Pat. L. R. 273.

—S. 42—Will—Invalidity of bequest—Possession if to be asked.

A suit for declaration that the bequests under a will are void and for an injunction restraining the expenditure of money on such bequests is maintainable, without possession being claimed in the plaint. S. 42 does not compel a plaintiff to sue for all the reliefs which could possibly be granted or debar him from obtaining a relief which he wants, unless at the same time he asks for a relief which he does not want. (*Bilaram, A. J. C.*) *SHAMBAI v. GOVERDHAN*,
78 I. C. 249.

—S. 42—Proviso—Consequential relief—Suit for declaration of plaintiff's right as trustees of a Hindu temple and for injunction—Prayer for possession of temple and its properties, if necessary.

A suit by the plaintiffs for a declaration that they are lawful trustees of a Hindu temple and its endowments, for a direction that defendants who claimed to be trustees should be made to restore the office of trustee to them, and for an injunction restraining the defendants from interfering with the exercise by the plaintiffs of their duties as trustees does not offend against the proviso to S. 42 of the Specific Relief Act and the plaintiffs are not bound to sue for possession of the temple and its properties especially where the tenants of the properties are willing to pay the rents to whomsoever is the proper trustee. 28 Bom. 567, 36 Mad. 364 followed; 33 M. 452 distinguished. (*Spencer and Srinivasa, Aiyangar, JJ.*) *SWAMINADHA AIYAR v. RAMIER*.
20 L. W. 893 :
80 I. C. 1053 : 47 M. L. J. 671.

—S. 42—Proviso—Scope of.

The proviso to S. 42 does not compel a plaintiff to sue for all the reliefs which could possibly be granted or debar him from obtaining a relief which he wants unless at the same time he asks for a relief which he does not want. The section does not authorise the dismissal of the suit but only forbids the court to make the declaration the prayer for which is not coupled with a prayer for consequential relief. (*Mukerjee, J.*) *RAM SADHAN BISWAS v. MATHURA MOHAN HAZRA*.

80 I. C. 2 : 1925 Cal. 233.

—S. 45—Mandamus—Election—Returning officer—Functions of—Quasi Judicial—Eligibility of candidate for election.

Where an application is made to the High Court for a mandamus under S. 45 of the Sp. Rel. Act to compel a returning officer to declare that a candidate had been validly nominated, and it is proved that the returning officer had assumed a jurisdiction which he did not possess, the High

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Court would interfere by mandamus. Where however the returning officer did not usurp a jurisdiction which he did not possess or refuse to exercise a jurisdiction vested in him by law and it was not suggested that he was actuated by any *malafides* or extraneous circumstances, the mere fact that the returning officer might have committed an error of law in exercising his function does not justify the issue of mandamus. Moreover the fact that the applicant has another remedy is a ground for refusing a Mandamus. (*Sanderson, C. J. and Richardson, J.*) MAHARAJAH SIR MANINDRA CHANDRA NANDI *v.* PROVAS CHANDRA MITTER. 51 Cal. 279; 39 C. L. J. 58 : 79 I. C. 1042 : 1924 Cal. 761.

—S. 45—Mandamus—Writ of—Jurisdiction of High Court—Conditions to be fulfilled by applicant—Injury—Nature of—Franchise—Supplementary grant—Voting in Legislative Council—Ultra vires act—Denial of justice—Government of India Act, Ss. 52 and 72.

In dealing with applications under S. 45 of the Sp. Rel. Act, the principles applicable to a writ of mandamus should generally speaking be followed. It is a high prerogative writ and is granted to do justice and preserve a right where there is no specific legal remedy. The court, in the exercise of this authority to grant the writ of mandamus, will render it so far as it can be the supplementary means of substantial justice in every case where there is no other specific legal remedy for a legal right and will provide as effectively as it can that others exercise their duty wherever the subject matter is properly within its control. The writ being a high prerogative writ, it cannot be demanded *ex debito justitiæ* but it issues only in the discretion of the Court. The rights to be enforced must be of a public nature and also those which although of a public nature, specially affect the rights of individuals. The person applying must show that he has a real and special interest in the subject matter and a specific legal right to enforce. There must also be a sufficient demand to perform the act sought to be enforced and a refusal to perform it. There must also be the possibility of effective enforcement of the writ and the writ will not issue if alternative remedies are open to the applicant. These principles are laid down in S. 45 of the Sp. Rel. Act. The five conditions laid down in clauses (a) to (e) of S. 45 of the Sp. Rel. Act are cumulative and all of them must be fulfilled. The court is invested with very large powers and the remedy is of a summary nature and coercive in character. The wider the power, the greater must be the caution with which this power is exercised.

Where a member of the Bengal Legislative Council applied under S. 45 of the Sp. Rel. Act for issue of writ of mandamus praying for an order "directing the President of the Council to decide on the admissibility of a motion for minister's salaries contained in the agenda of business and to disallow the said motion and to forbear putting the same at the next Session of the Bengal Legislative Council." *Held* (1) that the applicant had not shown that his property or franchise or personal right would in any way be injured: (2) that there was no refusal of justice by

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President: and (3) that the application should be rejected. (*C. C. Ghose, J.*) JATINDRA MOHAN SEN GUPTA *In re.* 51 Cal. 874 : 40 C. L. J. 44 : 82 I. C. 374 : 1925 Cal. 48.

—S. 45—Municipal corporation—Right of councillor to move resolution for reduction of tax—Motion postponed at the request of the President—Subsequent resolution ruled out—Application for Mandamus—Madras City Municipal Act, Ss. 99, 155 and 157.

At a meeting of the Municipal Corporation of the City of Madras for consideration of the annual budget, a municipal councillor wanted to move a resolution for the reduction of the property tax by 1 per cent. On the suggestion of the President that the resolution might be considered after discussion of the items of expenditure, the member did not move the resolution. Subsequently after the items of expenditure had been discussed and voted upon, the member moved a resolution for reduction of the property tax. The president however ruled the resolution as out of order on the ground that if allowed it would reduce the income so much that the balance of one lakh of rupees required to be maintained by S. 155, Cl. 2, of the Madras City Municipal Act, 1920, could not be maintained. Thereupon the member moved a resolution for reduction of the property tax by $\frac{1}{2}$ the original rate and to suspend proposals for increase of the tax, which also was ruled out by the President. On application for Mandamus against the president directing him to put the resolution before the meeting of the council, *held* that the writ should issue against the president. The resolution was in order inasmuch as it was the statutory duty of the councillors to fix what the rates of tax were to be, whether the same as the previous year or not. The postponement of the resolution at the instance of the President was on the footing that though expenditure was voted upon, it was not final and a reduction might have to be made therein, if the income was to be reduced. Even if the grant of the estimates of the expenditure was final it did not necessarily negative the reduction of tax inasmuch as there might be other modes of taxation resorted to, to make up the deficiency. There was a denial to the applicant of his right as a municipal councillor by the President and the applicant had no other adequate remedy. Consequently the Writ of Mandamus should issue against the president. (*Kumarswami Sastri, J.*) THE CITY MUNICIPAL ACT, THANIKACHALLAM CHETTIAR, PETITIONER, *In the matter of.* 20 L. W. 589; 1924 Mad. 868.

—S. 54—Injunction—When to be granted—Deprivation of property.

Plaintiffs, one a Hindu and the other a Mahomedan, jointly purchased the building in suit and they were obstructed in the attempt to open a door in the eastern wall of the building which would lead to a courtyard common to them and defendants respondents. They therefore prayed for an injunction restraining the respondent from interfering with their rights. *Held*, if the injunction is withheld it would be tantamount to depriving the appellants of the user of the property which they own for it is not to be expected that a Hindu and a Mahomedan family

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could occupy one room jointly. The house can be brought into use only by means of a partition wall, and to make both the apartments habitable the door proposed to be opened by the appellants was indispensable, and therefore the injunction ought to be granted. Per *Madgavkar, A. J. C.*—The joint ownership of the courtyard entitles the plaintiff to the injunction and the question of the creed of the parties is immaterial. (*Raymond and Madgavkar, A. J. C.*) *AZIZULIAH KHAN v. GULAM HASSAIN.* 17 S. L. R. 63 : 1924 S. 97 : 80 I. C. 994.

—S. 55—Mandatory injunction—Granting of.

A mandatory injunction is a most exceptional remedy and one which is never to be applied except with the greatest safeguard for the prevention of waste as well as injustice, (*Rankin and Mukherjee, JJ.*) *JAGABANDHU KUNDU v. RAJMOHAN PAL.* 78 I. C. 599.

—S. 56—Scope of.

Perpetual injunctions are governed by the Specific Relief Act and an injunction cannot be issued by a Court to stay proceedings in a Court not subordinate to that from which the injunction is issued. The prohibition in clause 6 operates only in respect of Courts which are not subordinate in the sense that they are co-ordinate or superior and not in respect of the Court itself which must always be taken as competent to regulate its own proceedings. (*Mukerjee, J.*) *RAM SADHAN BISWAS v. MATHURA MOHAN HAZRA.* 81 I. C. 2 : 1925 Cal. 233.

STAMP ACT, (II OF 1899) S. 24—Sale deed—Purchase-money—Sale of property subject to mortgages—Vendee agreeing to pay off encumbrance—Stamp duty payable on sale-deed.

The question in the case related to the stamp duty payable upon a sale deed executed by the vendors for a net consideration of Rs. 10,000. The property sold was along with another property subject to a mortgage of Rs. 13,858 and odd inclusive of interest at the date of sale. The property was also subject to attachment in respect whereof rupees 1,500 were payable. The sale deed made clear that the net consideration for the sale was Rs. 10,000. The liability for the mortgage charges and for the amount payable in respect of the attachment was accepted by the vendors under the terms of the document. The stamp duty actually paid was on Rs. 10,000. The collector demanded the duty on that amount as well as the amount of the encumbrances. On a reference to the High Court held, that the proper stamp duty payable on the deed of sale was in respect of Rs. 10,000 only. (*Shah, A. J. C. and Fawcett, J.*) *WAMAN v. COMMISSIONER, CENTRAL DIVISION.* 26 Bom. L. R. 942 : 1924 Bom. 524.

—Ss. 26 and 35—Mining lease—Claim for royalty exceeding amount covered by stamp on lease—Payment of deficient duty and penalty.

By the combined operations of Ss. 26 and 35 of the Stamp Act (II of 1899), a lessee under a mining lease is entitled, upon payment of the proper penalty, to recover the royalty provided for in the lease, even though the amount thereof should prove to be in excess of that covered by the stamp

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originally affixed to the lease. (*Lord Dunedin.*) *NARAYAN AGARWALA v. RAMESHWAR PRASAD SINGH.* 5 Pat. L. T. 570 : 26 Bom. L. R. 1140 : 20 L. W. 811 : 40 C. L. J. 443 : 1924 P. C. 22 (2) : 10 O. & A. L. R. 1272 : 10 W. N. 704 : 82 I. C. 789 (2) : 51 I. A. 332 : 47 M. L. J. 300.

—S. 26 and 35—Relation between.
S. 26 of the Stamp Act is subject to S. 35 of the same. (*Kinkhede, A. J. C.*) *NILKANTH v. KESHERAO.* 1924 Nag. 408 (2).

—Ss. 35, 45, 50 and 56—Deed of trust—Settlement—Penalty.

A declaration of trust is not defined by the Stamp Act I of 1879. The term implies a declaration by the executant that he holds certain property in trust : The executant of a document announced that he holds the property and intended to hold it for his life and thereafter it was to go to his son if one be born, in which case the son would become the permanent proprietor, and, as against him the document subject to a certain provision for maintenance would be void ; if daughters be born and no son, the property would be distributed between the daughters and nieces ; if daughters be not born an existing daughter and niece would become the permanent proprietresses. Held, that the document was a settlement and not a declaration of trust and should be stamped as such. Having regard to the bona fides of the parties, there was no reason for exacting a penalty. (*Morshead, M. C.*) *MT. LILAWATI DEBI v. SECRETARY OF STATE.* 2 Pat. L. R. 18 (Cr.)

—Ss. 35 (a) and 36—Arbitrator—Power to act under—Jurisdiction of Court—Document substituting one arbitrator for another—Stamp.

The parties to a submission to arbitration replaced one arbitrator by another and the document to appointing a new arbitrator was not stamped. But this defect was not brought to their notice and they admitted the document. Subsequently in a suit on the award, held that the arbitrators having admitted the document, the admission of the reference by them could no longer be called in question before them but the Court could, on ascertaining the true facts, proceed under S. 35 (a) of the Stamp Act. 27 C. W. N. 513 Ref. Per *Suhrwardy, J.* :—A subsequent variation in the names of the arbitrators will not be a reference to arbitration but would only be a substitution of the name of an arbitrator in the place of another and the document does not require to be stamped (*Walmsley and Suhrwardy, JJ.*) *KALI CHARAN BANIK v. MANI MOHAN SAHA BANIK.*

28 C. W. N. 871 : 82 I. C. 416 : 1924 Cal. 794.

—S. 62 (2)—Award—Partition—Liability to stamp—Signature by arbitrator—Offence.

46 A. 54.

—Sch. I, Arts. 5 (c) 57 (b)—Security bond and agreement of service—Limit not defined—Duty payable—Penalty.

A document which is an agreement of service and a security bond, but in which no limit is fixed falls under Arts. 5 (c) and 57 (b), Stamp Act—Any deficiency in stamp can be remedied by payment of the difference and a penalty. (*Kinkhede, A. J. C.*) *NILKANTH v. KESHERAO.* 1924 Nag. 408 (2).

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—Art. 53, Cl. 1 (b)—*Receipt of article—Failure to affix stamp—Conviction.*

There was a theft at the house of the applicant and Rs. 150 were recovered by the police from the house of the accused who was tried and convicted for the offence. The Tahsildar who tried the theft case ordered that the money be returned to the applicant as it was part of the property stolen from his house. The sum of Rs. 150 was accordingly paid to the applicant who executed a receipt for the same without fixing any stamp on it. He was subsequently convicted under S. 62 Cl. 1 (b) of the Stamp Act. *Held*, that the receipt came under exemption (b) Art. 53 of the Stamp Act and that the accused was not guilty of the offence. (*Stuart, J.*) KANHAILAL v. EMPEROR, 46 A. 354 : 22 A. L. J. 288 : L. R. 5 A. 78 : 81 I. C. 720 : 25 Cr. L. J. 1008 : 1924 A. 578.

SUCCESSION—*Ancestral property—Competition between daughter and collaterals in the tenth degree—Special custom—Khera Jats—Onus of proof—Entry in Riway-i-am—Evidentiary value.*

The onus is heavily upon persons who allege that by custom among the Khera Jats, the collaterals even of the tenth degree exclude the daughter from succession to the father's ancestral property, to strictly prove the particular custom. Value of an entry in Riway-i-am considered. (*Scott-Smith and Harrison, JJ.*) GURDIT SINGH v. MT. MALAN, 5 Lah. 364 : 1925 Lah. 35.

SUCCESSION ACT (X OF 1865) Ss. 3 and 46—*Married woman—Guardian appointed by Court—Age of majority—Power to make a will.*

A married woman who died before attaining the age of 21 years and of whose person and property a guardian has been appointed is not competent to make a will disposing of her property (*Buckland, J.*) EFFIE JESSIE CAROLINE MIRANDA in the goods of, 28 C. W. N. 527 : 81 I. C. 1008 : 1924 Cal. 644.

S. 48—*Foolish and unnatural provisions—Undue influence may not be presumed.*

By his will the deceased appointed his wife as the sole executrix. But the evidence that the deceased signed the will with full comprehension of its meaning and contents was overwhelming and explicit, and it was in evidence that the deceased had not been for some time on good terms with his eldest son. It appeared also that he has adequately provided for him (son) and it was proved that the deceased had full confidence in his wife.

Held, the evidence excluded the hypothesis of the will having been obtained by undue influence (*Tyrell v. Putinson*) (1894) P. 151, Dist. 11 M. I. A. 44, Ref. A. A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the Court will not interfere with the exercise of his volition. (*Mr. Ameer Ali*.) MOTIBAI HORMUSJEE KANGA v. JAMSETJEE HORMUSJEE KANGA, (1924) M. W. N. 173 : 2 Mys. L. J. (B. & C.) 1 : 19 L. W. 437 : 34 M. L. T. (P. C.) 4 : 26 Bom. L. R. 579 : 22 A. L. J. 98 : 80 I. C. 777 : L. R. 5 P. C. 165 : 29 C. W. N. 45 : 1924 P. C. 28.

SUCCESSION ACT, S. 187.

—Ss. 54 and 55—*Will—Attesting witnesses—Meaning of—Forfeiture of legacy.*

Where the names of certain persons appear on the face of a will governed by the Sessions Act oral evidence is admissible to prove whether or not such persons are really attesting witnesses or not. Where the testator expressly obtained the signature of his sons as a token of their consent to its provisions this is sufficient indication to put the court on enquiry and to permit the sons to lead oral evidence to prove that they did not sign as attesting witnesses. The mere fact that the scribe put the term "witnesses" below which certain persons signed their names, cannot make them attesting witnesses. (*Dalal, J. C. and Neave A. J. C.*) SHIAM SUNDAR SINGH v. THAKUR JAGANNATH SINGH, 10 O. & A. L. R. 1261 : 1 O. W. N. 881.

S. 84, Illus. (A)—*Bequest to daughter and children—Nature of estate.*

Where an Indian Christian by his will gives his property to his daughter and her children, the former takes an absolute estate, and the case falls under S. 84 (a) Illustration of the Indian Succession Act. (*Wazir Hasan and Kendaal, A. J. C.*) AGNES HARRIET DAVID v. MURRAY AND Co., 11 O. L. J. 459 : 79 I. C. 1026 : 1925 Oudh 24.

S. 107—*Will—Bequest of residuary estate to posthumous son—Vested or contingent.*

Where the will of a Parsi testator contained the following disposition relative to a posthumous son—"should a son be born he shall also be cherished and maintained and educated and brought up. And when he comes of age my executor or after his death his executors or executrices shall make over the whole of my remaining properties to the said son. Should the child (whether) daughter or son born of the womb of my wife die in tender age (i.e.) a minor and should my wife for any reason whatever be unwilling to live as a member of the family with my executor, then my executor, shall out of my property purchase bonds for Rs. 5,000 bearing interest at 4 per cent. at the market rate and shall transfer the same to the name of my said wife Ratanbai. *Held* that the bequest to the son was contingent within the meaning of the initial clause of S. 107 of the Succession Act and not vested and did not fall within the Exception at the end of the section. (*Lord Carson*.) COWASJI EDALJI DADACHANJI v. RATAN BAI, 1 O. W. N. 863 : 27 Bom. L. R. 1 : 47 M. L. J. 850 (P. C.)

S. 133—*Meaning of 'Article'.*

To construe the word 'article' as referring to both moveable and immoveable properties is opposed to rules of interpretation of statutes. (*Spencer, O. C. J. and Srinivasa Aiyangar, J.*) JULIA MARY MARGARET FERNANDEZ v. SEVERINA SOBINA COELHO, 20 L. W. 748.

S. 179—*Executor—Title of, not derived from probate but from the will—Right to represent estate for all purposes. See EXECUTOR.* 22 A. L. J. 193.

S. 187—*Mahomedan will—Probate—Application for.*

SUCCN. CERTIFICATE ACT (IX OF 1887), S. 4.

Though it is not obligatory in the case of a will of a Mahomedan to take out probate, yet probate can be granted of such a will. S B. 241 Ref. (*Mookerjee and Chotzner, JJ.*) SYED ABDUL ALIM v. BADARUDDIN. 28 C. W. N. 295 : 1924 Cal. 757.

SUCCESSION CERTIFICATE ACT (IX OF 1887), S. 4—Minor—Succession certificate—Attainment of majority—Payment to certificate holder.

The position of a holder of a succession certificate who has to collect the debts due to the estate of a minor cannot be compared to that of a certificated guardian. Such a succession certificate holds good until the minor takes steps to revoke it on coming of age. So it does not follow that the moment the minor becomes eighteen years of age the succession certificate is no longer valid and that if any payment is made to the holder, it is made to an unauthorised person. (*Macleod, C. J. and Shah, J.*) GANPAYA NARNAPPA v. KRISHNAPPA ANNAYA. 26 Bom. L. R. 491 : 80 I. C. 423 : 1924 Bom. 394.

—S. 4—Debt—Meaning of—Paddy rent due from tenant. 1924 Rang. 139 (1)

—S. 4—Objection to non-production of certificate raised on appeal—Procedure.

Sec. 4 of the Succession Certificate Act lays down that no Court shall pass a decree against a debtor of a deceased person for payment of his debt except on the production of a succession certificate.

It is well-established that the production of a succession certificate is not a condition precedent to the institution of a suit and that it is sufficient if it is produced at any time before the decree is made.

Where an objection is taken for the first time in appeal that the suit should not have been decreed inasmuch as the plaintiff had not produced the succession certificate, the suit should not be dismissed but opportunity should be given to the plaintiff to produce the certificate. (*Das and Ross, JJ.*) ZAHUR MIAN v. PURAN SINGH. 1924 P. H. C. C. 103 : 78 I. C. 307 : 5 Pat. L. T. 504 : 1924 P. 525.

—S. 18 (B)—Revocation of certificate—Concealment of material particulars.

Where a succession certificate had been issued without issuing notice to a party preferentially entitled and where material particulars had been concealed from the Court. Held, that the court acted rightly in revoking the succession certificate (*Das and Ross, JJ.*) DAMINI DASI v. FATUMANI DASI. 2 Pat. L. R. 34 : 78 I. C. 639 : 5 Pat. L. T. 564 : 1924 P. 520.

—Ss. 19 (3) and 26 (3)—Proceedings under the Act for certificate—Appointment of Receiver.

The Succession Certificate Act cannot be treated as analogous to the other Acts, like the Guardian and Wards Act and the Bengal Tenancy Act, to which the general provisions of the Civil Procedure Code have been held to apply. Section 141 cannot be made applicable to the Succession Certificate Act except in so far as it is expressly introduced by section 19 (3) and also, as a corollary by section 26 (3). The result is that it is not competent for a Court sitting as a Succession

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Certificate Court, working the provisions of the Succession Certificate Act, to entertain an application for the appointment of a Receiver and if the Court does so it acts without jurisdiction. (*Walsh and Ryves, JJ.*) KANHAIYA LAL v. KANHAIYA LAL. L. R. 5 A. 238 : 22 A. L. J. 345 : 79 I. C. 363 : 46 A. 372 : 1924 A. 376.

—S. 25—Decision in succession certificate proceeding—Not res judicata.

No decision given in proceedings under the Succession Certificate Act upon any question of right between any parties bars the trial of the same question in any suit between the same parties. (*Scott-Smith and Ffords, JJ.*) MURLI DAS v. ACHUT DAS. 5 Lah. 105 : 1924 Lah. 493.

SUCCESSION (PROPERTY PROTECTION) ACT (XIX OF 1841)—Applicability of—Administration suit—Order for making inventory and appointing Curator.

Act XIX of 1841 is really out of date and there is no necessity whatever for parties claiming the estate of a deceased person to have recourse to it. The relief which is properly open to them is to file an administration suit and apply for the appointment of a Receiver in which case the question will be, who should be given possession until the dispute between the parties has been decided in the suit ; then the Court can by an interlocutory order either appoint a receiver and so take the property into its own possession or it can allow any of the disputing parties to have possession on such terms as it may think fit. The scheme of Act XIX of 1841 is as follows. First a person must have died possessed of moveable and immoveable property; and the same must have been taken or alleged to have been taken upon some pretended claim of right by gift or succession. Then the Act contemplates that it shall be open to any person claiming a right by succession to the property of the deceased to make application to the judge of the court of the district where any part of the property is found or situate for relief, and that application for relief must clearly take the nature of a plaint in a summary suit. (*Macleod, C. J. and Crump, J.*) MAHMAD-BHAI v. BAI HAVABAI. 26 Bom. L. R. 145 : 80 I. C. 269 : 1924 Bom. 507.

SUITS VALUATION ACT, S. 8—Partition suit—Jurisdiction—Test.

In a partition suit, jurisdiction is determined by the value of the whole property and not merely plaintiff's share in it. The fact that plaintiff's title is disputed does not make it any the less a partition suit. (*Greaves and Chakravarty, JJ.*) RAJANI KANTA BAG v. RAJABALA DASI. 29 C. W. N. 76 : 1925 Cal. 320.

—S. 8—Suit for declaration and injunction against waste—Valuation for purposes of court fees and jurisdiction.

In all cases falling under the operation of Section 8 of the Suits Valuation Act, parties should first value their suits for the purposes of Court-fees and when this has been done, the valuation for purposes of Court fee will be the same for purposes of jurisdiction. In a suit by Hindu reversioners for a declaration and injunction to

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restrain the widow from wasting the estate the plaintiffs are entitled to state the value to them of the reliefs claimed, and the Court fee payable must be calculated according to the amount at which the relief sought is thus valued. These provisions, however, must be read subject to Section 8 of the Suits Valuation Act. The plaintiffs cannot put a high valuation on the plaint for purposes of jurisdiction, and thus obtain an adjudication on the matter from a Court of superior grade putting at the same time a different and a much lower valuation for purposes of Court-fees (*Piggott, J.*) *KANDHAIYA OJHA v. JAGRANI KUER.* 46 A. 419 : 22 A. L. J. 349 : 10 O. & A. L. R. 485 : 79 I. C. 358 : 1924 A. 597.

—S. 8—Suit for redemption—Valuation for purposes of jurisdiction—Court Fees Act, S. 7 (ix).

S. 8 of the Suits Valuation Act does not cover redemption suits so that the valuation for the purpose of jurisdiction does not necessarily follow the valuation for the purpose of court fees. In redemption suits jurisdiction will depend not on the amount assured but on the amount ultimately found to be due. A suit should be instituted in the Court of the lowest grade competent to try it. Competency means jurisdiction and the competency of a court depends on the nature of the suit and upon its own pecuniary jurisdiction. That jurisdiction must be determined with reference to the various Acts constituting the courts and the question of valuation by reference to the Court Fees Act and Suits Valuation Act. (*Suhrawardy and Chotzner, JJ.*) *SARODA SUNDARI BOSU v. AKRAMANNESSAKHATUN.* 51 Cal. 737 : 28 C. W. N. 710 : 78 I. C. 747 : 1924 Cal. 783.

—S. 8—Valuation of—Set off for purposes of jurisdiction. See JURISDICTION.

2 Rang. 462.

—S. 11—Jurisdiction—Question as to—When can be raised.

All questions of jurisdiction should be raised in the court of first instance at the earliest stage and should be given effect to by a Court of Appeal only if there has been prejudice caused by the trial in the first court. It is not the policy of the law to allow such objection to be raised in appeal by the parties except under very restricted conditions. (*Krishnan and Waller, JJ.*) *ADURI CHELLAMAYYA v. LAKSHMI DEVAMMA.* 79 I. C. 857.

—S. 11—Suit beyond pecuniary jurisdiction of a court—Trial and decision without objection by any of the parties—Decree—Not to be set aside by fresh suit. See DECREE SETTING ASIDE. 22 A. L. J. 122.

—S. 11 (a) and (b)—Scope of—Valuation reduced by plaintiff without objection by defendant—Appeal—Decree not a nullity. 75 I. C. 305.

—S. 11 (2)—Undervaluation—Right of appeal affected—Prejudice. 1924 Mad. 6.

TORTS—False imprisonment—Wrongful arrest—Decree against a person as heir—Liability.

A money decree was passed against a person as the legal representative of the deceased debt-

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or to the extent of his assets in his hands. In execution the heir was arrested and kept in restraint for a few days. *Held*, he was entitled to damages for wrongful arrest as the decree holder must have known he was not entitled to arrest under the decree. (*Macleod, C.J., Kajiji and Kemp, JJ.*) *VELJI BHIMSEY & Co. v. BACHOO BHAIKAS.* 48 Bom. 691 : 26 Bom. L. R. 349 : 1925 Bom. 118.

—Fire—Negligence—Liability of master for acts of servant—Injury to neighbouring property.

The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property. And if he authorises another to act for him he is bound not only to stipulate that such precautions shall be taken, but also to see that these are observed. Otherwise he will be responsible for the consequences. The person owning property whereon such a dangerous operation is performed cannot get rid of responsibility by delegating the performance to a third person and is liable for the injury to the adjoining owner. (*Lentaigu, J.*) *MAUNG PEIN v. MA THE NGWA.* 2 Rang. 549 : 1925 Rang. 143.

—Joint tortfeasors—Death of one—Suit for contribution. *MT. PHILLO v. GOPI.* 1924 Lah. 348.

—Malicious house search.—What plaintiff has to prove.

In a suit for damages for malicious house search, the plaintiff has to establish to the satisfaction of the court that the defendants or some of them were responsible for the search which was held in the house. If he relies on circumstantial evidence to prove this, that evidence must not only be consistent with the guilt of the defendants but incapable of explanation on any other hypothesis. (*Das and Kulwant Sahay, JJ.*) *SHYAMANANDAN SAHAY v. RAM JIVAN LAL.* 1924 P. 817.

—Negligence—Dog—Ferocious animal—Injury due to dog bite—Invitation. *MARY LENNON v. PERCY FISHER.* 1924 Bom. 207.

—Nuisance on a public thoroughfare—Suit to remove.

The general rule is that any one who sues to remove nuisance on a public thoroughfare must prove special injury. (31 All. 444). The facts in 10 Atl. 553 are an exception to the general rule. (*Gokul Prasad, J.*) *KALIDIN v. CHANDRIKA PARSAD.* 1923 All. 182.

—Nuisance—Overflow of water—Noncultivable land—Damages.

According to the principles laid down in *Ryland v. Fletcher* a person who stores quantities of water in his land does so at his risk and if it escapes and causes damages to the neighbours, he is liable in damages for the loss caused. In the case of uncultivable land which is submerged

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the damages cannot be based on the basis of loss of cultivation (*Kinkhede, A. J. C.*) *GOPALA BAPU v. DOMA BAPU*.

1924 Nag. 229.

—Trees—Damage Caused by over hanging trees—Rights to have them removed. *MAUNG PO THAUNG v. MA GYI*.

76 I. C. 812.

—Trespass—Damages—Assessment of—Considerations for court.

In an action for trespass, the damages awarded against a wilful trespasser ought in no case to be less than the amount, for which having regard to all the circumstances, a prudent and reasonable landlord would have agreed to let the land, or less than the amount which the trespasser would have had to pay as the result of reasonable negotiations for the use and occupation of the land. Over and above this minimum amount, the *animus* with which a trespasser commits the wrong may be taken into consideration for the purpose of awarding higher damages than would otherwise have been. But a plaintiff who stands by and virtually encourages the wrong is not entitled to damages on the same scale, (*Srinivasa Iyengar, J.*) *RAMASAMI NAYAKAR v. MEENAKSHI SUNDAM CHETTIAR*.

1925 Mad. 222 : 20 L. W. 836 :
47 M. L. J. 922.

—Joint tort-feasors—Contribution—Liability for. See CONTRIBUTION.

47 M. L. J. 305.

—Trade mark—Infringement—Importer of goods manufactured by another—Reputation of—If can be acquired—Infringement of the right of the importer—Suit for—Maintainability—Manufacturer being sole importer—Sale in competition with—If and when actionable—Trade-mark—Passing off of goods—Applicability to India.

In 1901, W. D. & H. O. Wills (manufacturers of "Gold Flake" cigarettes) amalgamated with similar other companies and formed into one company known as "The Imperial Tobacco Company, Ltd." to whom it assigned its good will and trade-marks. In 1902, the new company agreed with the "American Tobacco Company" that the latter should confine its trade to the U. S. A. and certain islands, and the former to Great Britain and Ireland, and that the two companies together should form a third "The British American Tobacco Co., Ltd." which should confine its trade to the rest of the world not included in the territories of the first companies. The "British-American Tobacco Co. Ltd." was then incorporated, the other two companies assigned to it their business, good-will and trade-marks outside their respective territories and mutual respective covenants to the afore-said effect were entered into by the three companies. Subsequently the British-American Tobacco Co. (India), Ltd. was incorporated to act as distributors in India of "The British American Tobacco Co., Ltd." and by an agreement (which was not, however, followed by a proper assignment) made the 1st September 1910, between the British-American Tobacco Company, Ltd. of the first part, the British American Tobac-

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co Co. (India), Ltd. of the Second part and the Imperial Tobacco Co. of India, Ltd. (the appellant Company) of the third part, the last named Company agreed to buy the goodwill, business, rights trade-marks and other assests of the "British American Tobacco Company, Ltd." in *inter alia* India and of "The British-American Tobacco Company (India), Ltd." together with the sole right to use their name or names and the names of all firms and companies which they had acquired.

Packets of "Gold Flake" cigarettes having the distinctive appearance and trade-marks of W. D. & H. O. Wills were manufactured by "The British American Tobacco Co Ltd", and between 1902 and 1910 imported and distributed in India by "The British American Tobacco Co. (India) Ltd," and Since 1910 by the appellant company. In 1921 the respondent purchased about 21 millions of such cigarettes (made by the "British-American Tobacco Co, Ltd" and sold to the Government of the United Kingdom) from the Surplus war stores liquidated by the British Army Canteen authorities in England, subject only to a stipulation that they were not to be re-sold in the United Kingdom, and they despatched and sold part of these in India.

In an action by the appellant company for an injunction restraining the respondents from so selling these cigarettes which were an alleged infringement of their trade-mark as importers and sole vendors thereof. *Held* that (1) neither by assignment nor by reputation had the appellant company any title to the trade-marks in India as alleged. *Performing Right Society Ltd v. London Theatre of Varieties, Ltd.* (1924) A. C. I. Ref. (2) there being no covenant by the respondents against selling the cigarettes outside the United Kingdom, nor any conduct on their part showing that they represented the cigarettes to be other than they genuinely were, no action lay for infringement or passing off.

It is possible for an importer to get a valuable reputation for himself and his wares by his care in selection or his precautions as to transit and storage or because his local character is such that the article acquires a value by his testimony to its genuineness, and if therefore goods, though of the same make, are passed off by competitors as being imported by him, he will have a right of action. There is nothing to prevent a tradesman acquiring goods from a manufacturer and selling them in competition with him even in a country into which hitherto the manufacturer or his agent has been the sole importer. The ordinary principles of jurisprudence with regard to trade marks and those forbidding the passing off of goods apply to India, (*Lord Phillimore.*) *THE IMPERIAL TOBACCO COMPANY v. ALBERT BONNAN AND BONNAN CO.*

20 L. W. 495 : 80 I. C. 1013 : 51 Cal. 892 :
(1924) M. W. N. 602 : 35 M. L. T. (P. C.) 156 :
51 I. A. 269 : 29 C. W. N. 81 : 1924 P. C. 187 :
26 Bom. L. R. 683 : 2 Pat. L. R. 230 :
47 M. L. J. 69 (P. C.).

TRADE MARK—Infringement—Prior user by manufacturer in Scotland—Commission to examine witnesses.

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It is open to a person in British India to acquire an exclusive user in British India of a trade-mark even though it had been previously used by a manufacturer in Scotland. Consequently in a suit by a person in British India for infringement of his trade mark, the question of its prior user in Scotland is irrelevant. (*Beasley, J.*) *C. R. COWIE & Co. v. E. M. H. PATEL BROS.* 2 Rang. 278. : 82 I. C. 723 : 1924 R 333.

— *Infringement—Similarity in design—Resemblance of names—Injunction—Duty of Court.*

In an action for an injunction restraining the defendant from advertising, offering for sale, selling or otherwise dealing in articles contained in packets or other receptacles which were a colourable imitation of those owned and used by plaintiff, the whole question turns upon this as to whether or not the court will believe that there is any probability of deception and instances of actual deception need not be proved if the court is otherwise satisfied of the probability of deception. The true view is that while the judge must not surrender his own independent judgment to any witness whatsoever, he must, at the same time, in order to arrive at a proper conclusion, not disregard the evidence in the particular case before him. The court has to consider whether the degree of resemblance between the two names and between the two designs of get up is such as is likely to deceive. In considering the matter the court must pay attention at the same time to the question as to who were likely to purchase the goods (*i. e.*) the ultimate purchasers in the market, many of whom are unacquainted with English language and most of whom are illiterate. In finding out the amount of resemblance between the two designs not only must the court look at the distinguishing features, *i. e.*, dissimilarities, but it must look at the whole and come to a decision. Each resemblance is not to be taken by itself and a conclusion based thereon. (*C. C. Ghose, J.*) *IMPERIAL TOBACCO CO., LTD v. ATLANTIC TOBACCO CO.*

40 C. L. J. 230 : 1925 Cal. 220.

TRADE NAME—Right of action—Claim to exclusive user, 1924 Cal. 216.

TRANSFER OF PROPERTY—Covenant against alienation—If applies to alienation by operation of law.

A general restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum*, as a sale under an execution. (*Baker, J. C.*) *MT. KASTURI v. BALIRAM.* 1924 Nag. 222.

TRANSFER OF PROPERTY ACT—If exhaustive.

The Transfer of Property Act is not exhaustive and does not profess to be a complete Code. (*Mukerjee, J.*) *JATINDRA CHANDRA CHOWDHURY v. RANPOOR TOBACCO COY.* 1924 Cal. 990.

— *Not exhaustive regarding mortgages.*

The Transfer of Property Act is not exhaustive on the law of mortgages. (*Kennedy, C. J. and Madgavkar, A. J. C.*) *HOTCHAND BALCHAND v. KISHIN CHAND.*

1934 S. 23 : 83 I. C. 548 (2) : 17 S. L. R. 178.

TRANSFER OF PROPERTY ACT, S. 3.

— *Two mortgages as regards some items—Third mortgage as regards same items, and some additional items. Framing a consolidated decree.*

Where a decree on a suit for enforcement of mortgages on three bonds, was passed, by consolidating all the debts. *Heid*, that the consolidation of all the debts would impede the right of redemption of the mortgagors and contrary to O. 34, R. 2, C. P. C. and S. 61 of the T. P. Act, and that in the absence of a specific contract to the contrary, the consolidation is illegal. (*Per Jwala Prasad and Kulwant Sahay, JJ.*) *PARMESWARA PANDEY v. RAJKISHORE PRASAD NARAYAN SINGH.*

3 Pat. 829 : 5 Pat. L. T. 646 : 1925 P. 59.

— *S. 3—Applicability—Punjab.*

The Transfer of Property Act is not in force in the Punjab. Its provisions are useful guides in deciding points of equity and are frequently so applied, but there is no obligation on the courts to use the Act as if every detail was the law of the Province. (*Campbell, J.*) *DULA SINGH v. BELA SINGH.*

78 I. C. 374 : 1925 Lah. 92.

— *S. 3—Immoveable property—Mahua trees—Nature of.*

Mahua trees so long as they are attached to the earth are not standing timber and as such are immoveable property within the meaning of the Transfer of Property Act. (*Wazir Hussain, A. J. C.*) *CHANDI v. SAT NARAIN.*

10 O. & A. L. R. 186 : 81 I. C. 650 : 1925 Oudh 108 (2).

— *S. 3—Notice—What amounts to—Abstinence from enquiry—Equitable mortgage.*

28 C. W. N. 470 : 39 C. L. J. 186 : 79 I. C. 910 : 51 Cal. 86.

— *S. 3—Registration—If amounts to notice.*

Registration of a document does not of itself amount to notice in all cases. Whether registration of a document is sufficient to impute notice or not has to be decided on the merits of the particular case. 18 A. L. J. 1074 foll. (*Stuart, J.*) *KALI DIN v. MADHO.*

77 I. C. 862 : 1923 A. 169.

— *S. 3 (c)—Building for sheltering Machinery—Immoveable property—Permanent beneficial enjoyment.*

If there was a building in existence inside which the machinery was sheltered, it cannot be said that this machinery was attached to the building for the permanent beneficial enjoyment of the building itself as is contemplated in Cl. (c) of the definition in Sec. 3 of the Transfer of Property Act.

It would be difficult, in a case of this kind, to speak of the machinery being attached to a building embedded in the earth for the beneficial enjoyment of the building. On the other hand, it would seem more natural to suppose that the building is really put up for the purpose of sheltering the machinery and protecting it from the weather. Nor again with reference to the definition of the immoveable property contained in the General Clauses Act it is possible to say that this

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machinery was permanently fastened to anything attached to the earth. (*Lindsay and Sulaiman, JJ.*) *MEGRAJ v. KRISHNA CHANDRA*.

46 A. 286 : 22 A. L. J. 193 : L. R. 5 A. 193 :
78 I. C. 243 : 1924 A. 365.

———S. 5—Transfer of property—Definition not applicable to Presy. Towns Ins. Act.

75 I. C. 203 (2).

———S. 6—Interest of a person's holding on which he has planted grove is transferable.

The interest of a person's holding on which he has planted a grove is property and is transferable under S. 6. (*Sulaiman and Mukerji, JJ.*) *BAJUNATH SINGH v. CHANDRAPAL SINGH*.

L. R. 5 A. 255 (Rev) : 1924 A. 795.

———S. 6—Mesne profits—Right to—Assignment of.

A right to mesne profits accrued due is merely a right to sue and cannot be validly transferred. (*Das and Ross, JJ.*) *JAI NARAYAN PANDEY v. KISHAN DATT MISRA*.

5 Pat. L. T. 581 :
2 Pat. L. R. 306 : 1924 P. 551.

———S. 6—Right to sue—Assignment of—Rights of assignee.

The sale of a right to sue for immoveable property does not confer on the vendee any title to the immoveable property and the vendee cannot sue for possession. (*Kendall and Pullan, A. J. C.*) *NAZIR HASAN v. MOULVI MATINUZZAMAN*.

10 O. and A. L. R. 780 : 1 O. W. N. 337 :
11 O. L. J. 672.

———S. 6 (a)—Sale of reversionary rights—What passes.

The sale of a reversionary right is null and void. It creates no right *in praesenti*, but as against the vendor if the title opens in his favour, the vendee can proceed under S. 18, Specific Relief Act and claim specific performance. (*Pipon, J. C.*) *ZABTA KHAN v. SAID HABIB*.

75 I. C. 246.

———S. 6 (a)—Spes, successionis—Transfer of—Validity.

The transfer of the bare chance of surviving another and succeeding to his inheritance is forbidden by S. 6 (a), T. P. Act. (*Wazir Hasan and Neave, A. J. C.*) *DWARKA PRASAD v. NASIR AHMED*.

78 I. C. 850:

11 O. L. J. 219: 1925 Oudh 16.

———S. 5 (e)—Contract to sell—Transfer of rights under—If a mere right to sue.

Where the vendee in a contract to sell land transfers his rights under the contract, the transfer is not of a mere right to sue, although a right to sue is involved in it on breach of its conditions. The transferee can sue for specific performance or if it is refused sue for damages. (*Campbell and Moti Sagar, JJ.*) *AKHTAR BEG v. HAQ NAWAZ*.

1924 Lah. 709.

———S. 6 (e)—Co-sharer—Assignment of right to profits.

The assignment by a co-sharer of his right to profits is an assignment of a mere right to sue and is invalid. (*Baker, J. C.*) *CHOONILAL v. NANI SINGH*.

1924 Nag. 284.

TRANSFER OF PROPERTY ACT, S. 6.

———S. 6 (e)—Mesne profits—Nature of—Accrued profits—Assignment of—Validity.

Mesne profits are unliquidated damages. A claim to mesne profits is not a claim to any debt or to any beneficial interest in moveable property and where mesne profits accrued due are assigned the assignment is not of an actionable claim but of a mere right to sue and is hence invalid. (*Das and Ross, JJ.*) *JAY NARAIN PANDEY v. KISHUN DUTT MISRA*.

78 I. C. 705 (2) : 3 Pat. 575.

———S. 6 (e)—Partner's right to sue for accounts—If a mere right to sue—If assignable.

A partner's right to call upon the other partners to account is not a mere right to sue within S. 6 (e), T. P. Act and is assignable. (*Raymond, A. J. C.*) *THAWERDAS JETHANAND v. SETH VISHENDAS NIHALCHAND*.

79 I. C. 384 : 1925 Sindh 7

———S. 6 (e)—Past profits of partnership—Right to recover, if transferable.

The right to recover past profits in a partnership is not a mere right to sue but an actionable claim which can be validly transferred and on which an action can be brought. (*Baker, O. J. C.*) *SRINATH v. KANHAIYALAL*.

75 I. C. 817.

———S. 6. (e)—Right to sue agent for accounts—Assignment of—Rights of transferee.

A right to sue an agent for accounts and to recover such sums of money as might be found payable by the agent is not assignable. (*Suhrawardy and Graham, JJ.*) *KHETTRA MOHAN DAS v. BISWA NATH BERA*.

28 C. W. N. 894 :

51 Cal. 972 : 1924 Cal. 1047.

———S. 6 (e)—Right to sue—Transfer of—Amount found due on the taking of accounts.

Rights arising out of torts are unassignable but there may also be rights arising out of contracts which offend against the rule in S. 6 of the T. P. Act. A right to sue for accounts and for the recovery of money found due on the taking of accounts is not assignable. One useful test for determining the transferability or otherwise of an inchoate right is whether it can be attached in execution of a decree. The right to demand accounts or to an indefinite sum which may or may not be found due on the taking of accounts cannot be attached. (*Suhrawardy and Graham, JJ.*) *PROHALAD CHANDRA DAS v. BISWAS NATH BERA*.

82 I. C. 411 : 40 C. L. J. 79.

———S. 6 (e)—Share in partnership—If a mere right to sue.

The assignment of a share in a partnership is not bare right to sue. When a question arises whether an assignment is of a bare right to sue, it has to be determined on the facts of each particular case. (*Kennedy and Bilaram, A. J. C.*) *SETH VISHINDAS NIHALCHAND v. THAWARDAS*.

80 I. C. 642 : 1925 Sindh 18.

———S. 6 (e)—Title in dispute—Effect.

1924 Oudh 62.

———S. 6 (h)—Sale deed—Champerious nature—Legality.

Where a transaction which purports to be a sale deed is of a champerious nature it is immoral and opposed to public policy and hence invalid. (*Hallifax, A. J. C.*) *HEMRAJ v. TRIMBAK KUNBI*.

1924 Mad. 146.

TRANSFER OF PROPERTY ACT, S. 8.

—S. 8—Sale of house—What passes—Fixtures if pass—English law if applicable. *NARAYANA SA v. BALAGURUSAMI NADAR.*

(1924) M. W. N. 43 : 75 I. C. 838 : 1924 Mad. 187.

—S. 10—If applies to the Punjab.

S. 10. Transfer of Property Act embodies a sound and equitable principle which should be applied to the Punjab. An absolute restriction in perpetuity on every sort of alienation for any purpose by a donee of land should not be recognized and enforced. (*Harrison, J.*) *NAND SINGH v. PARTAP DAS.*

1924 Lah. 674.

—Ss. 10, 14—Covenant in sale deed—Restraint an alienation—Remoteness.

The vendee of a house covenanted to live in the house himself, not to sell it piecemeal and if he wanted to sell it to give the option of first refusal to the vendor and his heirs at a certain fixed price. *Held*, the covenant was not void for remoteness or as a restraint on alienation. (*Kincaid, J. C. and Kennedy, A. J. C.*) *KHENCHAND RAMDAS v. MOHSON SHAH.*

80 I. C. 962.

—S. 10—Grant of absolute estate—Restraint on alienation.

Where in a grant of an absolute estate, there is a clause restraining alienation except to a specific class of persons, the restraint is void. (*Wazir Hasan, J. C.*) *TEJA SINGH v. MOTI SINGH.*

1 O. W. N. 423 : 10 O. & A. L. R. 1004 :

80 I. C. 918 : 1925 Oudh 125.

—S. 10—Restraint on alienation of estate—Term embodied in a compromise—If void.

Restrictions on the power to alienate land with full proprietary rights is a derogation from the full proprietary rights and is consequently void though it is the result of compromise. (*Shadi Lal, C. J. and Rossignol, J.*) *PARTAP DAS v. NAND SINGH*

(1924) Lah. 729 (1).

—S. 14—Contract of pre-emption—If offends rule against perpetuities.

When a contract of pre-emption is entered into by the proprietors of a village there is no transfer of any property effected at all. S. 14 of the Transfer of Property Act, therefore, in terms cannot apply to it. If it be conceded that a contract of pre-emption does not create any interest in land it would be very difficult to contend that such a contract comes within the rule against perpetuities. Such a rule cannot apply unless an interest in land purports to have been created. (*Lindsay and Sulaiman, JJ.*) *BASDEO RAI v. JHAGRU RAI.*

66 A. 333 : 1924 A. 400 :

22 A. L. J. 265 : L. R. 5 A. 31.

—S. 14—Rule against perpetuities—Reservation of interest in property sold for benefit of himself and his descendants—Legality of.

There is nothing to prevent a vendor from reserving a certain interest in the property comprised in the sale for the benefit of himself and his lineal male descendants without any power of alienation subject to the reversion of that interest in case there were no male descendants left to enjoy the benefit of that reservation. The reservation of such an interest does not offend against

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the rule of perpetuity or involve the laying down of a rule of succession varying the ordinary law. On the other hand it merely amounts to the cutting of a certain interest out of the property sold for a limited purpose and the vendee becomes fully entitled to the whole, when the interest so created dies out. (*Kanhaiya Lal, J.*) *SUKHDEO v. RAM NEWAZ.*

L. R. 5 A. 727 :

82 I. C. 326 : 1925 A. 65.

—S. 35—Grant of permanent lease by prior holder—Receipt of rent—If amounts to election.

Where a permanent lease is granted by a prior holder of an estate and the successor receives rent without knowing of the circumstances in which the lease was granted or of the terms on which it was held, he does not know of his duty to elect and the acceptance of rent does not amount to an estoppel or waiver. (*Kanhaiya Lal, J.*) *GOPI KOERI v. MT. RAJ ROOP KOER.*

78 I. C. 191.

—S. 39—Apportionment of rent—Agricultural lease—Acquisition of proprietary interest by Patnidar—Effect of.

Under the terms of Patni, rent was payable in ten monthly instalments and the last kist was payable before the end of the agricultural year, i. e., to say in Magh. In Falgoun 1326 B. S. there was a partition between the co-sharers under which the whole of the proprietary interest passed to the patnidar. *Held*, that the patnidar was bound to pay the whole rent for the year though he became the proprietor before the end of year as there was no contract between the parties for apportionment of rent. Rent does not accrue from day to day but is payable according to the terms of the contract. (*Greaves and Chakravarti, JJ.*) *SATYA BHUPAL BANERJEE v. RAJNANDINI DEBI.*

28 C. W. N. 1039 : 1924 Cal. 1069.

—S. 40—Contract of pre-emption—Enforceability against purchaser.

A contract of pre-emption though not amounting to an interest in or easement of land, certainly creates a benefit of an application in favour of the other parties and is attached to their proprietorship. Such a contract, therefore, under the law can be enforced against all gratuitous transferees and even against transferee for consideration with notice. *A fortiori* such a contract could not be held to be unenforceable against the heirs of the contracting parties.

A contract of pre-emption can be enforced against the personal representatives as well as transferees of the original parties in the same manner and to the same extent as the restrictive covenants mentioned in the earlier part of Section 40 of the Transfer of Property Act. (*Lindsay and Sulaiman, JJ.*) *BASDEO RAI v. JHAGRU RAI.*

L. R. 5 A. 161 : 22 A. L. J. 265 :

46 A. 333 : 1924 A. 400.

—S. 41—Co-sharer entered as owner in revenue records—Mortgagee—Title of.

Where some alone of several co-sharers are entered in the revenue records as owners and on the basis of that a mortgagee entered into a mortgage with them, his title is protected under S. 41,

TRANSFER OF PROPERTY ACT, S. 41.

T. P. Act. (*Lindsay and Kanhaiya Lal, JJ.*)
 MUBARAK-UN-NISSA v. MUHAMMAD RAZA KHAN.
 L. R. 5 A. 257 : 22 A. L. J. 307 : 79 I. C. 174 :
 46 A. 377 : 1924 A. 384.

—S. 41—*Notice of dispute about title—If transferee can be said to have good faith—Effect of.*

A person who purchases property from another knowing that with respect to it a suit had been filed by a third party against his vendor cannot be said to have acted in good faith within the meaning of S. 41, T. P. Act. (*Abdul Raoof and Abdul Qadir, JJ.*) RAGHO v. DWARKA DAS.

1924 Lah. 738.

—S. 41—*Transferee from Hindu widow—Not entitled to the benefit of the section.*

A transferee from a Hindu widow who takes the property from her before the reversioner's right has accrued cannot successfully plead the bar of S. 41 of the T. P. Act. It cannot be said that the transferee has taken from an ostensible owner who was in possession with the consent express or implied, of the reversioners. (*Sulaiman and Kanhaiya Lal, JJ.*) SHIB DEO MISRA v. RAM PRASAD.

22 A. L. J. 690 : 46 A. 637 :
 1925 A. 79.

—S. 43—*Applicability—Absence of title known—Subsequent acquisition of title—Effect.*

The principle of S. 43, T. P. Act will not apply to a case where the transferee knew of the absence of title in his transferor. In such a case even if the transferor acquires title subsequently it will not enure to the benefit of the transferee. (*Wazir Hasan and Neave, A. J. C.*) DWARKA PRASAD v. NASIR AHMED.

11 O. L. J. 219 : 78 I. C. 850 : 1925 Oudh 16.

—S. 43—*Applicability of sale by Official Receiver prior to order vesting property in him—Subsequent order of court vesting property in him—Effect of—Sale valid. See PROV. INS. ACT, Ss. 2 and 27.*

47 M. L. J. 749.

—S. 43—*Estoppel—Transfer by unauthorised person—Acquisition of title subsequently.*

The owners of certain property which had been mortgaged sold the equity of redemption to one Anant. In execution of a decree on the mortgage the property was sold and purchased by Anant. In the meantime the original owners of the property sold it to the plaintiff who obtained possession. The original owners disputed the execution sale but eventually compromised it in 1913 whereby the property was sold with the assent of the plaintiff to the first defendant and Anant was paid off from the sale proceeds. Subsequently the plaintiff who was dispossessed by defendants sued for possession. Held, that the suit was not sustainable and that there was no estoppel of which the plff. could take advantage. (*Macleod, C. J. and Crump, J.*) RAMKRISHNA MARTOBA v. ANUSUYABAI NARAYAN.

26 Bom. L. R. 173 : 1924 Bom. 300.

—S. 43—*Mortgage of wife's property by husband as agent—Death of wife—Husband succeeding to a share of the property—Mortgage if can be enforced against husband.*

TRANSFER OF PROPERTY ACT, S. 51.

Plff. was the mortgagee of certain properties belonging to a Mahomedan lady, the document having been executed by her husband as her agent. The plff. sued both the husband and the wife on the mortgage and the wife pleaded that the mortgage was unauthorised and not binding on her. The husband did not deny execution of the deed but put forward other pleas. The court below dismissed plaintiff's suit holding that the power of attorney in favour of the husband was not explained to the wife and that the mortgage was not binding on her. Pending an appeal by plaintiff, the wife died leaving the husband as heir to one-fourth of the estate. Held that the plaintiff could at his option seek a remedy against the property which had come by inheritance in the hands of the husband from the wife, inasmuch as the husband actually received the money paid by the plaintiff on the mortgage and had further acknowledged that the debt was valid and subsisting. 34 A. 455 : 99 C. 749 : 7 C. 245 Ref. (*Lindsay and Sulaiman, JJ.*) AISHA BIBI v. MAHFUZ-UN-NISSA BIBI.

46 A. 310 : 22 A. L. J. 205 :
 78 I. C. 180 : L. R. 5 A. 97 : 1924 A. 362.

—S. 43—*Principle of—If exhaustive of the doctrine of equitable estoppel in India—Void contracts.*

The principle of S. 43, T. P. Act is a principle of law generally known as feeding the grant by estoppel. If an assignor with defective title purports and intends to make an assignment for value and thereafter acquires an interest in the property such interest is available in equity to make the assignment effectual. There is nothing in the provisions of S. 43 or any other law in force in India which would preclude a court from giving effect to this principle.

But a contract which is void *ab initio* cannot be validated by the provisions of S. 43. If the contract purports to transfer property which the law makes inalienable that contract cannot be given effect to on this principle. (*Cuming and Wazir Hasan, A. J. C.*) MOHAN SINGH v. SEWA RAM.

10 O & A. L. R. 217 : 10 O. L. J. 424 :
 75 I. C. 579 : 1924 Oudh 209.

—S. 43—*Title by estoppel—Sale by official Receiver—No vesting order—Subsequent passing of vesting order—Effect of. See PROV. INS. ACT, Ss. 2 & 27.*

47 M. L. J. 749.

—S. 43—*Transfer of share by co-owner—Transferee not affected by acts subsequent to transfer*

A transferee of the share of a co-owner, is only subject to the liabilities existing at the time of his transfer and cannot be saddled with incumbrances created subsequent to his transfer. (*Kinkhede, A. J. C.*) CHANDRASEKHAR v. ABIDALLI.

80 I. C. 920 : 1925 Nag. 68.

—S. 51—*Knowledge of absence of title—Effect.*

A person who plants trees on another's land, knowing he has no valid title to it, cannot claim compensation for loss suffered. (*Hallifax, A. J. C.*) MT. MUNNA v. SUKLAL.

1924 Nag. 142.

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———S. 52—*Alienee after preliminary but before final decree*—*Lis Pendens*.

An alienee *pendente lite* (after preliminary decree but before final decree) is bound by the decree and cannot be allowed to re-open questions already decided in the suit nor can he sue for the establishment of his title. (*Baker, J. C.*) LACHIRAM v. BHOLU.

82 I. C. 452; 1925 Nag. 132.

———S. 52—*Lease pendente lite*—*Validity*

Leases *pendente lite* cannot be avoided if the granting of them was an ordinary and reasonable incident of interim beneficial enjoyment. If it can be shown they are of such a nature that the lessor would have granted them even if he had known that he was to continue indefinitely as owner of the property, the same are valid. (*Hallifax, A. J. C.*) KARU v. PANDIA.

1924 Nag. 226

———S. 52—*Lis pendens*—*Administration suit*—*Mortgage during pendency of*.

A creditor of a deceased person sued his heirs for recovery of money due from him, for sale of certain pledged goods and if necessary for administration of his estate. The heirs executed a mortgage of immoveable property which had belonged to the deceased for a debt due by him. Subsequently an order was made in the suit for administration of the estate. Held that the mortgage was not affected by the doctrine of *lis pendens*. (*Sanderson, C. J. and Walmsley, J.*) BEPIN KRISHNA GHOSE v. BYOM KESH DEBI.

1925 Cal. 395 (2); 51 C. 1033.

———S. 52—*Lis pendens*—*Administration*—*Suit—Sale by administrator*—*Not affected*.

The executor's or administrator's power of disposal over the assets is not at all controlled or suspended by the mere commencement of an action on the part of a creditor of the deceased for the administration of the estate; for the power of the personal representative to alienate and make a good title to any part of the assets continues until there has been judgment in the action. Where a creditor or one of the next of kin institutes an administration action against an executor or administrator, the mere institution of the action or obtaining of a mere administration decree does not ordinarily deprive the executor or administrator of the general power to dispose of assets, unless and until the plaintiff has obtained an order appointing a receiver of the estate or at least an injunction restraining the executor or administrator from exercising the powers vested in him. (*Heald and Lentaigne, JJ.*) LEE LIM. MA HOOK v. SAW MAH HONE.

2 Rang. 4; 79 I. C. 729; 1924 R. 221.

———S. 52—*Lis pendens*—*Court sales*—*Doctrine if applicable to*—*Suit for specific performance*.

It might be taken as settled law that the rule of *lis pendens* applies to Court sales. Consequently pending a suit for specific performance of a contract for the sale of immoveable property the vendor could not transfer the property to a third person so as to defeat the plaintiff's claim. What the vendor could not do could not be done by the

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court by selling the property which was the subject-matter of litigation. 27 B 266; 25 C. 179 P. C. Ref. (*Macleod, C. J. and Shah, J.*) BHASKAR MAHADEV v. SHANKER VITHAL.

26 Bom. L. R. 418; 80 I. C. 453; 1924 Bom. 467.

———S. 52—*Mortgage*—*Lease after mortgage suit was filed*—*Liability of lessee to mortgagee*—*Pre-payment of rent*—*Effect*.

Where after the institution of a suit on a mortgage, the mortgagor leases the property and receives the rent for a certain period as advance, such payment is not binding on the mortgagee as the lease is affected by *lis pendens*. The payment to be valid must have been of rent accrued due at that time and without notice of the mortgage or where the lease was before the mortgage if the mortgagee has failed to make enquiries about the title of the lessee in possession. After a mortgage is created, the mortgagor's powers of leasing are limited. (*C. C. Ghosh, J.*) KIRAN CHANDRA BOSE v. DUTT AND CO.

29 C. W. N. 94; 40 C. L. J. 500; 1925 Cal. 251.

———S. 52—*Mortgage suit*—*Pendency of*—*Lease*—*Effect*.

A lease granted by the mortgagor during the pendency of a mortgage suit takes effect only subject to the result of the litigation and cannot affect the rights of the true owner. (*Prideaux, A. J. C.*) MOTILAL GULABSABO v. GANPAT RAO.

1924 Nag. 211.

———S. 52—*Suit for maintenance*—*Declaration of charge*—*Execution sale of properties*—*Lis pendens*. See MORTGAGE, PRIOR SUBSEQUENT. 46 M. L. J. 258.

———S. 52—*Suit to set aside mortgage decree*—*Pendency of*—*Purchaser at execution sale*—*If affected*.

Where a mortgage decree obtained against a Hindu widow is being challenged by way of suit by the reversioners, the purchaser at the sale during the pendency of the suit is affected by *lis pendens* and cannot be said to have acted in good faith. (*Neave, A. J. C.*) BASAWAN v. NATHA.

1 O. W. N. 319; 10 O. & A. L. R. 857;

82 I. C. 747; 1925 Oudh 30; 110 L. J. 452.

———S. 53—*Applicability to the Punjab*—*Test for judging validity of transfer*—*Intention*—*Purchaser in good faith*—*Rights of*.

The Transfer of Property Act though not applicable in terms to the Punjab, the principles contained therein apply.

The knowledge and intention of the transferee are the determining factors in these cases. If he buys in good faith and for valid consideration, his purchase cannot be set aside by reason of the transferor having sold the property for the express purpose of defeating or delaying creditors. It is question of fact in each case if the transferee purchased in good faith without knowledge of the transferor's object for selling. (*Abdu Raoof and Fforde, JJ.*) IBRAHIM v. JIVAN DAS.

1924 Lah. 707.

———S. 53—*Covers transfer for defeating future creditors*—*Transfer due to natural love may yet be fraudulent*—*Question depends on circumstances of each case*.

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It is not necessary under S. 53 that the creditor impugning the alienation should have been a creditor at the time of the alienation. If a person makes a transfer of his property in view of his becoming a debtor, or of getting a decree passed against him in the future, and if the object of the transfer is shown to have been to defeat the claims of such creditors, S.53 will cover the case. That the deed of the transfer was not executed gratuitously but on account of natural love and affection does not necessarily imply that the intention was not to defeat creditors. A man may make a transfer to his wife or a near relation of his to defeat creditors. The question has to be decided on evidence, as to the circumstances under which the transfer was made. (*Krishnan and Odgers, JJ.*) *RAJAGOPALA CHETTY v. SIVAGAMI AMMAL*. 20 L. W. 538 :

35 M. L. T. 100 (H.C.); 82 I. C. 945 :
(1924) M. W. N. 869; 1924 Mad. 779.

———S. 53—*Debtor preferring one creditor to another—Effect of.*

In a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide payment of the rest of his debts. (*Wazir Hasan, A. J. C.*) *Mr. ZOHRRA BIBI v. GANESA PRASAD*. 78 I. C. 106.

———S. 53—*Execution of decree—Attachment in—Property attached subject of contract for sale prior to attachment—Decree in suit for specific performance of contract for sale brought after attachment or delivery of possession to vendee—Attachment creditor not made a party to the suit—Rights of vendee of attaching creditor—Vendee's title prevails. See C. P. CODE; S. 64.*

46 M. L. J. 361.

———S. 53—*Fraudulent transfer—Avoidance of—Mortgage in part supported by consideration—Transaction intended to defeat creditors—Mortgage not wholly void—Debts discharged by transfer intended to defeat creditors—Proof of—Onus on transferee.*

Where a part of the money advanced under a mortgage is applied for the discharge of the debts of the mortgagor, the mortgage cannot be held to be wholly void, under S. 53 of the Transfer of Property Act even where it appears that the transaction was intended to defeat creditors of the mortgagor.

Converting immoveable property into cash is the most obvious and effective method of defeating and delaying creditors.

Where a mortgage document has been executed under circumstances which show that the object of the transaction was to defeat creditors of the mortgagors, the onus lies heavily on the mortgagee to prove the existence of the debts alleged to have been discharged from and out of the amount advanced under the mortgage. (*Phillips and Venkatasubba Rao, JJ.*) *LOORTHY ODAYAR v. GOPALASWAMI AIYAR*. (1924) M. W. N. 117 :

19 L. W. 135; 1924 Mad. 450; 80 I. C. 147;
46 M. L. J. 125.

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———S. 53—*Fraudulent intent to prefer one creditor—No bona fides—If enforceable.*

Where a transfer is not made in good faith but with the intention of preferring some creditors and to defeat others, the same is unenforceable. (*Kinkhede, A. J. C.*) *SHEIKH GANI v. SITARAM*.

1924 Nag. 318.

———S. 53—*Fraudulent transfer—Benami sale—Fraud on creditors—Right of transferor to recover property.*

So long as a benami transaction does not contravene the provision of the law, the Courts are bound to give effect to it. But where the object of the transaction is to defraud third persons and the fraudulent purpose has been effected, the maxim in *pari delicto potior est conditio possidentis* applies and the Court will help neither party. On the other hand, where the purpose of the fraud is not carried into execution, the mere intention to defraud will not deprive the true owner of his right of recovering his property. 33 Cal. 967; 35 I.A. 98 followed. (*Wazir Hasan, J.C. and Pullan, A. J. C.*) *BANSIDHAR v. LALA AJODHIYA PRASAD*. 10 O. & A. L. R. 701.

11 O. L. J. 619; 82 I. C. 333; 27 O. C. 175;
1 O. W. N. 248; 1925 Oudh 120.

———S. 53—*Inadequacy of consideration—Fraud.*

Mere inadequacy of consideration does not raise a presumption of fraud under S. 53, T. P. Act and is not a ground for refusing to enforce possession under the transfer. (*Kotwal, A. J. C.*) *DOMA v. GOVIND*. 1924 Nag. 124.

———S. 53—*Transfer in fraud of creditors—Future creditors—Transfer with a view to becoming a debtor.*

It is not necessary under S. 53 of the Transfer of Property Act that the creditor impugning the alienation as a fraud on creditors should have himself been a creditor at the time of alienation. If a person makes a transfer of his property in view of his becoming a debtor or of getting a decree passed against him in the future and if the object of the transfer is shown to have been to defeat the claims of such creditors S. 53 will cover the case. The mere fact that a deed of settlement was executed on account of natural love and affection does not necessarily show that the intention of the transferor was not to defeat his creditors. A man may make a transfer to his wife or any other near relation of his so as to defeat creditors. Where a father transfers all his properties to his second wife after his son by the first wife had brought a suit for account and for the delivery of his share of the family property, the transfer is *prima facie* fraudulent. (*Krishnan and Odgers, JJ.*) *RAJAGOPALA CHETTY v. SIVAGAMI AMMAL*. 20 L. W. 538 : (1924) M. W. N. 869 :
82 I. C. 945 : 35 M. L. T. (H. C.) 100 :
1924 Mad. 779.

———S. 54—*Agreement to sell—Interest in land—Right of pre-emption.*

An agreement to sell land does not create an interest in the property and a pre-emption suit cannot be maintained with respect to it. (*Kotwal, A. J. C.*) *TUKARAM v. UKARDA*. 1924 Nag. 327.

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———Ss. 54 and 14—Contract of sale — Rule against perpetuities—Contract when repugnant to —Contract Act. S. 37. L. R. 5 A. 17.

———S. 54—*Ejectment suit—Agreement to sell—If can be pleaded in defence—Specific performance—Barred—Effect.*

Though S. 54, T. P. Act is mandatory as to the acquisition of title in a contract of sale, a person in possession of property under an agreement of sale and who has performed his part of the contract can set it up in defence even though at that time a suit by him for specific performance would be barred. In a suit in ejectment, what plaintiff has to show is not only his title but his right to immediate possession — Case law discussed. (*Brown, J.C.*) MAUNG PO THA v. MAUNG BA DIN. 76 I. C. 141.

———S. 54—*Essentials of valid sale.*

In a real sale, there must be transfer of ownership and the payment or promise of price. If either of these is absent, it is not a sale.

Where a sale deed recites the vendee has already spent a sum of money for the vendor's litigation and that the vendor receives another sum which he deposits with the vendee for further costs of litigation, it does not amount to a valid sale. (*Hallifax, A. J. C.*) HEMRAJ v. TRIMBAK KUNBI. 1924 Nag. 146.

———S. 54—*Non-payment of purchase money—Effect of entering higher consideration in sale deed.*

In a sale of immoveable property, where non-payment of the purchase money or the fact that the consideration shown is higher than what actually passed does not prevent title passing. (*Kanhaiya Lal, J.*) MT. ISLAM FATIMA v. TAMIZ ALI. 75 I. C. 111.

———S. 54—*Sale of land—Agreement for sale—Delivery of possession—No registered conveyance—Suit in ejectment—Defence—Evidence Act S. 91.*

Proof of a valid agreement for sale is a good defence to a suit for possession brought by the seller against the purchaser in a case where owing to failure to execute and register an instrument there has been no legal conveyance of title from the seller to the purchaser and where a suit for specific performance of the agreement for sale would not be barred by limitation. Evidence of a prior contract of sale is admissible where the sale has failed to take effect for want of a registered conveyance. 46 M. 919 : 24 M. 377 : 42 C. 801 (P.C.) foll. (*Robinson, C.J. Heald, May Oung Lentaing and Carr, JJ.*) MG. MYAT THA ZAN v. MA DUN. 2 R. 285 : 3 Bur. L. J. 78 : 81 I. C. 857 : 1924 Rang. 214.

———S. 54—*Oral sale—Land worth more than Rs. 100—Possession given—Subsequent registered sale to another—Effect.* 77 I. C. 305 : 1924 Bom. 150.

———S. 54—*Sale of lands—Contract for—Duty of vendor to make out a marketable title—Payment of earnest money—Title subsequently discovered to be defective—Refund of purchase money—Estoppel—Waiver—Right to rescind contract.*

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The moneys in dispute were paid by the plaintiff as earnest money and as part payment of the purchase money for the purchase of a house in Bombay from the defendant. The latter had contracted to try the property for Rs. 1,28,000. The contract was made on 29-11-19. The vendor agreed to make out a marketable title free from all reasonable doubts subject to a lease of 1901. The owner of the land on which the house stood had granted a lease of the property on 29th September 1860 for a period of 99 years with a covenant for renewal for a like period to the vendor. On 7-3-1901 the land has been sublet with the same conditions and stipulations as those contained in the head lease by the vendor. The defendant purchaser in his turn agreed to sell the property to the plaintiff for Rs. 1,72,000 on 20-1-1920. It was agreed that the vendor was duly to make out his title marketable and that the sale was to be completed in two months. A sum of Rs. 10,000 was paid as earnest money under the contract. On 21-2-1920 the plaintiff agreed to sell the house to certain third persons at a profit of Rs. 18,000 on the same conditions subject to which he had purchased. The sale was to be completed on 31st May 1920. Both the plaintiff as well as the defendant engaged the same solicitors and at the time of the contract they were not aware of the leasehold character of the property. The solicitors investigated the title under the first contract and advised the purchase. The plaintiff paid Rs. 1,20,000 on account of the purchase money on 14-4-1920. The owner of the house, the plaintiff's solicitors and the defendant all met on 20-4-20 and the owner was paid Rs. 1,16,000 by the solicitors being the balance of the purchase money and he passed an assignment of the property direct to the plaintiff. The defendant not having received Rs. 46,000 the balance of his purchase money from the plaintiff refused to sign the assignment in token of his assent. The solicitors of the plaintiff's vendees when called upon to complete the sale, refused to do so on the ground that the property was leasehold property and that the lessee might or might not exercise his option to renew. The plaintiff answered the requisition by saying that there was a covenant for renewal of the lease in perpetuity and that there was therefore no defect in title. On an originating summons taken out by plaintiff the court held that the title was not marketable and on the same day the plaintiff's solicitors wrote back putting an end to the contract. The plaintiff thereupon sued for recovery of the earnest money and the purchase money paid by him to the common solicitors and also for costs and expenses incurred. The defendant resisted the suit on various grounds and counter-claimed that he was ready and willing to execute the assignment on receipt of Rs. 46,000 from the plaintiff. Held that the defendant was not in a position to make out a marketable title and that there was no waiver by the plaintiff of the stipulation in the contract of sale that the vendor was to make out a marketable title. The purchase money having been paid on account of an honest error of judgment on the part of the plaintiff's solicitors the plaintiff was entitled to a refund of the same. Though there may be an effectual waiver of any stipulation in an agreement

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must be intentional and based upon a full knowledge of the circumstances. If the purchaser enters into possession or pays the whole or part of the purchase money or does other acts, which a purchaser is not bound to do, till a good title has been made, he may be deemed to have waived objections to the title. The question as to whether objection as to title has been waived is one of fact and it may be that under certain circumstances the payment of purchase money may indicate a waiver on his part. But action induced by an honest mistake on the part of the solicitors does not amount to a waiver or give rise to an estoppel. (*Shah, A. C. J. and Kincaid, J.*) *MEGHJI MOORJI v. TYEBALLI KAMRUDDIN.* 26 Bom. L. R. 1019 1925 Bom. 64.

—S. 54—*Transfer of undivided share of immoveable property—Tangible immoveable property—Oral sale under Rs. 100 to be accompanied by delivery of possession.*

A share in undivided immoveable property is "tangible immoveable property" within the meaning of S. 54. Transfer of Property Act and if the purchase price of such share is under Rs. 100 the agreement for sale must be accompanied by delivery of possession. (1911) 11 I. C. 673 followed. (*Carr, J.*) *MAUNG HOE KYIN v. PE HLA GYI.*

3 Bur. L. J. 63 : 1924 R. 267.

—S. 54—*Unregistered sale—Delivery of possession—Document admissible to prove nature of vendee's possession.*

Where there has been a sale with delivery of possession the effect of the transaction is not destroyed by reason of an unregistered sale deed having been executed at the time. The sale deed can be referred to, to show the nature of the vendee's possession. (*Daniels, J.*) *DAYA RAM v. SITA RAM.* L. R. 5 A. 317 : 79 I. C. 394.

—S. 55—*Contract for sale of land and building—Duty of vendor to produce a marketable title—Property mortgaged to a firm—Release by one of the partners—Effect of.*

On 21-10-1919 the owner of a building had agreed to sell it to defendant for Rs. 2,45,000. The sale was to be completed in six months. The vendor agreed to make out a marketable title free from all reasonable doubts. The defendant agreed to resell the building to the plaintiff for Rs. 2,95,000 and received Rs. 20,000 as earnest money. The agreement of sale was made subject to the conditions of the prior sale. In May 1918 and September 1918 the owner had mortgaged it by deposit of title deeds and by a registered mortgage respectively the said building for Rs. 70,000 and 30,000 to two firms of bankers. Both these mortgages were paid off on 23-12-1918. At that time the first mortgagee passed a release which was signed "Jayantilal Mothilal and Co. by their partner Harilal Mothilal". The legal mortgagee also executed a reconveyance of the mortgage to him. It was signed "Venilal Bhaichandba & Co by partner Venilal Bhaichandba". On the same day the owner took from each of the executants a declaration that the declarant was a partner duly authorised to accept a discharge of the mortgage. Title deeds of the house were in due course submitted to the vendee's attorneys who on 21-4-1920 required proof that the ex-

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ecutants of the two release deeds were partners of the firms of the mortgagees and also that they were authorised to receive payment of the mortgage amount on behalf of the firm. The vendor's attorneys did not comply with the requisition but stated that the production of the release deeds and the original title deeds were sufficient to satisfy the vendee. Eventually on 7-10-1920 the purchaser's attorneys alleging that the vendor was not "willing to comply with the said requisitions and to make out a marketable title to the property" demanded return of the earnest money. The vendor's attorney responded on 12-10-1920 that the purchaser would not complete the sale on the frivolous excuse that the title was not marketable and intimating that the vendor had forfeited the earnest money. In a suit by the purchaser to recover the amount of the purchase money. Held that the requisitions of the vendee's attorneys were reasonable and had not been complied with. The vendor ought to have shown who the individual partners of the two firms who took the mortgages were and that the person who purported to give a discharge had been duly authorised to execute a release of the properties from the mortgage. On the facts stated to the purchaser the title was not free from reasonable doubt and he was right in refusing to complete the purchase. The suit was therefore decreed.

Quære : Whether it is competent to a partner in the absence of express authority, to mortgage partnership property either by deposit of title deeds or by legal mortgage. 16 B. 568 ; 19 M. 471 ; 31 M. 206 ; 4 A. 437 Ref. (*Marlon and Kincaid, JJ.*) *HIRACHAND v. JAYAGOPAL.*

26 Bom. L. R. 1049 : 1925 Bom. 69.

—S. 55—*Sale of land—Covenant to pay an annual sum by vendee—Rights of purchaser from vendee.*

Plaintiff's predecessor-in-title sold certain lands to the defendant's predecessor-in-title and the latter agreed to pay the former and his defendant a sum of Rs. 20 annually for worship of God. The defendant purchased the lands from a purchaser from the original vendee. Held, that the covenant did not run with the land and bind the defendant. There is no such thing as between a vendor and purchaser as a covenant to pay money running with the land. (*Rankin and Ghose, JJ.*) *MOHINI MOHAN ROY v. RAMDAS.*

28 C. W. N. 271 : 80 I. C. 210 :

39 C. L. J. 532 : 1924 Cal. 487.

—S. 55—*Sale of land—Vendor and purchaser—Unpaid purchase money left with vendee—All minor attained majority—Lien not lost. See HINDU LAW—MINOR.* 47 M. L. J. 737.

—S. 55 (1) (g)—*Covenant for title—Contract to the contrary—Statutory covenant excluded.*

The plaintiff obtained a sale-deed from the defendants for a sum of Rs. 6,500. It was stated in the sale deed that the property was subject to only one incumbrance of Rs. 4,000. It was further stated that there was no other incumbrance, and if any party either as a co-sharer or as an encumbrancer laid a claim and if, as the result of such a claim, any portion of the property was lost, the vendors would indemnify the vendees to the extent of the whole of the purchase money in case

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the whole of the property was lost, or in the case of a partial loss, to the extent of a proportionate amount of the purchase money. Subsequently a mortgagee of the year 1882 sued and obtained a decree for sale for Rs. 13,000 and odd. The plaintiff paid up the amount and sued for its recovery with interest from the defendant. *Held* that the express covenant excluded the statutory covenant and the parties having substituted an express contract in the case of an incumbrance being found out cannot throw it out and rely on a statutory contract. Consequently in the circumstances that happened the plaintiff was not entitled to any relief. (*Mukerji and Dalal, JJ.*) *RAM CHANDER v. BHAGWATI.* 22 A. L. J. 576 : L. R. 5 A. 382 : 79 I. C. 590 : 1924 A. 937.

—S. 55 (1) (g)—*Leasehold property—Sale of—Liability of seller to pay rent accrued due up to date of sale.*

Where leaseholder property is sold, the seller is bound to pay under S. 55 (1) (g), T. P. Act, all rent accrued due in respect of the property up to the date of sale, during his tenancy or that of a person through whom he claims otherwise than by purchase. (*Das and Ross, JJ.*) *MT. PAUL KUER v. RAMBHAJAN SINGH.* 1924 P. 822.

—S. 55 (2)—*Covenant for title—Presumption of—Punjab—Vendor purchasing at insolvency sale—Vendee's knowledge—Effect.*

The question whether the principle underlying S. 55 (2) T. P. Act, should be applied to a case arising in the Punjab must depend on the facts of the particular case.

Where a person purchases property at an insolvency sale and another person with full knowledge of this fact buys it from him but is later on dispossessed of a portion by a person possessing legal title, equity does not require that the Court should presume an implied covenant for title in favour of the vendee. (*Lindsay, J.*) *DULA SINGH v. BELA SINGH.* 78 I. C. 374 : 1925 Lah. 92.

—S. 55 (2)—*Covenant as to title—When exists.*

Where in a deed of sale the vendor describes himself as the owner of property sold there is an implied warranty under S. 55 (2) that he has full proprietary title and the purchaser will be entitled to the benefit of it in the absence of fraud, notice, waiver or an express or implied contract. (*Stuart, J.*) *KALI DIN v. MADHO.* 77 I. C. 862 : 1923. All. 169

—S. 55 (2)—*Scope of.*

Vendor described himself as the owner (malik) in possession of the property transferred. He nowhere suggested that he had obtained his title from Hindu women. The deed was silent on the subject.

Held, the interest which he professed to transfer was clearly full proprietary title. Under S. 55 (2) he must have been deemed to have contracted with the buyers that he had full proprietary title in the property. (*Stuart, J.*) *KALI DIN v. MADHO.* 77 I. C. 862 : 1923 All. 169.

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—S. 55 (5) (b)—*Mortgagor selling property—Vendee undertaking to redeem—Mortgagee if can sue under the mortgage.*

Where after executing a mortgage, the mortgagor sells away the property leaving with the vendee money to redeem the mortgage and the vendee agrees to do the same, the mortgagee cannot sue the vendee on the mortgage as there is no privity between them. (*Roe and Coultis, JJ.*) *KAMTA PRASAD SINGH v. NANKU PRASAD SINGH.* 78 I. C. 545.

—Ss. 56 and 82—*Mortgage—Assignment free of incumbrances—Assignee if liable to contribution.*

Where a property is mortgaged and a portion of the same is afterwards assigned to a third party free of incumbrances, the assignee cannot be asked to contribute towards the mortgage debt in respect of his portion of the mortgaged property. (*Phillips and Venkatasubba Rao, JJ.*) *VISVANATHA AIYAR v. VENGAMA NAIDU.* 19 L. W. 567 : 78 I. C. 52 : 1924 Mad. 749.

—S. 58—*Contingent liability—Mortgage if can be created to discharge.*

A mortgage of immoveable property for the discharge of a contingent liability is perfectly valid. (*Milner, C. J. and Kulwant Sahay, J.*) *NAND LAL v. DHARAMDEO SINGH.* 78 I. C. 457.

—S. 58—*English mortgage—Essentials of—Covenant for entry—Rights of mortgagee—Possession of property obtained at an invalid sale—Effect of.*

The three essentials of an English mortgage are (1) that the mortgagor binds himself to repay the mortgage money on a certain day : (2) that the property mortgaged is transferred absolutely to the mortgagee and (3) that such absolute transfer is made subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage money on the day on which the mortgagor bound himself to repay the same. Though the mortgage does not contain in so many words a covenant for possession, a right of entry on the part of the mortgagee may be implied from the terms of the deed. Even though the mortgagee enters into possession of the property by reason of a purchase at an execution sale under his decree, which subsequently turns out to be invalid, he cannot be ousted from possession either by the mortgagor or by a person claiming under him without the mortgage being redeemed. (*Pearson and Graham, JJ.*) *RUKMINI KANTA CHAKRAVARTI v. BALDEO DAS.* 28 C. W. N. 920 : 81 I. C. 1025 : 1925 Cal. 77.

—Ss. 58 and 76—*English mortgage—Redemption—Foreclosure or sale—Interest—Post diem—Right to.*

Unless the terms of a mortgage document show that it was the intention of the parties that no interest should be paid subsequent to the date when the mortgage money falls due post diem interest is payable till the date when the money is actually realised by the mortgagee. But the mortgagee is not entitled to compound interest. The period of limitation for a suit for sale or foreclosure under an English mortgage is 60 years

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under Art. 147 of the Limitation Act and the period for redemption is that prescribed by Art. 148. Even though the mortgage confers a power of private sale on the mortgagee on default of payment of principal on the due date still the mortgagee will be entitled to post diem interest and the mortgagee is not bound to exercise the power of sale under penalty of losing his right to subsequent interest. (*Kumaraswami Sastri, J.*) *AGNES ISABELLA CAMPBELL v. ADIKESAVALU NAIDU*, 20 L. W. 153 : 82 I. C. 399 : 1924 Mad. 736.

S. 58—Mortgage of a charge—Validity.

The mortgage of a charge is perfectly valid in law. (*Cuming and Wazir Hasan, A. J. C.*) *MOHAN SINGH v. SEWA RAM*.

10 O. & A. L. R. 217 : 10 O. L. J. 424 : 75 I. C. 579 : 1924 Oudh 299.

S. 58—Mortgage by conditional sale.

A transaction ostensibly a sale with right of repurchase in the vendor was held to be only mortgage by conditional sale, where time fixed for re-purchase was not of the essence of the contract, the price was extremely inadequate, vendor's right in mines were not sold and other circumstances indicated a mortgage. (*Lord Blanesburgh*.) *RAJA BAHADUR NARASINGERJI GYANAGERJI v. RAJA PANUGANTI PARTHASARATHI RAYANIM GARU*, 47 Mad. 729 : 20 L. W. 701 : 1 O. W. N. 684 : 51 I. A. 305 :

10 O. & A. L. R. 1172 : 1924 P. C. 226 : 82 I. C. 993 : 40 C. L. J. 481 : 27 Bom. L. R. 4 : 47 M. L. J. 809.

Ss. 58 and 60—Mortgage—Conditional sale—Sale and agreement to reconvey—Construction of the deed.

In construing whether two documents, one of sale and another of an agreement to reconvey, constitute a mortgage by conditional sale, the intention of the parties is the deciding factor. It lies on the party who contends that a document *prima facie* connoting an absolute sale is really a mortgage to prove his contention. Where there is no intention in the parties to keep alive the relationship of debtor and creditor between them, the transaction is one of sale and not of mortgage, 14 M. 170 : 5 L. W. 141; 42 M. 407 foll. (*Wallace, J.*) *GANESA MUDALIAR v. GNANASIKHAMANI MUDALIAR*, 35 M. L. T. (H. C.) 87 :

1924 M. W. N. 643 : 20 L. W. 338 : 1925 Mad. 37 : 47 M. L. J. 385.

S. 58—Mortgage—Covenant to pay—Implication.

In every mortgage there is a personal covenant to pay the mortgage-debt unless the contrary is expressly stated in the terms of the bond or appears by necessary implication from them. It is not express or even implied affirmation of the personal liability in the terms of the bond that is required. It arises out of the fact of the loan itself, and all that is wanted is the absence of any express or necessarily implied negation of it, of which there is no trace in the bond in this case. (*Halifax, A. J. C.*) *SETH GOPIKISAN v. MT. MANKUARBAL*, 20 N. L. R. 46 :

78 I. C. 239 : 1924 Nag. 97.

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S. 58—Mortgage—Palmyra trees—Usufructuary mortgage of palmyra trees—Registration unnecessary. See REGISTRATION ACT, Ss. 17 AND 49. 19 L. W. 494.

S. 58—Usufructuary mortgage—Oral mortgage—Delivery of possession—Rights of mortgage—Part performance—Rights of mortgagor—Redemption.

Where there is an oral usufructuary mortgage under which the mortgagee has paid money and obtained possession, though the mortgage is invalid and the mortgagee does not obtain a charge on the land, he can resist a suit for possession by the mortgagor. The doctrine of part performance applies to the case of incomplete mortgages where the agreement to mortgage is specifically enforceable. Where a mortgagor has given possession under an invalid oral mortgage, though he cannot sue for redemption he can maintain a suit for recovery of possession and the Court will decree the suit conditional on his repaying the amount of the loan advanced. (*Lentaigne and Carr, JJ.*) *MAUNG TUN YA v. MAUNG AUNG DUN*.

3 Bur. L. J. 130 : 2 Rang. 313 : 1925 Rang. 1.

S. 58 (c)—Mortgage by conditional sale—Agreement to reconvey—Intention of the parties—Pre-emption.

On 1st Dec. 1919 two sale deeds of two separate properties were executed in favour of the same vendee and on the same date two agreements were executed by the vendee in favour of the vendors promising to retransfer the properties conveyed for the amounts of the purchase money if they were paid between the years 1340 and 1345 Fasli. The plaintiffs treated both these transactions as separate and brought a suit for pre-emption on the footing that there was a sale. Held that the transactions were mortgages by way of conditional sale as defined in S. 58 of the T. P. Act and a suit for pre-emption in respect thereof was not maintainable. (*Lindsay and Sulaiman, JJ.*) *RAM CHARAN LAL v. DHARAM SINGH*.

46 A. 173 : 22 A. L. J. 10 : L. R. 5 A. 16 : 79 I. C. 626 : 1924 A. 444 (1).

S. 58 (e)—Mortgage or sale—Test.

A document of sale contained a provision that if the money was returned in a certain time the property should be reconveyed, and in default the sale was to become absolute. There was liability to pay interest till redemption. Held it was a mortgage by conditional sale.

In deciding whether a document is a sale or a mortgage, the language used and the surrounding circumstances are to be the sole guide. Precedents are of no use except in so far as they lay down the general law. If mutual rights and remedies are provided in the document, it is a mortgage. (*Wazir Hasan and Neave, A. J. C.*) *GULZAR SINGH v. SHEO NATH*.

11 O. L. J. 275 : 78 I. C. 547 : 1925 Oudh 11.

S. 58 (c)—Sale—Agreement to reconvey in favour of one of the vendors if mortgage by conditional sale.

Where there was a deed of sale by two vendors and a mere agreement by the vendee in favour of

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one of the vendors only, *held* that the transaction was not one of mortgage by conditional sale, though both these documents were executed on one and the same date because the property which was transferred on that date was worth the sale consideration and the agreement to reconvey was in favour of one vendor only (*Lonsay and Sulaiman, JJ.*) MT. FATIMA BIBI v. ABDUL GHAFFAR KHAN. 1924 All. 748.

——— S. 58 (a)—Transfer—Agreement to reconvey—Provision to deposit in Court—Nature of transaction.

Where a simultaneously with a deed of transfer, the transferee undertook to reconvey in case the money was paid at a certain time and there was a provision for depositing the money in Court in case the reconveyance was not effected, the transactions amount to a mortgage by conditional sale. (*Wazir Hasan, A. J. C.*) MAHABIR v. BHARATH BIHANI, 78 I. C. 426.

11 O. L. J. 312. 1924 Ouch 417 (2).

——— S. 59—Attestation—Proof of. 1924 P. 317.

——— S. 59—Deposit of title deeds—Promissory note—Equitable mortgage.

Where title deeds are deposited with the creditor to secure moneys due under an account or a promissory note it amounts to an equitable mortgage as soon as the title deeds are handed over to him. (*Newbould and Rhose, JJ.*) v. GALSTAN SONA TRAN PAL. 78 I. C. 668.

——— S. 59 English and Indian Law—Difference. 28 C. W. N. 470 : 39 C. L. J. 186 : 76 I. C. 910 : 51 Cal. 86.

——— S. 59—Equitable mortgage—Document creating or document merely recording already completed transaction of—Test—Registration—Necessity—Document creating equitable mortgage unregistered—Proof of mortgage by proof of fact of deposit of title deeds—Permissibility.

The test to find out whether a document is in itself an equitable mortgage and requires to be registered, is, does the document constitute the bargain between the parties, or is merely the record of an already completed transaction. In the former case, the document must be registered and is, if it affects immoveable property, of the value of Rs. 100 or upwards, inadmissible in evidence unless registered; in the latter case, the document need not be registered. The easiest guide is the question whether or not the money was paid before the making of the document, because, if the money is handed over contemporaneously with, or in exchange for, the document, or after the document it will be very difficult to establish that the document did not contain the terms of the bargain between the parties. The terms of the document itself are a better guide to the truth than the verbal evidence given afterwards by persons either trying to escape from the liability or to establish it.

Held that the document in the question in the case did not itself create the charge, but was merely the record of a charge which was already been created. Where the document is in itself the equitable mortgage and is inadmissible,

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because unregistered, the mortgagee cannot prove the equitable mortgage by proof of the fact of the deposit of the title deeds with him. After the decision of the Privy Council in *Subramanyam v. Lachman* in 50 C. 338, the decision in *Elumalai Chetty v. Balakrishna Mudali* 41 M. L. J. 297 on this point can no longer be taken to be the law. (*Schwabe, C. J. and Ramesam, J.*) VELAMA KANYA v. PONNUSWAMI AIYAR

47 Mad. 398 : 19 L. W. 384 : 34 M. L. T. (H. C.) 298 : 1924 Mad. 547 : 46 M. L. J. 295.

——— S. 59—One partner redeeming mortgage by another—If charge is created.

Where one partner redeems a mortgage of partnership property entered into by another partner and takes back the title deeds, it is only an advance from the one to the other to be paid off out of the profits and no equitable charge is created (*Viscount Haldane.*) HENG MOH & Co. v. LIM. SAW YEAN. 29 C. W. N. 12.

——— S. 60—Clog on the equity—Long period fixed—Mortgagees at liberty to make any improvements and charge for same—Effect.

1924 Lah. 129.

——— Ss. 60 and 98—Clog on equity—Provision of T.P. Act not extended—Effect. (*Robinson, C. J. and May Oung, J.*) MA MIN BYU v. MAUNG CHIT PE. 1924 Rang. 83.

——— S. 60—Clog—Period of 60 years—Prior redemption if allowed.

Stipulation which are likely to nullify the right of redemption are treated as clog on redemption. When the period fixed for the mortgage is 60 years, it cannot by itself be treated as a clog and hence redemption cannot be claimed before the expiry of the term fixed. (*Mukerji, J.*) NARAIN v. JAGAN. 80 I. C. 728 : I. R. 5 A. 632.

——— S. 60—Default in payment as agreed—Suit for possession—Redemption if to be allowed.

Under a mortgage deed, if money was not paid after 10 years, the mortgagee was to get possession for 20 years. In a suit by the mortgagee for possession after the terms of the clause, *held* the proper decree to pass is one for redemption and if not redeemed within a time to be fixed by Court to direct possession to be given to the mortgagees till redemption. (*Wazir Hasan and Neave, A. J. Cs.*) BAKHTAWAR SINGH v. BAKHTAWAR SINGH. 78 I. C. 232.

——— S. 60—Equity of redemption—Right of some only of the co-sharers to redeem the whole.

Where some only of several co-sharer landlords, as representatives of an occupancy tenant who mortgaged his occupancy holding and died without heirs, claimed as part owners of the mortgagor, to redeem the mortgage, and it was contended that plaintiffs are not entitled to redeem the whole, against the wish of the mortgagee,

Held relying on *Mirzayad Ali Bag v. Tuka Ram* 48 Cal. 82 that there is nothing in S. 60 to debar the owner of a part of the equity of redemption from offering to redeem the whole

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mortgage. There can be no objection to a suit by a part-owner of the equity of redemption for the redemption of whole. (*Dawson Miller, C. J. and Mullick, J.*) **SRIKANTA PRASAD v. JAG SAH.**
3 Pat. 818 : 1925 P. 57.

—S. 60—Mortgage—Forfeiture clause—Redemption—Transfer of ownership—Possession
76 I. C. 624 (2).

—S. 60—Mortgage—Redemption and acquisition of portion of mortgaged property by mortgagee—Possession—Liability to surrender—Mesne profits

The appellant obtained two mortgages of certain shares in a patti of 4 annas. Subsequently, whether after the redemption or the mortgages or before the redemption, the mortgagees purchased a small share (6 ps) out of the patti. The mortgages were redeemed. After the mortgage the appellants obtained possession over certain parts of land. Presumably this possession was obtained as mortgagees and on behalf of the mortgagors. The dispute arose when the mortgage was redeemed. The mortgagees refused to give up the lands over which they were in possession as mortgagees. Their contention was that they had become co-sharers in the lands and they were entitled to keep possession as co-sharers. *Held*, that the appellants (mortgagees) were bound to hand over the lands of which they got possession in the capacity of mortgagees and in no other capacity. Where the share was redeemed the whole quantity of land should have been handed back to the mortgagors. After that act had been performed it was for the parties to settle between themselves, if possible, what lands out of the land should be handed back to the mortgagors as representing a fair share of the lands. The mortgagees were not at all entitled to keep possession simply because they had become co-sharers in the patti. In this view the possession of the mortgagees over the lands which they have got in the capacity of the mortgagees was unlawful and after redemption the mortgagees were bound to hand over the entire quantity of land they had taken possession of as mortgagees or to pay mesne profits for their occupation. (*Stuart and Mookerji, JJ.*) **DILDAH v. SHUKER-ULLAH.**

46 All. 152 : 78 I. C. 1023 :
1924 A. 444 (2).

—S. 60—Mortgage—Redemption clog on—Mortgage for 82 years—Single day's time allowed for redemption.

A mortgage whose term was 82 years allowed only one day for redemption at the end of the period falling which the mortgage was to be treated as a sale. There was also a further clause that the mortgagor should redeem with his own money and not with borrowed funds. *Held* that the conditions in the deed constituted a clog on redemption and were invalid. (*Daniels and Neave, JJ.*) **RAM GANESH RAI v. RUP NARAIN RAI.**

80 I. C. 944 : L.R. 5 A 542 (Civ.).

—S. 60—Mortgage taking possession of part of property—Integrity of mortgage if broken.

Where a mortgagee who was entitled to possession of the properties got possession of only a

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moiety, and then brought a suit for the other half the integrity of the mortgage is not broken and the mortgagors cannot claim to redeem a portion only. (*Kendall, A. J. C.*) **THAKUR PRASAD SINGH v. CHANDRIKA PRASAD.**
10 O. & A. L. R. 212 :
11 C. L. J. 436 : 81 I. C. 742 : 1925 Oudh 150 (2).

—S. 60—Partial redemption—Purchase by mortgagee—Splitting up integrity—Apportionment.

Where the mortgagee by his own act in acquiring one of the mortgaged properties has split up the integrity of the mortgage, any person interested in a share of the mortgaged properties may redeem that share on payment of the proportionate amount of the balance of the mortgage debt. The mortgage debt should be apportioned in proportion to the share held. (*Dass and Ross, JJ.*) **RAGHUNATH PRASAD SINGH v. SADHU SARAN PRASAD SINGH.**
5 Pat. L. T. 312 : 75 I. C. 821 :
1925 P. 31.

—S. 60—Redemption—Purchase by one out of several mortgagees of a portion of mortgaged property—Indivisibility of mortgage—Piecemeal redemption whether permissible.

Where one only out of several mortgagees has acquired by purchase a part of the mortgaged property, the mortgage does not merge in the sale. It remains one and undivided and must be redeemed in its entirety and not piecemeal. 6 O. C. 223 and 9 O. C. 63 distinguished. (*Neave, A. J. C.*) **JAGMOHAN SINGH v. HARBAHS SINGH.**

1 O. W. N. 637 : 10 O. & A. L. R. 970

—S. 60—Suit by mortgagee for his share of the mortgage money—Decree—Form of—Merger—Acquisition of interest, **MOHAN LAL v. PRASADI LAL.**
1924 A. 11.

—S. 60—Usufructuary mortgage—Subsequent contract to sell equity of redemption—No sale deed executed—Right to redeem, if lost.

Some time after the execution of an usufructuary mortgage, the mortgagor entered into a registered contract to sell the equity of redemption and received some earnest money. The sale deed was never executed nor the balance of consideration paid. *Held* there was no transfer of the equity of redemption but only a contract for such a transfer and the right to redeem was not lost. (*Kendall and Pullan, A. J. C.*) **SITLA SAHAI v. DHUM SINGH.**

10 O. & A. L. R. 655 : 82 I. C. 408 :
1925 Oudh 114.

—S. 60—Usufructuary mortgage—Term fixed—Redemption before time—If allowed.

If under the terms of a usufructuary mortgage, the mortgagee is to remain in possession for fixed term and there is no specific provision for redeeming earlier, the mortgagor cannot in the absence of fraud or undue influence claim to redeem before the expiry of the term fixed. (*Kinkhede, A. J. C.*) **RAMA v. WAMANRAO.**

79 I. C. 870. 1925 Nag. 11.

—S. 61—Consolidation of several mortgages—Validity.

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Consolidation of several mortgage amounts against different properties is illegal in the absence of a contract to that effect (*Jwala Prasad and Culwant Sahay, JJ.*) PARMESHWAR PANDEY v. RAKISHORE PRASAD NARAYAN SINGH.

3 Pat. 829 : 80 I. C. 34 : 5 Pat. L. T. 646 ; 1925 P. 59.

— S. 63—Acquisition of tenancy lands by mortgagee—If an accession—Rights of mortgagor.

Tenancy lands acquired by a mortgagee in possession by virtue of an ejectment decree form an accession to the mortgaged property and the mortgagor is entitled to such lands on redemption, provided he pays to the mortgagee the expenses of acquiring it. (*Das and Ross, JJ.*) BABU RAM RAI v. MAHESWAR PRASAD SINGH.

78 I. C. 466.

— S. 65 (a)—Mortgagee purchaser—Defect in title—Covenant—Enforcement

The purchaser at a sale under a mortgage decree acquires the interest of both mortgagor and mortgagee and when the mortgagee after purchasing the property finds a portion of the property does not belong to the mortgagor, he can enforce the implied covenant under S. 65 (a) and sue for loss. (*Lentaigne, J.*) MA GUN v. MG. LU GALE.

3 Bur. L. J. 282 : 1925 Rang. 130.

— Ss. 67, 68 & 98—Anomalous mortgage—Power of sale—Provision empowering mortgagee to sell in case possession was not given—Rights of mortgagee.

Plaintiffs as sons of the original mortgagee, instituted a suit for recovery of the mortgaged money by sale of the hypothecated properties. The mortgage was an anomalous one. It provided *inter alia* (1) that the mortgagee would be put in possession of the mortgaged properties and appropriate the usufruct, after paying the landlord's rent, towards payment of interest, (2) that the mortgagor would pay up the debt within eight years and take back the properties, (3) that in case of default, the mortgagee would be entitled to recover his dues by suit, by sale of the mortgaged properties as well as other properties of the mortgagor, and (4) that in case any hindrance or obstruction was offered to the possession of the mortgagee, he would be entitled forthwith to sue for a decree to recover the amount of the bond. Plaintiffs alleged that they had not been put in possession of the mortgaged properties as agreed and were thus entitled to recover the amount of the bond by a sale of the mortgaged properties although the due date had not expired. The material defence taken was that a suit for sale on the basis of the mortgage bond was not maintainable as the due date had not expired.

Held, that this mortgage while it is not a usufructuary mortgage is also not a mere combination of a simple and usufructuary mortgage. It is not what is sometimes called a simple mortgage usufructuary, but it is an anomalous mortgage within the meaning of Sec. 98 of the Transfer of Property Act, that is to say, there are elements in the bargain which cannot be brought under either of those two conceptions. How far the rights of the parties in the circumstances are intended to extend must in any possible case, apart from Sec. 98,

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be controlled by the construction of the document. The mortgage deed did not empower the mortgagee to sue for sale of the property in the contingency which happened. (*Rankin and Page, JJ.*) GAJADHAR AGARWALLA v. SIBANANDA PREDHANJ.

28 C. W. N. 532 : 39 C. L. J. 269 : 81 I. C. 768 : 1924 Cal. 592.

— S. 67—Execution of decree—Immoveable property given as security for stay of execution realisable in execution without a suit under S. 67 of the T. P. Act. See C. P. CODE, Ss. 47 AND 145. 51 C. 150.

— S. 68—Diminution in rent—If security diminished—Inclusion of plots not belonging to mortgagor. L. R. 5 A. 29.

— S. 68—Mortgage—Mortgagee dispossessed by stranger—Suit for recovery of mortgage money. MAUNG PO KIN v. MAUNG KYANKYE. 1924 Rang. 143.

— S. 68—Mortgagee's right to recover money by sale—Retention of possession of a portion of the mortgaged property—Effect of—Transference from mortgagor—Liability of.

Where in a mortgage deed there is covenant entitling the mortgagee in the event of dispossession from the whole or any part of the property to recover his mortgage-money from any moveable or immoveable property belonging to the mortgagor whether forming part of the mortgage property or not the covenant is binding on any person claiming title from mortgagor and stands on an entirely different footing from the right to personal decree. The mere fact that the mortgagees still retains possession of some part of the hypothecated property is no ground for refusing him his remedy for recovery of the mortgage-money. (*Daniels, J.*) RAM KARAN SINGH v. RAJA RAM. L. R. 5 A. 225 (Rev.) : 1924 A. 877.

— S. 68—Prayer in plaint for charge as well as personal decree—Charge decreed—Effect.

Where in an action on a usufructuary mortgage bond under S. 68, T. P. Act, the plaintiff asked for a charge on certain moneys and also a personal decree against the defendant and the court decreed the charge, the latter portion of the relief claimed must be deemed disallowed. (*Jwala Prasad and Foster, JJ.*) KISHUNDEO SINGH v. JAGLAL SAHU. 78 I. C. 774 : 5 Pat. L. J. 603.

— S. 68 (A)—Mortgage—Foreclosure—Agreement to pay within fixed period—Default—Rights of mortgagor. 1924 Nag. 53.

— S. 69—Power of sale—Outside Court—Validity. 75 I. C. 7.

— S. 72—Mortgagee paying revenue—Right to claim on redemption—Interest.

A mortgagee paying revenue assessed on the land and which he is compelled to pay can add it on to the amount due under the mortgage. But he cannot claim interest thereon unless the mortgage deed provides for it. (*Abdul Raoof and Moti Sagar, JJ.*) RAJA RAM v. GAHI. 78 I. C. 1033 (2) : 1925 Lah. 76.

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— Ss. 72 and 76 - Mortgagee in possession—Right to settle lands with tenants—Acquisition of non-occupancy rights.

A mortgagee in possession can settle lands with tenants and the latter can acquire non-occupancy rights thereby. (*Kulwant Sahay, J.*) MAHADEO LAL v. SRI GOBIND LAL SAHU.

78 I. C. 943 : 1925 P. 198.

— S. 72—Puisne mortgagee—Redemption—Right to be paid moneys due under prior mortgage.

1924 Lah. 154.

— S. 73—Sale for arrears of Government revenue—Existence of charge—Remedy of mortgagee.

A mortgagee has a charge on the surplus sale proceeds after the sale of the mortgaged property for arrears of Government revenue. But he is not bound to follow the surplus sale-proceeds of the property and the existence of the statutory charge is no bar to his seeking a decree against the successors of the mortgagor. (*Dis and Ross, JJ.*) BENARSI PRASAD v. MOHIUDDIN AHMAD.

3 Pat. 581.

— S. 74—Suit by prior mortgagee Puisne mortgagee paying money under decree—Rights of—If can be worked out in the same proceedings

In a mortgage suit by a prior mortgagee impleading the puisne mortgagee and mortgagor as defendants the usual preliminary decree was passed in Form 6 of Appx. D. C. P. Code. The puisne mortgagee paid the money due and applied to be transferred as plaintiff and for a final decree in his favour. Held under S. 74, T. P. Act, he acquired all the rights of the prior mortgagee and could work out his rights in the same proceedings. (*Hallifax, A. J. C.*) SHANKAR RAO v. GANPATRAO.

80 I. C. 283 : 1925 Nag. 15.

— S. 76—Mortgagee in possession—Surplus collections—Liability to pay interest.

A mortgagee in possession of mortgaged property and in receipt of the profits of the property is not liable to pay interest on the surplus collections till the date of the institution of a suit for redemption by the mortgagor. Under S. 73 of the Contract Act interest by way of damages can be given only where there is a breach of contract and a mortgagee who keeps the surplus collections in his hand cannot be said to be guilty of any breach of contract so as to make him liable for interest by way of damages. (*Mukerji and Dalal, JJ.*) ISMAIL HASAN v. MADHI HASAN.

22 A. L. J. 833 : L. R. 5 A. 625 : 10 I. C. 63 : 1924 A. 881.

— S. 76 (c)—Mortgagee must pay Govt. revenue though increased when he was in possession and cannot add the increment to the principal money—Mortgages before T. P. Act—Law applicable.

In British India a mortgagee in possession of immoveable property under a mortgage made before T. P. Act of 1882 came into force, was under the ordinary law then in force, bound to manage it as a person with ordinary prudence would manage if it were his own, and unless there was an agreement to the contrary with the mortgagor, he was bound to pay out of the in-

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come of the property the Government land revenue which might during his possession be assessed upon it and such charges of a public nature as might accrue due in respect of the property and be payable by the person in possession of the rents and profits, and was not entitled to charge such payments against his mortgagor in the accounts. (*Sir John Edge*) ABID HUSAIN v. KANIZ FATIMA.

46 A. 269 :

22 A. L. J. 284 : 10 O. & A. L. R. 281 :

19 L. W. 703 : 34 M. L. T. (P. C.) 78 :

(1924) M. W. N. 657 : 50 I. C. 1019 :

1 O. W. N. 33 : 11 O. L. J. 427 :

27 O. C. 72 : 29 C. W. N. 214 :

1924 P. C. 102.

— Ss. 76 and 77—Usufructuary mortgage—Profits in lieu of interest—Liability to render accounts—Interest.

Where under the terms of an usufructuary mortgage, the mortgagee after meeting certain specified expenses was to appropriate the balance towards interest and no rate of interest was fixed, in a suit for redemption there is no liability on the mortgagee to account nor on the mortgagor to pay interest. (*Kendall and Pullan, A. J. C.*) SITLA SAHAI v. DHUM SINGH.

10 O. & A. L. R. 655 : 32 I. C. 406 :

11 O. L. J. 543 : 1925 Oudh 114.

— S. 76 (3)—Mortgage of fixed-rate holding—Liability for rent—Contract between the parties

Part of a fixed-rate holding had been mortgaged but the mortgagor as well as the mortgagee both defaulted to pay the rent. The zemindar ejected both the mortgagor and the mortgagee under S. 35 of the Rent Act and recovered the decretal amount by levying execution against the mortgagee. The mortgagee brought the other property of the mortgagor to sale in satisfaction of the amount recovered from him by the zemindar and purchased it himself. Held, that in the absence of a contract to the contrary, the mortgagee was bound under S. 76 (3) of the T. P. Act to pay the rent falling due in respect of the portion of the holding covered by his mortgage. The zemindar made him a party to the suit for recovery of the arrears of rent and he was equally justified in ejecting him from the mortgaged land and recovering the decretal amount by his arrest. The mortgagee was not liable for arrears of rent due in respect of the portion of the holding not covered by his mortgage and was entitled to recover from the mortgagor and his successors interested any sums paid by him on that account and to effect a valid sale of the mortgagor's property in satisfaction thereof. The liability to pay arrears of rent could not be treated as a personal liability so as to pass merely the life interest of the mortgagors in the property sold in satisfaction. (*Kannaya Lal, J.*) RAM DULARE v. SAHDEO.

L. R. 5 A. 374 (Rev.).

— S. 76 (g)—Duty to keep accounts—If can be contracted against.

1924 Oudh 92 : 10 O. & A. L. R. 328 :

11 O. L. J. 362.

— S. 77—Usufructuary mortgage—Malkana payable to mortgagor—Redemption—Accounts.

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Under a usufructuary mortgage the mortgagees had to pay the mortgagors an annual sum as malikana in lieu of all claims to accounts against the mortgagees. In a subsequent suit for redemption by the mortgagors held that that being usufructuary there was a liability to account and that the mortgagees were entitled to a decree on payment of the mortgage money less the amount of malikana remaining unpaid to them. The remedy of the mortgagee was not confined to a suit for recovery of arrears of malikana by a separate suit (*Daniels and Neave, JJ.*) BEHARI LAL v. SHIBLAL. 46 A. 633 : 22 A. L. J. 579 : L. R. 5 A. 414 : 82 I. C. 25 : 1924 A. 591.

—Ss. 79 and 80—Scope of.

28 C. W. N. 470 : 39 C. L. J. 186 : 76 I. C. 910 : 51 Cal. 86.

—S. 81—Marshalling—Right of—Puisne mortgagee purchasing a portion of the equity of redemption—Right not lost.

The object of Section 81 is to protect the subsequent mortgagee from the properties mortgaged to him being sold to satisfy the dues of a prior mortgagee who has the additional security of some other properties also. It will be dangerous and in many cases will make the provision nugatory, if it were held that the moment the subsequent mortgagee purchases in execution of his mortgage his rights of marshalling are extinguished. A mortgagee is a transferee of property and the mortgagee acquires certain rights and incurs certain obligations in the property mortgaged from the time he takes his mortgage. One of those rights is the right of marshalling. The right acquired by him passes to the purchaser in execution of the mortgage decree whether he or a third person is the purchaser. Execution sale does not extinguish the rights or obligations already acquired or incurred by the mortgagee at the time when the mortgage was executed. His rights and obligations against the mortgagor are thus not extinguished. Hence the purchaser of the property in execution of his mortgage decree is entitled to enforce the rights of marshalling against a prior mortgagee so long as that prior mortgage is not extinguished. (*Jwala Prasad, and Kulwant Sahay, JJ.*) RAJKESHWAR PRASAD NARAIN SINGH v. MAHOMED KHALIL-UL RAHMAN. 3 Pat. 522 : 5 Pat. L. T. 223 : 78 I. C. 796 : 1924 P. 459.

—S. 82—Applicability—Co-mortgagors—Suit for contribution.

S. 82, T. P. Act obviously deals primarily with the relations between mortgagor and mortgagee and has nothing to do with co-mortgagors, and a suit for contribution as between them will be governed by S. 95. (*Hallifax, A. J. C.*) PUNDALIK v. KADTAI BAI. 82 I. C. 2.

—S. 82—Construction—Several properties subject to same mortgage—Liability—Extent of

Where several properties whether of one or several owners are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage after deducting

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from the value of each property the amount of any other encumbrance to which it is subject at the date of the mortgage. 36 A. 372 Ref. (*Lindsay and Sulaiman, JJ.*) MEGRAJ v. KRISHNA CHANDRA. 46 A. 286 : 22 A. L. J. 193 : L. R. 5 A. 193 : 78 I. C. 243 : 1924 A. 365.

—S. 82—Principle of contribution, application of.

It is doubtful whether the principle of contribution as stated in S. 82 to the effect that where several properties are mortgaged to secure one debt they are liable to contribute rateably to the debt secured by the mortgage, is applicable where (1) the property is not mortgaged to secure the debt paid off by the party claiming contribution and is in no way involved in the decree for that debt, (2) the party claiming contribution acquiesces in the sale of other property and does not claim the property to be sold in execution of the decree for that debt, and, (3) the property is sold in good faith to another party and the claim to contribution is an equitable claim. 33 A. 708 distinguished (*Wazir Hasan and Pullan, A. J. C.*) MURT CHANDYA KUNWAR v. SHFO DAYAL. 1 O. W. N. 372 : 11 O. L. J. 707.

—S. 83—Deposit of mortgage money—Money paid to the account of legal representatives of mortgagee and sub-mortgagee—Validity of deposit.

The expression "Mortgagee" in S. 83 of the Transfer of Property Act includes the legal representatives and assigns of the mortgagee. A sub-mortgage is in substance an assignment of the mortgage. Consequently a deposit by the mortgagor of the mortgage moneys payable both to the legal representatives of the deceased mortgagee and his sub-mortgagee is valid. (*Kumara-swami Sastri and Waller, JJ.*) SUBBA RAO v. PONNAMMAI NADATHI. 19 T. W. 294 : 80 I. C. 363 : 1924 Mad 453 : 56 M. L. J. 74.

—S. 83—Deposit under—Validity—Effect—Death of mortgagee—Dispute as to who is legal representative—Deposit in case of.

On receiving a petition under S. 83 of the Transfer of Property Act it is the statutory duty of the Court to give notice to the mortgagee, and it is the mortgagee's duty upon receiving such notice to state the amount due on the mortgage and his willingness to accept the money deposited in full discharge of that mortgage and to deposit the mortgage deed in Court and receive the money. The expression "mortgagee" in S. 83 includes the legal representatives of the mortgagee, and where there are disputes among the heirs of the mortgagee and money is deposited in Court but the money not drawn owing to those disputes interest will cease to run from the date of the deposit.

On the death of a simple mortgagee, there was a dispute between his widow and his adopted son as to who was entitled to his estate. Each gave notice to the mortgagor not to pay interest to the other claimant. The appellants, who were the purchasers of the equity of redemption, paid the money up to date into Court under S. 83 of

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the Transfer of Property Act. The petition prayed for the issue of notice to the widow and the adopted son of the mortgagee, for cancellation of the hypothecation deed and the return of the title deeds and for a direction that they should take the amount due from the amount deposited in Court and pay the Petitioner's costs. In the body of the petition there was a statement that it was just that an order should be passed directing either of the two counter petitioners or anybody who might be entitled, to receive the whole of the said amount or the amount that might be found due. The widow and the adopted son each asked for the payment of the whole amount to the exclusion of the other; but neither stated what amount was due at that time or questioned the sufficiency of the amount deposited. In a suit for sale on foot of the mortgage instituted by the adopted son who was ultimately found to be entitled to the estate, held, that the deposit under S. 83 was a proper deposit and that interest ceased to run from the date thereof. (*Spencer, O. C. J. and Kumaraswami Sasri, J.*) **BATHAI BALUSWAMI AIYAR v KRISHNASWAMI AIYAR.**

19 L. W. 541 : 1924 Mad. 559 ;
1924 M. W. N. 535 : 46 M. L. J. 497.

—S. 84—Deposit of amount prior to redemption suit—Mesne profits—Accountability—separate suit if lies.

Where a mortgagor makes a valid deposit of the amount due but as it was not accepted a redemption suit was filed, the court should take into account the mesne profits realised by the mortgagee from the date of deposit up to at least the filing of the redemption suit and reduce the price of redemption by the amount of the profits. No separate suit would lie ordinarily for the recovery of that amount. (*Hallifax, A. J. C.*) **SAVITRI v. MADHORA.**

1924 Nag. 285.

—T. P. Act, S. 88—Application for execution.

Where the preliminary decree in a mortgage suit was passed before and the final decree after the new Civil Procedure Code, held, that an application for execution beyond 12 years after the date of the final decree is barred since the new Civil Procedure Code governed the case, final decree being the only executable decree. (*Ryves and Mukherji, JJ.*) **TARA CHAND v. MURTAZA HUSSAIN.**

1924 All. 696 (1)

—S. 90—Hindu reversioner—If can redeem during widows' life.

A Hindu reversioner has such an interest in the property as entitles him to redeem even in the life time of the widow. (*Neave, A. J. C.*) **BASAVAN v. NATHA.**

1 O. W. N. 319 : 82 I. C. 747 ;
11 O. L. J. 452 : 10 O & A. L. R. 30 :
1925 Oudh 30.

—S. 91—Tenant from year to year—Right to redeem.

78 I. C. 47 (2).

—S. 91 (f)—Judgment creditor of the Mortgagor's right to redeem—Decree on mortgage pending attachment—Subsequent purchase.

The statutory right given by S. 91 (f) can be exercised only by a person who answers to that

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description in that clause, and the Plaintiff in the suit having purchased the properties of the judgment debtor, and then applied to redeem the properties from the original mortgagee, he shed his character as judgment creditor, and that therefore no right of redemption could be claimed by him, following. *Chenayappa Tharagar v. Rama Aiyar.* 44 Mad. 232. (*Srinivasa Iyengar, J.*) **SUBRAMANIYA CHETTIAR v. CHINNAMMAL.**

20 L. W. 761.

—S. 91—Co-mortgagors—Suit for contribution.

A suit for contribution as between co-mortgagors is governed by S. 95 and not by S. 82. (*Hallifax, A. J. C.*) **PUNDALIK v. KADTABA BAI.**

82 I. C. 2.

—S. 95—Possession—How far necessary.

The acquisition of possession, constructive or actual, is a condition precedent for the creation of a charge under S. 95, T. P. Act. As a general rule, there is no lien at law without possession and this rule of Common Law has been adopted for the purpose of S. 95. (*Cuming and Wazir Hasan, A. J. C.*) **MOHAN SINGH v. SEWA RAM.**

10 O. & A. L. R. 217 : 10 O. L. J. 424 ;
75 I. C. 579 : 1924 Oudh 209.

—S. 100—Applicability of—Charge—Mortgage security, when amounts to a charge.

S. 100 does not enable a security to be converted into a charge if the transaction intended to be a mortgage is not reduced to writing or registered. (*Duckworth and Godfrey, JJ.*) **P. R. P. A. SOMASUNDRA CHETTIAR v. Y. R. N. NACHIAPPA CHETTIAR.**

2 Rang. 429 : 1925 Rang. 55.

—S. 100—Charge holder—Rights against subsequent transferee without notice.

A charge which does not amount to a mortgage can be enforced against a subsequent transferee for value without notice of the charge. The position is not affected by S. 40, T. P. Act, which applies only to contractual rights. (*Daniels and Neave, JJ.*) **MAHADEO PRASAD v. ANANDI LAL.**

22 A. L. J. 887 : L. R. 5 A. 749 : 1925 A. 60.

—S. 100—Charge—Creation of—General words—Intention.

A covenant in a document that the obligee could recover the debt from the estate and heirs of the debtor does not amount to a charge on the property. To create a charge the property or fund must be specifically indicated. There must also be the expression of a present intention coupled with the necessary words of hypothecation to constitute it. (*Kinkhede, A. J. C.*) **TULSIRAM v. ANUSUYA.**

1924 Nag. 360.

—S. 101—Mortgagee—Keeping alive—Owner of property paying off a prior charge—Subrogation—Composite security—Purchase of a portion of the property.

Certain lands were sold in execution of a money decree, subject to three mortgages. The second of the mortgages comprised not only the land but also the crops raised thereon from time to time. The second mortgagee obtained a decree on his mortgage and realised part of the decree by actual sale of crops and the rest was

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discharged by the auction-purchaser. The third mortgagee instituted a suit on his mortgage and obtained a decree, in execution of which he brought the properties to sale. After paying off the first mortgagee, there remained a balance of about Rs 1,300 to the credit of the suit. On the question whether the appellant or the respondents were entitled to the money in Court.

Held, that the auction-purchaser and his assignees (respondents) were entitled to subrogation of the rights of the second mortgagee to the extent they discharged his mortgage apart from the amount realised by him by the sale of crops, 11 I. A. 126; 29 I. A. 9; 39 I. A. 68; 22 M. L. J. 468 (P. C.) followed. (*Lord Phillimore*) MALIREDDI AYYA REDDI v. ADUSUMILLI GOPALA-KRISHNAYYA.

22 A. L. J. 45; 47 Mad. 190; 19 L. W. 215;

26 Bom. L. R. 204; 34 M. L. T. (P. C.) 1;

(1924) M. W. N. 290;

2 Pat. L. R. 99; L. R. 5 P. C. 49;

10 O. & A. L. R. 269; 39 C. L. J. 204;

28 C. W. N. 1025; 79 I. C. 592; 1 O. W. N. 27;

51 I. A. 140 (P. C.); 1924 P. C. 36; 46 M. L. J. 164.

— S. 101—*Mortgage decree—Purchase of property pending suit—Mortgage if kept alive.*

Where pending a mortgage suit a stranger purchases the property and deposits the decree amount in court after notice to the mortgagee of his purchase, mortgage which was redeemed thereby is kept alive for the benefit of the purchaser. (*Lentaigne, J.*) HLA BAN v. RAMANATHAN CHETTIAR.

3 Bur. L. J. 287; 1925 Rang. 89.

— S. 101—*Mortgage—Acquisition of portion of the mortgaged property by prior mortgagee—Redemption—Election to keep alive mortgage.*

A prior mortgagee acquired a portion of the equity of redemption of the property mortgaged in full satisfaction of the mortgage. Subsequently an intermediate mortgagee sued for partial redemption and in that suit the prior mortgagee disclaimed all rights as owner of the equity of redemption and elected to treat his mortgage as existing. *Held*, that the prior mortgagee having elected to stand by his rights as mortgagee, he was entitled to demand the entire debt due to him from a person claiming to redeem.

So long as the fusion of the rights of the prior mortgagee and of the mortgagor's equity of redemption lasted, the intermediate mortgagee could have relied on the application of the last para of S. 101 of the T. P. Act but the moment the prior mortgagee made his election and separated his two capacities, the last para of S. 60 of the T. P. Act ceased automatically to be applicable to the case. 44 A. 659; 15 C. P. L. R. 188; 16 Nag. L. R. 154. (*Kinkhede, A. J. C.*) LAXMAN SINGH v. JANARDAN.

20 N. L. R. 115; 1924 Nag. 266.

— S. 101—*Mortgage—Keeping alive—Sale in discharge of prior mortgage—Mortgagee entitled to possession.*

Where under a mortgage the mortgagee is in possession and the mortgage is discharged by means of a sale, if the sale subsequently turns out to be invalid, the mortgage revives and the

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mortgagee is entitled to remain in possession. (*Dalal and Simpson, A. J. Cs.*) AMBIKA PRASAD v. LAL BAHADUR.

11 O. L. J. 164; 1924 Oudh 353.

— S. 101—*Mortgage—Subrogation—Payment by puisne mortgagee or by purchaser of mortgaged property—Payment made to save property—Right to a charge.*

Subrogation is by redemption and there can be no subrogation where there has been no redemption. A partial payment of the debt on an earlier mortgage by a subsequent mortgagee does not give a claim for subrogation. Similarly where a purchaser of mortgaged property has only paid off a portion of the mortgage debt, he is not entitled to the benefit of the doctrine of subrogation. Where a person purchased an oil-well subject to the rights of a prior mortgagee and also to a right of pre-emption in favour of another person and in order to satisfy a decree for sale which had been made on foot of the mortgage made certain payments to the decree holder with a view to avert the sale, *held* that the purchaser had a right to be subrogated to the rights of the prior mortgagee. (*Prait and Macgregor, JJ.*) MA LON v. MA NYO.

1 R. 714; 79 I. C. 766; 1924 R. 204.

— S. 101—*Prior mortgagee—Purchasing property—Agreement to pay subsequent mortgage—Priority if can be pleaded in suit by latter.*

75 I. C. 1016

— S. 101—*Subsequent mortgagee—Paying off prior mortgage—Charge if kept alive.*

Where the amount of a prior charge is left with a subsequent mortgagee for payment to the prior mortgagee and he pays it accordingly, he is subrogated to the rights of the prior mortgagee; as it is to his interest to keep the prior charge alive it must be presumed in the absence of proof to the contrary that he did what was to his interest to do. The intention to keep a prior mortgage alive in India is never formally expressed in the latter deed. (*Daniels, J. C.*) GOKUL PRASAD v. SUKRU.

10 O. & A. L. R. 129; 81 I. C. 581;

11 O. L. J. 269; 1924 Oudh 374.

— S. 105—*Kabuliyat executed by lessee—If a lease.*

A registered Kabuliyat executed by the lessee and accepted by the lessor is not a lease within S. 105, T. P. Act. (*Kotwal, A. J. C.*) AHMED KHAN v. SADASHEO.

80 I. C. 736; 1925 Nag. 121.

— S. 105—*Person occupying premises executing registered kabuliat—Acceptance by an owner—If a lease.*

A registered *kabuliyat* executed by the person occupying the premises and accepted by the person owning the premises is not sufficient to bestow title upon the person occupying the premises and can in no way be considered a lease as defined in Section 105 of Act IV of 1882, 39 C. 1316; 35 M. 95; 31 A. 276; 27 A. 136, *Rel.* (*Stuart and Mukerjee, JJ.*) KEDAR NATH v. SHANKER LAL.

46 A. 303; 22 A. L. J. 185; L. R. 5 A. 80;

78 I. C. 934; 1924 A. 514.

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———S. 106—*Agreement to vacate at a certain date—Notice to quit—If necessary.*

Where the tenant has expressly agreed to give up possession at a certain fixed date he need not be given a formal notice to quit. (*Hallifax, A. J. C.*) DINA SINGH v. JAMALSINGH.

78 I. C. 446 : 1925 Nag. 48.

———S. 106—*Applicability—Agreement to vacate house whenever wanted—Notice.*

Where the lessee of a house agrees to vacate the same whenever wanted, S. 106, T. P. Act can not be made applicable and the omission to give notice cannot be regarded as fatal to a suit in ejectment. (*Kanhaya Lal, J.*) MUKAT SINGH v. MISRA PARAS RAM.

1924 A. 726.

———S. 106—*Applicability—Contract to the contrary—No specification as to when notice is to expire.*

S. 106, T. P. Act applies only where there is no contract to the contrary. A contract for a month's notice without any specification of the time when the notice is to expire is a contract to the contrary of the rule in S. 106 and the notice need not expire with the end of the tenancy. (*Kotwal, A. J. C.*) SAIK KASIM v. HAJI YUSUF KARIM ABU.

1924 Nag. 220 (1).

———S. 106—*Notice to quit—Legality of—Suit for ejectment in case tenant did not quit—Notice of ejectment issued by Manager of Temple.*

A notice given by a landlord to his tenant requiring him to quit a shop on the 1st of the following month and informing him that if he did not so quit, a suit for ejectment and damages would be brought against the tenant is not invalid. This is quite distinguishable from a case where the person giving the notice says that if premises were not vacated he would sue for ejectment and for recovery of rent at an enhanced rate. A notice to quit certain premises belonging to a temple is not invalid simply because it is signed by the authorised agent of manager and not by the manager himself. (*Daniels, J.*) BHAGWANA v. SHIB SAVITRI PRASAD.

78 I. C. 651 : L. B. 5 A, 294.

———S. 107—*Lease for a year—Hindu Sanbut year—If registrable.*

Though a Hindu Sanbut year is more than one year according to the British Calendar, a lease for one Sanbut year is not compulsorily registrable. (*Baker, J. C.*) MOTI RAM v. SETH LAKSHMI CHAND.

1924 Nag. 216 (1).

———S. 108, Cl. 1—*Lessee—Transfer of interest to third person—Liability to pay rent.* MANMATHANATH CHUKERBUTTY v. BALAI CHANDRA BAG.

1924 Cal. 359 (1).

———S. 108 B. (j)—*Permanent leases for purposes of habitation created before the Act are not transferable—Case-law fully discussed.*

A permanent tenancy created before the passing of the Transfer of Property Act for the purpose of habitation cannot be transferred when pucca buildings have not been erected on the land leased, when the document creating the tenancy does not confer upon the lessee the right to transfer and when there is no evidence of a local

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custom in favour of such a transfer. (*Walmsley and Mukerji, J. J.*) SAFAR ALI MIA v. ABDUL RASID KHAN.

39 C. L. J. 585 : 1924 Cal. 1012.

———S. 103 (j)—*Transfer of lease—Liability to pay rent—If extinguished—Agricultural land.*

Where a lessee signs his lease, his own liability to pay rent is not extinguished. The lessor has a remedy for realizing rent both against the lessee and against the assignee but he can take out only one execution.

This principle does not apply to agricultural lands or to the Bengal Tenancy Act. (*Suhrawardy and Chotenu, J. J.*) SHEBAIT OF IDOL SRIDHAR JIN v. NALINAKSHA RAI.

79 I. C. 557.

———S. 111—*Surrender of lease—Acceptance of new lease implied—Surrender—Subsequent lease invalid—Effect of.*

1924 Cal. 855.

———S. 111—*Transfer of property—Infringement of terms of devise—Effect of—Forfeiture.*

S. 111 of the Transfer of Property Act does not apply to a forfeiture claimed by reason of an infringement of the provisions of a devise. Where the will does not provide for a right of re-entry in case of a transfer or sub-lease in contravention of the terms thereof, no right of forfeiture can be exercised so long as the plaintiff is willing to use the house for the purposes for which it was assigned to him and does nothing inconsistent with the terms of the will. (*Kanhayyalal, J. C.*) SHANKARAYAL v. BINAYAK PRASAD.

27 O. C. 1 : 79 I. C. 695 : 1924 Oudh 305.

———Ss. 111(g) and 114—*Lease—Non-payment of rents—Forfeiture—Covenant for re-entry—Relief against.*

1924 Lah. 49.

———S. 116—*Lessor and lessee—Expiry of lease—Lessee continuing in possession—Renewal of lease—Option of the lessor—Notice to quit—Liability to pay rent.*

Where after the expiry of the period of a lease the lessee remains in possession with the assent of the lessor to his continuing in possession, the lease is renewed from month to month or year to year terminable by a proper notice to quit. The option of giving an assent which will convert the holding over into a tenancy is one that is conferred on the lessor and not on the lessee. 31 M. 163 Kel. Consequently where a tenant after the expiry of his lease continues in possession of a ground with the consent of his lessor but without giving notice of his intention to quit on a specified day, he is liable to pay a full month's rent as well as the rent due for the prescribed period of a notice to quit even though his occupation of the premises was for a very short time. (*Fawcett, J.*) MEGHJI VALLABHDAS v. DAYALJI AND CO.

48 B. 341 : 26 Bom. L. R. 231 :

80 I. C. 507 : 1924 Bom. 322.

———S. 119—*Exchange by guardian of minor—Subsequent dispossession—Remedy.*

Where the guardian of a minor exchanges his property for another and he is subsequently dispossessed of it, his remedy is not to sue to set aside the alienation but under S. 119, T. P. Act for compensation or for getting back his land. (*Macleod, C. J. and Crump, J.*) IRANGAUDA v. NINGAPPA.

1924 Bom. 517.

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—S. 120—*Exchange—Right of parties—Third persons if can claim pre-emption.*

An exchange implies an interchange of property with another and except in so far as the price may not be payable in money, the rights and obligations attaching to an exchange are analogous to those of a sale, so far as the parties thereto are concerned. Third parties cannot be substituted in the place of either of them and as such cannot claim pre-emption. (*Lindsay and Kanhaiya Lal, JJ.*) SAMAR BAHADUR SINGH v JIT LAL.

22 A. L. J. 292 : L. R. 5 A. 254 : 76 I. C. 495 : 46 A. 359 : 1924 A. 390.

—Ss. 122 and 123—*Gift—Essentials of—Hindu Law—Acceptance—Divesting of donor's ownership in property—Registration of deed—Effect of—Gift and dedication—Law applicable.*

S. 123 of the T. P. Act does not purport to legislate that the registration of a deed of gift of an immoveable property is sufficient transfer of the property. It follows S. 122 of the Act which lays down the requisite essentials of a complete gift. There must be a voluntary giving by the donor and an acceptance by or on behalf of the donee. In the case of the donee, being incapable of signifying his acceptance by reason of age or of his being an impersonal being, recognised by law as capable of being a donee, such as a deity, the acceptance required by the section may be done on his behalf by somebody else competent to act as an agent. The acceptance may again be signified by an overt act such as the actual taking possession of the property or such act by the donee as would in law amount to taking possession of the property where the property is not capable of physical possession. Thus actual delivery of possession is not essential in all cases for it is only one of the modes of indicating acceptance. There must be something shown to indicate an acceptance on the part of the donee and as to whether there has been an acceptance and what constitutes acceptance depends on the circumstances of each case. On behalf of the donor the essential ingredient is that he should voluntarily and without consideration transfer the property to the donee. This implies a complete divesting of the ownership in the property by the donor. A registered deed of gift cannot take the place of these essential ingredients among which is the complete divesting of the ownership by the donor. In each case it must be proved, that apart from the registration of the document, there was a complete divesting of the ownership. A registered deed of gift or any other document, may be merely a nominal transaction without any intention on the part of the executant to give effect to the terms fictitiously set forth in the document. There is no real distinction in principle between the essential ingredients requisite for a valid gift on dedication in Hindu Law and those laid down in the T. P. Act. (*Jwala Prasad and Kulwant Sahay, JJ.*) DEO SARAN BHARTI v. DEOKI BHARTI.

5 Pat. L. T. 305 : 3 Pat. 842 : 80 I. C. 980 : 1924 P. 657.

—Ss. 123 and 129—*Buddhist law—Gift—Delivery of possession—Necessity for.*

If a rule of Buddhist law requires delivery of possession to validate a gift of immoveable pro-

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perty, such a rule must be held to be abrogated by Ss 123 and 129 of the T. P. Act. (*Lentaigne and Carr, JJ.*) U. PANDAWUN v. SANDIMA.

2 Rang. 131 : 83 I. C. 557 : 1924 Rang 309.

—S. 123—*Gift of immoveable property—Delivery of possession if necessary—Registration of deed.*

To constitute a valid gift of immoveable property in places where the Transfer of Property Act is in force execution and registration of a gift deed would be sufficient. Delivery of possession need not be made. (*Heald, J.*) MIHLA ZAN v. PA PA YE. 3 Bur. L. J. 111 : 1924 R. 353.

—S. 123—*Gift—Incomplete gift—Rights of donor and donee—Relationship of trustee.* NATHA GULAB & Co. v. W. C. SELLER

1924 Bom. 88.

—S. 123—*Gift—Revocation.*

Donor's right to revoke gift before registration of the deed. See INJUNCTION.

26 Bom L. R. 427.

—S. 123—*Gift unregistered—Actings of parties—Possession given* Estoppel. MA SHIN v. MAUNG HMAN.

79 I. C. 579 (2) : 1924 Rang. 102.

—S. 130—*Mode of transfer—Mortgage of an actionable claim—Assignment of mortgage—Payment to mortgagor.*

S. 130 does not prescribe any mode for assignments. A mortgage of immoveable property not being an actionable claim, the provisions of S. 130 do not apply to assignments by the mortgagee. Where the assignee of a mortgagee does not notify the fact of assignment to the mortgagor and the latter makes a payment to the mortgagee without notice or collusion, he is entitled to get credit for the payment. But the assignee in an action against the mortgagor can join the mortgagee as defendant and claim relief against him also. (*Kinkhede, A.J.C.*) BASANT RAO v. NARAYAN.

1924 Nag 401.

TREE PATTAS—*Tope poramboke—Grants of—Title.*

In the case of *tope poramboke prima facie* the title is with Government and the fact that a tree patta is granted to a person shows he is not owner of the land, because tree pattas are not issued to owners of the land on which trees stand. (*Wallace, J.*) RAMASWAMI THEVAR v. ALAGA PILLAI.

79 I. C. 881 : 1925 Mad. 143.

TRESPASS—*Effect of—On rights of owner.*

The occasional user by a trespasser of land cannot extinguish the title of the rightful owner unless the possession of the trespasser is open, adequate in extent and continuity and such as to amount to adverse possession. (*Chakravarti, J.*) HARISADHAN PATARI v. DINANATH BANERJEE.

82 I. C. 318 : 1925 Cal. 316.

TRUST—*Co-trustees—Notice to quit given by some without consulting the others—Legality of.* See LANDLORD AND TENANT. 46 M. L. J. 122.

—*Object of—Family ceremonials.*

1924 Nag. 63.

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— *Repudiation of, by trustee—Possession if to be surrendered first.*

A trustee acting under a trust which he knows or subsequently discovers to be void or invalid is not bound to surrender possession of the trust property before he can be allowed to repudiate the trust. (*Pridetux and Kinkhede, A. J. Cs.*) KRISHNABAI v. DHONDO RAMACHANDRA.

20 N. L. R. 63 : 78 I. C. 542 : 1924 Nag. 129.

— *Trustee—Incapacity to sell to himself.*

75 I. C. 7.

TRUSTEE—*Transfer of office—Validity.*

A transfer of the office of trustee is invalid. (*Phillips and Venkatasubba Rao, JJ.*) VISVANATHA AIYAR v. VENGAMA NAIDU.

19 L. W. 567 : 78 I. C. 52 : 1924 Mad. 749.

TRUSTS ACT, S. 5—*Mode of creating trust—Certainty of object.*

A trust relating to immoveable property must be in writing, signed and registered or by will. The objects of the trust should not be of a nebulous character, but of such a nature that a court can administer it. (*Dalal and Cuming, JJ.*) ANANT RAM v. ISHRI PRASAD.

78 I. C. 320 : 1925 Oudh 202.

— *S. 5—Trust for the purpose of acquiring property for the benefit of the settlor—Settlor allotting certain sum of money for the purpose—Trust reserving power to settlor, to revoke trust after the money is spent—Trust is valid and the refusal to further finance the work is valid revocation—If afterwards the trustee by his own exertions acquires the property, no trust attaches to it and the beneficiary can't claim it—Trust Act, S. 78—Evidence Act, S. 115.*

Per *Mullick, J.*—Where a person asks another to acquire a certain property for his benefit i. e., for benefit of the settlor and allots a sum of money for the purpose but reserves to himself the power of revoking the trust after the amount is spent, the trust is a valid one and his refusal after the amount is spent, to further finance the work is a valid revocation of the trust; and where, without any lack of good faith, the trustee relying on the abandonment by the beneficiary acquires the property for his own benefit, no trust attaches to it. *Keech v. Sandford* (1726) Case Temp King 61 Dist. 1 Yn. C. 98. 11 Irish Equity 2 Referred.

Per *Foster, J.*—A authorises B his agent to take up a speculative business project, and allots a sum of money for an experimental trial thereof. When after four years the money is exhausted. A refuses to furnish further expenses. B, instead of relinquishing the project as he might, without consequent loss to himself or further loss to A, proceeds with it. After 12 years of heavy expenditure of money with a great risk of loss B, and after his death his son, attain success, and the adventure becomes profitable. Twelve years after this, during which the profits have been increasing year by year, A's heir comes into Court and claims the whole property with all past profits minus B's capital outlay. In such a case the agency ceases on the principal's implied determination thereof by refusing to furnish further expenses. After a principal has refused to indemnify an agent in the future in a speculative

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business committed to that agent, that principal cannot say that the agency subsisted. *Keech v. Sandford* and Ch. L. C. 635 and 19 Beavon 356. 19 Ves 144. 13 L. J. Ch. 238 De Gm. and Cr. 787 Dist. Mc Naughten's Select cases in Ch. 29. 1900 A. C. 293 and 2 H and T. W. 224 Foll. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) HARIHAR PRASAD v. KESHO PRASAD.

5 Pat. L. T. Supp. 1 : 1925 Pat. 68.

— *S. 6—Gift of property—Maintenance charge in favour of third party—Implied trust—Enforceability*

Where property is gifted to a person subject to a maintenance charge in favour of a third party such third party though not a party to the deed can enforce the charge, as there is an implied trust in his favour. (*Baker, J.*) MT. JANKI v. MOHANLAL.

80 I. C. 405 : 1925 Nag. 29.

— *S. 48—Co-trustees—Suit in ejectment—One refusing to join—Suit if maintainable.*

Where one of two trustees refuses to join as plaintiff in a suit for ejectment relating to trust property, one alone can sue, impleading the other as co defendant. (*Kotwal, A. J. C.*) SHUKOR v. JAGAIYY.

1924 Nag. 335.

— *Ss. 63 and 64—Knowledge of nature of money—Effect.* MEENAKSHI NETHIAR AMMA v. PARVATI NETHIAR.

1924 Mad. 174.

— *S. 82—Burden whether altered after the passing of the Act—Position as regards burden of proof before the Act.*

S. 82 of the Indian Trusts Act appears to throw the burden of proving that a transaction is benami on the party alleging it, whereas previously to that enactment the position may well have been that plaintiff who came into Court with the proof that he had paid the consideration money himself would have been able to throw the burden of proving that the transaction was not benami on the other side 29 B. 306 dist fol. 53 I. C. 54 P. C. ref. to. (*Kendall and Pullan, A.J.Cs.*) MT. RAJ KUNWARI v. MT. RANI MALRAJ KUNWAR

82 I. C. 832 : 1 O. W. N. 710.

— *S. 88—Applicability.*

Per *Mullick and Foster, JJ.*—A trustee who relies on abandonment of the trust by the beneficiary and acquires property by his own exertions need not hold it as a trustee but may hold it for his own benefit. *Keech v. Sandford* Dist. (*Dawson Miller, C. J., Mullick and Foster, JJ.*) HARIHAR PRASAD v. KESHO PRASAD.

5 Pat. L. T. Supp. 1 : 1925 Pat. 68.

— *S. 88—Pleader and client—Pleader purchasing client's property in execution sale in his wife's name after his ceasing to be client's pleader—Sale if vitiated.*

There is no more certain way of taking advantage than the way of concealment and if an attorney or agent can show he is entitled to purchase yet if instead of openly purchasing he purchases in the name of a trustee or agent without disclosing the facts, no such purchase as that can stand for a single moment and the advantage he has acquired by concealing the

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name of the real purchaser must be given up. Even where the Trusts Act does not apply the above principles hold good. *Lewis v. Himan*, 3 H. L. C. 630 and *Mc Pherson v. Watt*: 3 A. C. 254, Ref. (*Lord Dunedin*). NAGENDRABALA DAS v. DINANATH MAHISH. 51 Cal. 299 :

1924 P. C. 84 : 19 L. W. 349 :
33 M. L. T. (P. C.) 472 : 22 A. L. J. 177 :
2 Pat. L. R. 96 : 10 O. & A. L. R. 408 :
26 Rom. L. R. 575 : L. R. 5 P. C. 110 :
1 O. W. N. 752 : 81 I. C. 752 : 51 I. A. 24 :
(1924) M. W. N. 155 : 46 M. L. J. 532.

— S. 90—Co-owners—Joint patta land—Default in payment of Government revenue by owner of one plot—Purchase at revenue sale by joint pattadar—Purchaser as a trustee for defaulter—Collector—Powers of, with reference to revenue sales—Notice to persons affected by order—Necessity for.

Plaintiff and defendant were owners of separate plots of land comprised in a joint patta. Owing to their default in the payment of Government revenue, the plaintiff's land was sold in public auction and purchased by the defendant. Though there was nothing fraudulent in the conduct of the defendant, the plaintiff claimed the benefit of the defendant's purchase under S. 90 of the Trusts Act; Held that the plaintiff and defendant were not co-owners within the meaning of S. 90 of the Trusts Act; that it could not be said that the defendant, in his capacity as co-sharer, contrived to bring the property of the plaintiff to sale; and that the plaintiff's suit was not maintainable. The Collector is the final authority in the matter of confirming sales held for arrears of Government revenue and the Deputy Collector has only a delegated authority in the matter. Though the Collector is ordinarily bound to give notice to the party affected before confirming a revenue sale overruling the order of the Deputy Collector to the contrary, the omission to give such notice is not fatal especially when it is not shown that the aggrieved party had any valid grounds to urge before the Collector. (*Devadoss J.*) NAGASAMI AIYAR v. RAMASWAMI AIYAR, 47 M. L. J. 755 : 1925 Mad. 288.

— S. 90—Co-tenants—Renewal of lease in favour of one—Benefit of renewal if accrues to all.

A house was erected on a plot of land belonging to a lessee who died before the expiry of the term of the lease. The lessee died and his interest was inherited by his son and daughter in the proportion of 2/3 and 1/3 respectively according to Mahomedan Law. On the expiry of the term of the lease, the lessor renewed it in favour of the son alone and refused to associate with the daughter in spite of her request. She thereupon filed a suit against the defendant because it was stated that as the lessor had deliberately and repeatedly refused to associate the plaintiff with the defendant in the benefits of the lease, the plaintiff was not entitled to such benefit.

Held, that the action of the lessor would not affect the equity existing between the tenants in common. As between the lessor and the lessee the defendant held the legal title but by so doing he could not relieve himself, from equitable obli-

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gations which had arisen in favour of his co-tenant. (*Wazir Hasan, A. J. C.*) ABDUL GHAFUR KHAN v. MT. BUTABIBI.

10 O. & A. L. R. 359 : 11 O. L. J. 558 :
1 O. W. N. 326 : 1925 Oudh 200 (2).

TRUST PROPERTY—Succession to—Hindu widow—Right of.

In the absence of a custom to the contrary, succession to a trusteeship follows the ordinary methods of devolution and a Hindu widow can succeed as the heir of her husband. (*Phillips and Odgers, JJ.*) KOTHANDARAMASAMI NAIDU v. PAPPAMMAL. 79 I. C. 891 : 1925 Mad. 218.

U. P. COURT OF WARDS ACT (III of 1889), Ss. 3, 4, 8, 10, 34 and 41—Disqualified proprietor—Part of the estate not taken in charge by Court of Wards—Effect of—Representation by disqualified proprietor—Estoppel.

It is only with the sanction of the Local Government that the Court of Wards can either assume or abandon the superintendence of any person or property. The mere fact that the Court of Wards does not take over the management in the manner laid down in Chs. IV and V of the Act cannot affect the legal character of the ward and of his property. These must remain under the Court's superintendence with all the consequences arising therefrom until a further notification is published in the Gazette under S. 46 of the Act. There is no distinction between the case of proprietors disqualified under S. 8 of the Act and the case of proprietors whose estates are taken over on their own application under S. 9 of the Act and in both cases the proprietors are under the disabilities imposed on wards. A mortgage by a disqualified proprietor executed while the estate was under the management of the Court of Wards is void *ab initio*. There is nothing in the Court of Wards Act to prevent a ward from being allowed to carry on the duties of a manager though normally such managers are specially qualified persons. The mere fact that a disqualified proprietor represents himself as competent to enter into a contract with reference to his estate does not estop him from subsequently impeaching the transaction. (*Neave and Kendall, A. J. C.*) HARI KISHUN DAS v. CHOUDHURI MAHOMED SAFI JIN.

10 O. & A. L. R. 491 : 11 O. L. J. 502 :
80 I. C. 800 : 1 O. W. N. 182 : 1924 Oudh 438.

— (IV OF 1912) S. 54—Notice—Transferee, if gets the benefit of. 1924 A. 98.

U. P. DISTRICT MUNICIPALITIES ACT, S. 23 (3)—Election dispute—Decision of Commissioner—Offence under S. 463, I. P. C.—Direction to prosecute—Interference by High Court in revision.

Having regard to the language of S. 23 (3) of the U. P. District Municipalities Act, it is not competent to the High Court to interfere either under S. 115, C. P. Code or S. 107 of the Govt. of India Act with an order of an Election Commissioner directing the prosecution of the petitioner for an offence under S. 463, I. P. C. by the commissioner which was disclosed during the course of an enquiry into an election dispute.

Elections are certainly civil matters, an election dispute is certainly a civil dispute and an

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election tribunal is not a revenue or criminal court but a civil court. (*Walsh and Ryves, JJ.*) *RAM NATH v. EMPEROR.*

22 A. L. J. 497 : 10 O. & A. L. R. 581 :
L. R. 5 A 109 (Cr.) : 83 I. C. 634 : 46 A. 611 :
1924 A. 684.

— S. 116—Municipal rubbish and night-soil—Property in—Municipal servant selling night soil and rubbish and appropriating proceeds—Breach of trust—Penal Code, S. 420.

76 I. C. 971 : 25 Cr. L. J. 299.

— S. 162—Residence within notified area—Liability to taxation of traders.

On a reference to the High Court as regards the liability of certain persons to tax by reason of their residence within a notified area, it was found that the area was no doubt their native town but that they were carrying on business at Calcutta. *Held*, that in every case residence is a question of fact, and it must depend upon the particular circumstances. The general practice is to accept as the person's residence the place where throughout the year one would ordinarily expect him to be found. The term residence is naturally a flexible one, but in the case of traders carrying on business outside their native place their place of residence is manifestly the place where they earn a living and do their daily work nor does that place cease to be their residence because for purposes of rest or recreation or family ties, they occasionally return to the family home where they and their families have been brought up. (*Mears, C. J. and Pigott, J.*) *THE MUNICIPAL BOARD OF BARIELLY v. HAFIZ ALA BAKSH.*

22 A. L. J. 457 : L. R. 5 A. 363 :
79 I. C. 567 (2) : 1924 A. 669.

U. P. EXCISE ACT, S. 60, Cl. A—Discovery of cocaine in a shop—Conviction of habitual attendance in the shop—Legality of.

Cocaine was found in certain parts containing grain in a bazaar's shop. The applicants were brothers and were serving habitually in the shop. *Held*, that the conviction of the applicants under S. 60 of Act IV of 1910 was not illegal. (*Boys, J.*) *GANESHI v. EMPEROR.*

L. R. 5 A. 136 (Cr.) : 1924 A. 776.

— S. 60-A—Offence of possessing excisable article except cocaine is not summarily triable.

Under the U. P. Excise Amendment Act (II of 1923), Section 13 the punishment for an offence under Section 6 in respect of excisable articles other than cocaine is imprisonment for one year. The offence is therefore not triable summarily. (*Ryves, J.*) *KING EMPEROR v. RAM NARAIN.*

46 A. 446 : L. R. 5 A. 69 (Cr.) : 81 I. C. 342 :
25 Cr. L. J. 806 : 1924 A. 675 (1).

— S. 64 (c)—Partnership—Liability of all for wilful breach by one. 1924 A. 101.

— S. 71 (a)—Report by Police Sub-Inspector—Magistrate if can take cognisance.

10 O. & A. L. R. 293 : 46 A. 158 :
L. R. 5 A. 40 (Cr.) : 1924 A. 267.

U. P. LAND REVENUE ACT (III OF 1901), S. 4.

U. P. LAND REVENUE ACT (III OF 1901)—*Binding nature of proceedings in revenue courts, or Revenue courts—Evidence recorded before completion of proceedings for appointment of guardian—Effect of acquiescence—Proceedings if irregular.*

Where in certain proceedings in a court of record, to which certain minors were parties, and were represented by a guardian-ad litem, and the evidence was recorded before the proceedings for appointing the guardians had been completed, and no objection on this score was raised in the lower courts.

Held, that the Court of Record had proceeded in a regular manner as laid down on S. 54 of Act II of 1901, and that under S. 57 their decisions are binding on the Revenue Courts, and that the proceedings were not irregular, in view of the fact that no objections were raised. (*Fremantle, S. M. and Burn, J. M.*) *RAHMAT ILAHI KHAN v. WAZIRA.*
L. R. 5 All. 323 (Rev.).

— Partial partition—Civil Courts finding the family joint—One member claiming individual ownership of some items on the strength of entry as Khadakast in his name for 2 years—Validity of.

In a case of partial partition, it was agreed that the 'sir' and Khadakast of each co-sharer should be left with him. In a suit for partition in the civil courts, it was found that the family was joint. The appellant claimed four plots of land, as his separate property, on the strength of the four plots having been recorded as the Khadakast of the appellant alone, with a period of only two years at the time when the proceedings began. *Held*, that under S. 123 of the Land Revenue Act, the appellant could not claim as a right to have Khadakast of 2 years included in his patti. There could be no doubt from the decision of the civil court that the appellant owned some property acquired from his own funds, and there was nothing to show that he claimed separate ownership of the 4 plots. (*Burn, J. M.*) *HAZARI LAL v. RAM LAL.*
L. R. 5 All. 326 (Rev.).

— S. 4, Cl. 12 (A)—Recorded as "sir"—Use of the expression "sir" unnecessary.

In considering whether a particular plot of land is 'sir' the absence of the word "sir" in the entry against the land in the last settlement is not conclusive. There were other ways in former times of recording land as "sir" without calling it "sir." In every case therefore the question will be not if the word "sir" is used, but if the land recorded at the last settlement in the manner in which "sir" was customarily recorded in that locality and at that period. As a rule a careful study of the settlement papers of the particular village and of half a dozen neighbouring ones, settled at the same time and by the same officer, will furnish a conclusive reply to this question. (*Fremantle, S. M. and Burn, J. M.*) *BISHUN NATH SINGH v. GULKI.*

L. R. 5 A. 135 (Rev.).

— S. 4 (12) (b)—'Sir' land—Entry as 'sir' in the settlement records—Onus on the person alleging entry to be incorrect.

In an ejectment suit, the defendants contended, that they became tenants in chief, on account of

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the surrender of proprietary rights by their landlords, and that the land was never 'sir' and that they had completed 12 years continuous possession, but the settlement papers of 1893 and 1894 showed the land as 'sir' of certain persons, preceding the passing of the Land Revenue Act. *Held*, (1) that the land was 'sir' within the meaning of S. 4 (12) (a) of the Act, unless it could be proved that the entries in the settlement registers were incorrect that the onus was on the tenants to prove that the entries were incorrect on the settlement registers (2) and although the land was sublet in 1892, (a year before the settlement) to was not sufficient to prove the in correctness of the entry. (*Freemantle, S. M. and Burn, J. M.*) DURGA PRASAD v. SUCHA. L. R. 5 All. 327 (Rev.).

—Ss. 10 and 36—*Ex-proprietary tenancy—Rent not fixed by Collector—Right of parties to fix rent.*

The duty of fixing the rent under S. 36 of the Land Revenue Act is laid in the first instance not on the parties but on the Mutation Court, though a right is reserved to the parties to apply subsequently, if the Revenue Court omits to make an order. There is nothing to prevent the parties agreeing upon a rent which is not above the legal maximum nor is there any reason why such rent if agreed upon by the parties should not be recoverable in the Court. (*Daniels, J.*) SRI KANTOO SINGH v. IMDAD ALI. L. R. 5 A. 136 (Rev.) : 79 I. C. 665 : 1924 A. 944.

—S. 34 (5)—*Notice of ejectment—Legality of—Person not recorded proprietor—Ejectment—Suit to contest.*

S. 34 (5) of the U. P. Land Rev. Act debars a person who is not the recorded proprietor from issuing a notice of ejectment. In a suit to contest a notice of ejectment on the ground that the rent was fixed at a favourable rate the chief point to be considered is whether the rent was deliberately favourable when it was fixed and not at the date of suit. (*Freemantle, S. M. and Burn, J. M.*) CHUNNI PANDE v. CHANDRA CHAN DUTT. L. R. 5 O. 145.

—S. 34 (5)—*Successions—Duty to report—Scope of the section—Outh Rent Act, S. 108 (15)—Scope of.*

Under S. 34 of the U. P. Land Revenue Act it is not only transfers but successions that have to be reported and what the plaintiff should have reported in the case in question was that he had succeeded to his father in whose favour the property had been transferred. The fact that his father was not bound to report the transfers in his own favour simply because the Act was not then in force cannot be held to relieve the plaintiff and his successors for all time from the necessity of complying with the Act. S. 34 (5) of the U. P. Land Revenue Act lays down a general proposition and is not only confined to cases under the Land Revenue Act. It must therefore be held to apply to cases under the Outh Rent Act and the fact that S. 108, sub-s. (15) refers to a sharer and not to a recorded sharer is of no importance. S. 108 is a list of suits that can be filed in the Revenue courts and conveys no author-

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ity to any person referred to therein to break the law as laid down in the Land Revenue Act. (*Kendall, A. J. C.*) UDAI BHAN PATTAB SINGH v. DARGAHI TEWAN. 10 O & A. L. R. 482 : L. R. 5 O. 106 (2) 11 O. L. J. 520 : 1924 Oudh 329.

—S. 35—*Mutation proceedings—Application after 14 days—Discretion.*

Proceedings in mutation are essentially of a summary nature and S. 35 of the U. P. Land Revenue Act undoubtedly contemplates that the Tahsildar should enquire into disputed cases before referring them to the Sub-divisional Officer. It does not contemplate objection by parties who have hitherto remained silent being made in the Sub-divisional Officer's Court. The Sub-divisional Officer has power to entertain such applications and should do so if good cause is shown. But it cannot be laid down as a general rule that such applications should be entertained if presented before the case is decided. (*Freemantle, S. M. and Burn, J. M.*) MT. INDRANI v. MATHURA. L. R. 5 O. 9 : 10 O. & A. L. R. 158 : 10 O. L. J. 705 : L. R. 5 O. 113.

—S. 36—*Exproprietary tenancy—Agreement to accept less than standard rent—Effect of.*

10 O. L. J. 638.

—S. 36—*Exproprietary tenant—Order fixing rent—If binding on heirs.*

In the absence of fraud or want of jurisdiction, an order of Court fixing rent to be paid by an exproprietary tenant based on an agreement of parties, is binding on the heirs of the tenant. (*Mukherjee, J.*) MUSADDI LAL v. CHHOTU. 78 I. C. 349 : L. R. 5 A. 171 (Rev.).

—S. 36, Sub-S. (4)—*Initiation of proceedings—Application for claim of expropriatory right.*

Action can only be taken under S. 36 of the U. P. Land Rev. Act on application by the Zamindar or tenant concerned. If expropriatory rights are so claimed within 6 months they are extinguished and can no longer be the subject of proceedings under S. 36. (*Freemantle, S. M. and Burn, J. M.*) LALJI SAHAI v. BADRI FANDEY. L. R. 5 A. 55 (Rev.).

—Ss 40 and 44—*Proceedings for correction of papers—Question of possession—Duty of Revenue Court—Question of title—Determination of.*

Under S. 40 of U. P. Land Revenue Act where the Revenue Authorities can find that a certain person is in possession the entry must be made on the basis of possession and the question can be reopened on the basis of title in either a Civil or a Revenue Court. The decision of the Collector in a case relating to the correction of papers is no more than a decision as to possession, and the determination of the question of title in a subsequent suit for ejectment is not barred either under S. 44 of the U. P. Land Revenue Act or by the rule of *res judicata*. (*Stuart, J.*) LAL MAN v. FAZAL MAHOMED. 78 I. C. 115 : L. R. 5 A. 132 (Rev.).

—S. 42—*Correction of papers—Procedure*

U. P. LAND REVENUE ACT (III OF 1901), S. 44.

In a case of correction of papers the Assistant Collector recorded that the partners produced no more evidence than that produced before the Naib Tahsildar and decided the case thereon without framing issues. *Held*, that the provisions of section 42 of the Land Revenue Act had not been complied with since the proper procedure laid down in that section had not been observed (*Fremantle, S. M. and Burn, J. M.*) *KAMLA PRASAD PANDEY v. SURAJ BALI PANDEY*.

L. R. 5 A. 108 (Rev.).

— S. 44—*Mutation—Relation of landlord and tenant—Defendant getting recorded as thekadar—Lessor.*

Where defendant applied for mutation of the plaintiff as lessor names and got himself recorded as thekadar and the plaintiff was entitled to rely on the presumption raised by S. 49 of the Land Revenue Act that the relation of landlord and tenant existed between the parties. (*Daniels and Neave, J.J.*) *NAND RAM SINGH v. HARISARAN DAS*.
L. R. 5 All. 235 (Rev.) : 82 I. C. 296 : 1925 A. 100.

— Ss. 44 and 57—*Settlement entries—Presumption of correctness—Rebuttal—Entries in previous Khasra or Khatanni.*

Production of inconsistent entries in previous Khasra of Khatanni does not disprove the correctness of a settlement entry. (*Hopkins, S. M.*) *BACHI v. MANGAL*.
L. R. 5 A. 16 (Rev.).
10 O. & A. L. R. 107.

— Ss. 56 and 86—*Cesses—Recording of, by Assistant Record Officer—No special sanction by Local Government—Recovery of.*

Cesses recorded by an Assistant Record Officer when no record officer had been appointed to supervise his work, and those which had not been generally or specially sanctioned by the Local Government cannot be recovered in a court of law. (*Mukerjee and Dalal, J.J.*) *SUKURVA v. NAZIR AHMAD*.
21 A. L. J. 900 : L. R. 5 A. 333 (Rev.) :
82 I. C. 1026 : 10 O. & A. L. R. 1155 :
1925 A. 121

— S. 57—*Entries in settlement records—Correctness—Presumption—Rebuttal.* *MURLI PRASAD AVASTHI v. SARAN CHAMAR*.
10 O. & A. L. R. 125

— S. 57—*Record Court—Decision of, how far binding—Omission to frame issue—Effect of*

A decision based on proceedings properly conducted in the Court of an Assistant Record Officer is binding in regard to the same subject-matter in all Revenue Courts. Where though no express issue is raised, still the matter was raised in the pleadings and evidence of the parties, it operates as *res judicata*. (*Fremantle, S. M. and Burn, J. M.*) *JHANDU SINGH v. AHMAD HASAN*.
L. R. 5 A. 342 (Rev.).

— S. 57—*Settlement record—Entries in—Disproof of*

Where land has been recorded as *sir* at the last settlement and has been continuously so recorded since, the correctness of the entry of the land as *sir* at the settlement is open to disproof. (*Stuart, J.*) *LAL MAN v. FAZAL MAHOMED*.
78 I. C. 115 : L. R. 5 A. 132 (Rev.).

U. P. LAND REVENUE ACT (III OF 1901), S. 87.

— Ss. 87 and 90—*Admission of tenancy—Proof—Attestation at settlement—Inclusion of name of tenant in general list of expropriatory tenants liable to enhancement of rent.*

The mere attestation at settlement is not such a formal admission of the defendant's status as can bind the zamindar. The inclusion of the defendant in the general list of tenants recorded as expropriatory or occupancy who were sued for enhancement under Ss. 87 and 90 of the Land Revenue Act, cannot possibly determine his status. Nor can the fact he is shown in the rent receipts in accordance with the records as expropriatory or occupancy tenant be considered to bind the zamindar. (*Fremantle, S. M. and Burn, J. M.*) *MT. JHAMOLA KUAR v. MT. SUKHO*.
L. R. 5 A. 233 (Rev.).

— S. 87—*Enhancement of rent—List of occupancy plots—Inclusion in the list—Effect of*

Where a plot was included in the list of occupancy plots of which the rent was enhanced by the Settlement Officer under S. 87 of the Land Revenue Act, it does not make the status of the tenant of the plot *res judicata*, so as to bar its decision in subsequent litigation. (*Fremantle, S. M. and Burn, J. M.*) *MAHESH PRASAD v. PARTHI SELI*.
L. R. 5 A. 332 (Rev.).

— Ss. 87 and 88—*Rent suit between landlord and tenant—Rate of rent—Determination of—Order of Settlement Officer—When final.*

In rent suits in the Revenue Courts against occupancy tenants the Courts must award rent at the rates which are fixed upon in the papers unless those rates are entered erroneously by a clerical mistake, and where there is binding order of competent authority such as an order by the Settlement Officer under Ss. 87 and 88, Local Act III of 1901 or under Ss. 43 to 46, Local Act II of 1901, the Court has no discretion but must allow the rent at the rates directed. If further the landlord of the tenant has any objection to those rates, he must apply to the proper authorities to have those rates altered, but the Court trying a suit for arrears of rent has no authority in the matter.

S. 88 of the Act lays down that an occupancy tenant among other tenants may apply for commutation of rent. S. 89 says that when such an application is made, it would be the duty of the Settlement Officer to commute the rent. Unless he has been specially authorised to refuse any such application, he cannot refuse it. He has to proceed as directed by S. 87 of the Revenue Act. That section authorises the Settlement Officer to fix rent even on his own motion. Nowhere is it laid down that a tenant making an application should name any person as the opposite party to whom notice has to be formally sent. It would be the duty of the Settlement Officer or his assistant officer to issue notice to the parties concerned and to hear those who according to him may be interested in the matter. In the circumstances the order of the Settlement Officer or his

U. P. LAND REVENUE ACT (III OF 1901), S. 109.

assistant unless reversed in appeal, is final although no person whatsoever may have been informed of the proceedings. (*Stuart and Mukerjee, JJ.*) *YAQUB ALI v. DHAN SINGH*.

46 A. 316: 22 A. L. J. 212 :
1924 A. 429 : 78 I. C. 863 : L. R. 5 A. 22 (Rev.).

S. 109—Collector—Partition—Appeal to Commissioner—Summary rejection of.

An appeal against an order of a Collector quashing a partition under S. 109 of the U. P. Land Rev. Act could not be summarily rejected by the Commissioner. He should hear the parties and then dispose of the matter. (*Burn, J. M.*) *JHA CLEA SINGH v. CHMATJU SINGH*.

L. R. 5 O. 179.

S. 111—Partition—Objection to—Proprietary title—Question of.

An objection made to an application for partition on the ground that the village has been already partitioned and the shares of the objector are not liable to be broken up by a new partition, raises a question of proprietary title. (*Fremantle, S. M. and Burn, J. M.*) *SHIVA NANDAN CHAND v. NARAIN PRASAD*.

L. R. 5 A. 230 (Rev.).

S. 111—Partition Proceedings—Civil and Revenue Court.

MT. KUSAM DEI v. HAR DATT.

1924 Oudh 129.

S. 111—Partition—Question of proprietary title—Appeal—Jurisdiction.

In a suit for perfect partition of a village, some of the co-sharers objected on the ground that the village had already been partitioned and that each pattidar was not in separate and exclusive possession of the land in his patti and that there was nothing to divide except a few patties of common land. Held, that a question of proprietary title was not raised and decided by the Asst. Collector and an appeal lay to the Dist. Court. (*Fremantle, S. M. and Burn, J. M.*) *MT. CHHAB KUBAB v. RAJA SIR MD. ALI MD. KHAN*.

L. R. 5 O. 125 : 10 O. & A. L. R. 600 :
11 O. L. J. 667.

Ss. 111, and 112—Partition by Revenue Court—Finality of.

L. R. 5 O. 33 : 1924 Oudh 224.

Ss. 111—(c), 114 and 132 (2)—Talukdari Mahal—Number of mahals—Jurisdiction of Civil and Revenue Court—Objection to partition proceedings—Confirmation by Collector.

On an application by a Talukdar for partition of a talukdari mahal the Local Govt. ordered that his share only be partitioned and formed into a separate mahal. Some of the defendants also desired to have their shares separated but the others objected. The Assistant Collector overruled the objection and holding that the defendants had proprietary title ordered a partition into more mahals than one. On appeal the District Judge agreed with the Assistant Collector in ordering a partition into more mahals than one but remanded the case for further consideration of the question of title. On second appeal held that the question as to how many mahals are to be formed out of the estate is one entirely within

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the jurisdiction of the Revenue Court and not of the Civil Court. The District Judge has power to remand the case on the question of title to the Assistant Collector who was sitting as a Civil Court under S. 111 (c) of the Land Rev. Act to decide the matter of title. Under Ss. 114 and 132 (2) of the U. P. Land Rev. Act objections to the carving out of a number of mahals should be taken before the Collector at the time when the scheme of partition was prepared before the Assistant Collector and came up before the Collector for confirmation. (*Dalal, A. J. C.*) *JAGMOHAN SINGH v. RUDRA PRATAP SINGH*, 83 I. C. 610 :

1924 Oudh 315 : 11 O. L. J. 8.

S. 117—Partition—Re-distribution—Custom against shamilat—Apportionment of.

In spite of the provisions of S. 117 of the U. P. Land Rev. Act where there has been previously a deliberate partition between parties, village custom must be considered to be against any re-distribution which would undo a partition previously made and sanctioned and the shamilat area could not be used to make up alleged deficiency but must be divided up according to shares. (*Fremantle, S. M. and Burn, J. M.*) *SAHEBZADA LAL v. RAMDAS*.

L. R. 5 A. 205 (Rev.).

S. 126—Provisions of—Surrender of expropriary rights.

S. 126 (Land Revenue Act) provides that when land held as Sir by any co-sharer is included at partition in the portion allotted to another co-sharer, it is only when the former continues to cultivate it after partition, that he becomes its expropriary tenant. Where the plaintiff came up into Court on the allegation that the defendant was in his possession, and no attempt was made by the defendant mortgagor to assert his expropriary right held that the defendant must be deemed to have surrendered his rights in the holding. (*Neave, J.*) *DERICHARAN v. RAGUBIR*.

L. R. 5 All 294 (Rev.).

S. 138, Sub-Ss. (3) and (4)—Applicability of—Responsibility for rent payable to Talukdar.

L. R. 5 O. 25.

S. 195—Service of summons—Affixure—Legality of—Temporary absence of person.

Where the person to be served is merely temporarily absent, affixion is not sufficient. (*Fremantle, S. M. and Burn, J. M.*) *RAJ NARAIN v. BASANT SINGH*.

L. R. 5 O. 198.

S. 233 (k)—Partition—Co-sharers agreeing to partition—Confirmation—Suit for possession—Civil Court—Jurisdiction of.

In 1913 the plaintiffs were recorded as co-sharers of a particular extent of land and the defendants of the remainder. Partition proceedings were instituted in 1913 at the instance of another co-sharer, but the plaintiffs and the defendants applied to have their shares made into separate pattis. In drawing up the partition proceedings a mistake was made and the share of the plaintiff was wrongly diminished by 6 Biswas which were added to the defendants' share. The partition was confirmed in 1914 and a new khewat prepared in accordance with it. The defendants

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had disposed of their share including the 6 Biswanis wrongly added to it. The present suit was brought by the plaintiffs in 1921 after the defendants had obtained mutation, on the allegation that owing to a fraud committed by the patwari and defendants and others, the *fard takasm* had been wrongly drawn up. *Held*, that the present suit was an attempt to set aside the partition and was barred by S. 233 (k) of the Agra Ten. Act. The partition record is analogous to a decree defining the rights of the parties given *inter parties*. (*Neave, J.*) *KEDAR NATH v. JAGANATH SINGH*.

1924 A. 879 : 80 I. C. 380 : L. R. 5 A. 227 (Rev.).

— S. 233 K—*Partition—Duty of Revenue Court—Suit by one co-sharer for exclusive possession of plot included in partition—Jurisdiction of Civil Court.*

One of the matters which the Revenue Court has to consider in a partition case is what particular plots should be given to particular co-sharers on partition and it seems to us that where a suit is brought to force the hands as it were of the Revenue Court or to embarrass it in coming to a decision on such a question, such a suit is excluded from the cognizance of a Civil Court. (*Walsh and Ryves, JJ.*) *SHAIKH NAZIR AHMAD v. SHAIKH MAHOMED SHARIF*.

L. R. 5 A. 110 (Rev.): 1924 A. 682 (1) : 79 I. C. 345 : 46 A. 453.

— S. 233 (k)—*Partition proceedings—If binding on mortgagee.* *MT. JANKA v. SHIAM KISHORE LAL*. L. R. 5 O. 29.

U. P. LOCAL RATES ACT (1914). S. 14—*Jurisdiction of Civil Court—Suit questioning rate of assessment imposed on plaintiff's estate—Substance of the relief.*

It is a principle of English Law that a subject from whom any tax is sought to be levied, is entitled to raise before a Court of competent jurisdiction the question whether the authorities levying such tax are or are not acting within their statutory powers. In determining questions, which from time to time arise with regard to cases apparently lying somewhere near the borderline of the jurisdiction of the two sets of courts, (*i.e.*) Civil and Revenue, one principle has been consistently laid down. It is the substance of the relief sought, and not the mere form in which the case is preferred in the plaint, that must be looked to in order to determine the proper forum for the trial of the action. Where the plaintiff in a suit instituted in a Sub-Court prays *inter alia*, that the assessment of a rate imposed upon his estate under the N. W. P. Local Rates Act be set aside the suit is not cognisable by the Civil Court having regard to the prohibition enacted in S. 14 of the U. P. Local Rates Act of 1914. (*Mears, C. J. and Pigott, J.*) *RAJA UDAI RAJ SINGH v. SECRETARY OF STATE FOR INDIA*.

22 A. L. J. 446 : 46 A. 553 : 1924 A. 652.

U. P. MUNICIPALITY ACT, S. 16 (3) (c)—“Place of profit”—Meaning of Election—Municipal contractor.

1924 A. 135.

U. P. MUNICIPALITY ACT, S. 128.

— S. 113—*Highway—Dedication of land for public use—Rights of owner of the soil—Injury—Compensation.*

Every public road or way must have a history and every piece of land must have had an ownership at some time or other, and lands which were once in private ownership can only be converted to public use in respect of its surface by an act of dedication. Dedication is the usual and almost invariable method by which land which was once in private ownership becomes, as regards its surface, reserved for the use of the public as a highway, and it precedes vesting and control. A dedication means something more than a gift. It involves a setting apart by the donor for a specific purpose. The existence of a prior dedication with regard to an ancient public way, takes very much the nature of what is called a lost grant. It is entirely different in its legal attributes and in its origin, from a private way or easement which may be acquired by prescription following upon continuous user. The public cannot acquire a public way by prescription, and where a public way is found, and no traces are forthcoming of its origin the law presumes a dedication or a lost grant by the owner to whom the land belonged and who alone could dedicate it. In the case of public ways, and highways the Courts must be governed by the principles of justice, equity and good conscience which mean the application of English principles, unless there is something in the state of Indian society which makes those principles inapplicable either wholly or in part. In the case of a public way it is the surface and not the soil which constitutes the street. It is the surface along which the public have the right to pass and it is the surface for the purpose of lawful passage which defines the public right. The Legislature did not intend to vest in the Municipalities anything more than what was necessary to constitute the street or passage and did not thereby deprive the owner of the land who made the original dedication, of the soil which he necessarily reserved to himself when he was content to dedicate the surface to the use of the public. Consequently the Courts have confined the right of suit and the right to compensation in the case of a particular individual to a person who can establish special damage. Special damage is not always easy to define or foresee but it may be stated as follows :—“More particular damage by the nuisance than the public in general, as, if any accident occur to him or he be obliged to go a greater distance and be thereby put to extra expense in the conveyance of his goods or otherwise”. The plaintiff must prove that he has suffered a more particular kind of obstruction or inconvenience beyond that of the general public by reason of the obstruction of the defendant. (*Walsh, A. C. J. and Ryves, J.*) *MAHOMED RAZA KHAN v. ASKARI KHAN*.

46 A. 470 : 22 A. L. J. 729 : 1924 A. 598.

— S. 128 (B)—Breach of sanction—Penalty. 1924 A. 200.

— S. 128 (1) c (9)—“Circumstances and property”—Carrying on trade—Liability to tax.

A person who resides outside a municipality but is employed during business hours as a clerk on a salary within municipal limits is not liable.

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to be taxed under a tax on circumstances and property imposed under S. 128 (IX) of the Act. Nor could he be said to be carrying on a trade within the municipality. (*Daniels and Boys, JJ.*) *BRIJ BHUSHAN LAL v. THE MUNICIPAL BOARD OF KANAUJI.* 46 A. 685 : 22 A. L. J. 599 : L. R. 5 A. 416 : 82 I. C. 89 : 1924 A. 567.

—S. 162—Municipal servant—Tax on salary—Absence on leave—If deduction proper.

A municipal servant cannot get a refund of the tax assessed on his salary under Municipal Bye-laws during the period he is absent on leave. (*Pullan, A. J. C.*) *PURVES v. MUNICIPAL BOARD, SITAPUR.* 80 I. C. 48 : 1925 Oudh 108 (1).

—S. 194, Sub-s. (1), Cl. (b) —“Circumstances and property”—Liability to assessment.

The liability to assessment under S. 194, Cl. 1 (b) of the U. P. Municipalities Act arises in virtue of the rule framed by the Local Government under the section regulating the assessment of tax on circumstances and property in the notified area. The tax should be assessed with regard only to the value of the assessee's property or trade within the area. (*Wazir Hasan, J.*) *LOUIS DREYFUS & Co. v. NOTIFIED AREA, RANDANLI.*

11 O. L. J. 434 : 80 I. C. 576 : 1924 Oudh 418.

—S. 211—Private land—Overhanging projection—Power to order removal—Public law.

Where a projection does not overhang in a street, but overhangs a private piece of property the municipal Board has no jurisdiction to pass an order for its removal and if an order is passed without any jurisdiction by a municipality, it may be called into question in a Civil Court. The Municipalities Act was never meant to destroy private rights that may exist in property. Where 14 inhabitants reside on either side of a lane in their houses, they constitute a portion of the public and the lane is a street within S. 23 (2) of the U. P. MUN. ACT. (*Mukerjee, J.*) *BANARSI DAS v. THE MUNICIPAL BOARD OF AMROHA.*

L. R. 5 A. 818.

—S. 233 (k)—Civil Court—Jurisdiction, when ousted. L. R. 5 O. 33 : 1924 Oudh 224.

—S. 247—Proceedings under—Transfer of Magistrate who has heard a case in part—*De novo* trial demanded—Cr. P. Code if applies. See CR. P. CODE, S. 350. 81 I. C. 139.

—Ss. 271 and 307—Paving by Municipality of a certain enclosure after notices to owner—Suit by the owner against the Municipality for restoration. 75 I. C. 607.

—S. 307—Notice under the section, requisites of—Disobedience to notice issued in contravention of the terms of S. 307, whether punishable.

S. 307 of the U. P. Municipalities Act, 1916, distinctly lays down that notice of which disobedience is punishable should be one issued under the provisions of the Act or under a rule or a bye-law.

Consequently if a notice is not issued as required by the aforesaid section, the person to whom

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it is issued may disobey it and yet be not liable to punishment. (*Dalal, J. C.*) *RAM CHARAN v. IMPROVEMENT TRUST, LUCKNOW.*

1 O. W. N. 611 : 10 O. & A. L. R. 935.

U. P. TENANCY ACT—Occupancy holding—Sale of tank.

A tenant is entitled to sell tank, house or a well on the holding and having sold cannot claim to redeem it with mortgaged holding. (*Mears, C. J. and Banerji, J.*) *RAM NARAIN v. MUHAMMAD AKBAR.* 1923 All. 180.

—S. 57 d)—Ejectment—Grove land—S. 25

A tenant of grove holder is not liable to be ejected from a grove land on the ground of having sublet. 17 A. L. J. 971 Dist. (*Stuart, J.*) *LALA SHEO PFASAD v. BABU RAM.* 1923 All. 168.

U. P. TOWN IMPROVEMENTS ACT (VIII OF 1919)

S. 49—Offence before trust came into being—If can prosecute.

Where an offence for which the accused was prosecuted by the Improvement Trust was completed before the Trust came into existence, the Trust is still entitled to prosecute as the whole object of S. 49 is to invest the Trust with the powers possessed by the Municipal Board with reference to the offence mentioned therein. (*Wazir Hasan, A. J. C.*) *KUNDAN LAL v. LUCKNOW IMPROVEMENT TRUST.* 10 O. & A. L. R. 206 : 11 O. L. J. 201. 81 I. C. 719 (2) : 25 Cr. L. J. 1007 (2) : 1924 Oudh 399.

USURIOUS LOANS ACT (X OF 1918)—Applicability of—Judgment on admissions in pleadings

—Power of Court. 1924 Rang. 144.

—S. 3—Hard and unconscionable rate of interest—Ignorance and illiteracy—Relief against

Where an ignorant and illiterate mortgagor agrees to pay interest at 2 per cent per mensem compoundable with monthly rests the stipulation is hard and unconscionable and a court of equity can grant relief. (*Kanhaiya Lal, J.*) *SHYAM LAL v. BADRI.* 75 I. C. 784 (2) : 1925 A. 31.

VACANT SITES—Ownership of—Obstruction—Remedy.

Open space in a *pole* belongs to the owners of the surrounding houses and any obstruction caused thereto gives a cause of action to the owners of the houses to bring an action to safeguard their rights. (*Macleod, C. J. and Crump, J.*) *SECRETARY OF STATE FOR INDIA v. BHATT LAXMISHANKAR.* 76 I. C. 591 : 1925 B. 27.

VENDOR AND PURCHASER—Breach of contract

—Default of purchaser—Earnest money—If forfeited.

Where a contract for sale of good falls through on account of the vendee's default, he is not thereby precluded from suing for return of the earnest money paid unless there is a stipulation to that effect. In other cases, the vendor must prove special damage. The case would be governed by the contract Act and not English law. (*Hallifax, A. J. C.*) *LACHMI NARAYAN v. DAMODARDAS.* 81 I. C. 282 : 1925 Nag. 109.

—Covenant to pay loss—Measure of damages.

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Where in a contract of sale of land the vendor covenants to pay compensation in case of eviction and the vendee is evicted from a portion, he is entitled to the value of that portion as damages. Except in cases where the purchase was made in expectation of rise in prices, the rate at the time of sale will govern. (*Kotwal, A. J. C.*) **MAHOMED RAZZAK v. AMRUT RAO.**

20 N. L. R. 55 : 76 I. C. 451 : 1924 Nag. 257.

Invalid sale—Agreement to sell—Equities—Defence to suit. **MA PYONE v. MA U.**

1924 Rang. 89.

Property left in—Vendor's godown—Notice to vendee to take delivery—Re-sale—Loss if can be recovered.

The vendees of goods left them with the vendor and on the vendor writing to them to take delivery asked for grace and were prepared to pay any loss that might occur by a fall in price. The vendors sold the goods at a loss and brought a suit for the loss. *Held* as vendors, they could not re-sell under S. 107, Contract Act without giving notice: if they held as agents of the vendee they could not sell without express authorisation and without giving notice to them. On either basis the suit was not maintainable. (*Müller, C. J. and Mullick, J.*) **DHANRAJ v. FIRM SANEHI RAM PANNA LAL.**

1924 P. 687.

Time for payment—Mercantile usage—Proof—Earnest money.

Ordinarily in a contract of sale, the price for goods must be paid at the time of delivery unless there are words to the contrary in the contract or there is a well-known and well-established mercantile usage postponing the date of payment. Where the buyer deposits purchase money in instalments after the agreement of sale, it is not earnest money liable to forfeiture. (*Abdul Raoof and Moti Sagar, JJ.*) **VERMAN & Co. v. FIRM OF GOPAL DAS RAM LAL.**

1923 Lah. 363.

WAIVER—Burden of proof—Essentials of.

The person who sets up waiver must prove it. Waiver must be an intentional act with knowledge. Where it is sought to be proved by acts of acquiescence, there is a distinction in law between acquiescence while the act is in progress and after it. (*Bilaram, A. J. C.*) **FIRM OF KISHINDAS PURSUMAL v. FIRM OF MENGHRAJ KHALDAS.**

81 I. C. 834 : 1925 Sindh 144.

WAJIB-UL-ARZ—Construction—Abadi right to transfer houses and sites.

Held on a construction, of the *Wajib-ul-arz* in question in the case that the *Qasabes* (butchers) not being proprietors in the village but ryots, had no rights to transfer their houses and that they did not fall within the description of "sheikh" in the *Wajib-ul-arz*. (*Daniels, J.*) **QADIR BAKSH v. ABDUL HAQ.**

L. R. 5 A. 187 (Rev) : 1924 A. 509.

Contraction—Inclusion of extraneous matters Effect.

The inclusion of extraneous matters in the same clause which could not possibly be the subject of a custom precludes the possibility of the clause

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being treated as a record of custom in regard to any of the matters of which that clause forms a part. Where a *wajib-ul-arz* contains matters which could not properly or possibly be the subject of a custom then the ordinary presumption that the *wajib-ul-arz* was a *prima facie* record of a custom is overturned by the internal evidence afforded by the other terms embodied therein though they might be separable from the rest. (*Sulaiman and Kanhaiya Lal, JJ.*) **LAL CHAND v. RAM CHAND.**

46 A. 674 : 82 I. C. 528 : L. R. 5 A. 469 : 1924 All. 753.

Construction—Record of custom of pre-emption—Interpretation.

Where the *wajib-ul-arz* did not say that the right of pre-emption or a claim to enforce that right would only accrue where a co-sharer has transferred his share to a stranger of a person outside the co-parcenary body and it mentioned the different classes of persons who could enforce the right in their due order whenever a transfer was effected. *Held*, that in the absence of any terms of limitation the right of pre-emption could be enforced as far as it might be between the persons belonging to the different categories *inter se* and that each *wajib-ul-arz* required to be interpreted according to its own terms. Per *Sulaiman, J.* (contra) Such a *wajib-ul-arz* should be construed as creating a right of pre-emption only on a sale to a total stranger. The priority of the several categories refers to pre-emption from a stranger vendee and does not refer to any right accruing on sale to any of the co-sharers themselves. (*Sulaiman and Kanhaiya Lal, JJ.*) **LAL CHAND v. RAM CHAND.**

46 A. 674 : 82 I. C. 528 : L. R. 5 A. 469 : 1924 All. 753.

Construction—Right to cut and sell trees—If includes power to transfer.

The *wajib-ul-arz* of a village stated that the tenants could cut and sell trees planted by them on the fields or ridges of fields. *Held*, it included a right to transfer standing trees planted on the holding with the consent of the *Zamindar*. (*Stuart, J.*) **HAR DAYAL SINGH v. GAR DAYAL SINGH.**

79 I. C. 542.

Custom—Entry in—Interpretation.

At a time when a village was a unit by itself, the *wajib-ul-arz* contained an entry that by custom, villagers could manure only the land contained therein. Later by partition the village was split up into 3 mahals, but no new *wajib-ul-arz* was prepared. *Held*, the custom should not be whittled down by confining it to a mahal only. (*Dalal, A. J. C.*) **SRI RAGHUNATH v. ANTOO.**

10 O. & A. R. 208 : 82 I. C. 740 (2) : L. R. 5 O. 87.

Entries in—Custom.

1924 A. 86.

Entries in—Evidence of custom—Rebuttal of—Onus.

Entries in the *wajib-ul-arz* are valuable evidence of the custom recorded therein and the onus is on the party who challenges their correctness to rebut the same. (*Abdul Raoof and Moti Sagar, JJ.*) **SHER MAHOMMAD KHAN v. DOST MUHAMMAD KHAN.**

78 I. C. 451.

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Entry in—Value of—Grove holders right of planting trees.

In the absence of any contract or condition in the *wajib-ul-arz*, a grove holder has the power to plant new trees, when the land preserves its character as grove. (*Burn, J. M.*) *Mt. INDRA KUAR v. GYAN SINGH.* L R. 5 All. 299 (Rev).

Entries in—Value of—Custom—Hindu widow's power to adopt without husband's authority.

In a case, where reliance was placed on the *wajib-ul-arz* of two villages, to prove the custom of adoption by Hindu widows without their husband's authority, and the document stated, "owners of proprietary rights (in one case, widows being mentioned) had power to adopt."

Held, that the entry was merely a statement of Hindu law, and was not evidence of a custom by which a Hindu widow would be entitled to adopt without her husband's authority. (*Fremantle, S. M. and Burn, J. M.*) *BEHARI LAL v. BABU RAM.* L R. 5 O. 172 (Rev.).

Evidence of custom but may record contract about some matters—Presumption.

A *wajib-ul-arz* is in the absence of intrinsic or extrinsic evidence to the contrary *prima facie* evidence of the custom it records. It may however record a custom about certain matters and a contract as regards others. If it records a custom the incidents of that custom and the occasion which would give an opportunity for its enforcement may be proved by its production or by external evidence or by both. (*Sulaiman and Kanhaiya Lal, JJ.*) *LALCHAND v. RAM CHAND.*

46 A. 674 : 82 I. C. 526 :
L R. 5 A. 469 : 1924 All. 753.

WAJIB-UL-ARZ AND FARD-I-RAWAJ—*Entries in—Value to be attached—Custom to transfer materials, whether sufficient to transfer a right of occupation.*

Wajib-ul-arz and *Fard-i-rawaj* cannot be accepted as sufficient proof of the customs recorded therein. An entry therein that tenants have a right to transfer the materials of the houses, even if accepted as a sufficient proof of the custom recorded therein, would not be sufficient to establish the right of a tenant to transfer a right of occupation of a building site where no house existed. 32 A. 363, 4 O. C. 71 and 1 O. L. J. 319 Ref. to. (*Kendall, A. J. C.*) *BHI KHARI LAL v. HADI ALI KHAN.* 1 O. W. N. 1520 :

11 O. L. J. 738 : 82 I. C. 810 :
10 O. & A. L. R. 1159.

WASTE LAND—*Suit for declaration of possession Land Revenue assessment not conclusive evidence of possession—Rights of trespasser to produce.*

In a plaintiff's declaratory suit for possession of Government waste land, which was contested by the defendants, on the ground that plaintiffs' lands were not assessed, held that omission to assess the plff. cannot be regarded as conclusive evidence of non-possession and that the assessment in the defendants' name cannot be regarded as Government's recognition of trespasser's possession, and that a trespasser who enters

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upon another person's land, and plants thereon does not become entitled to the produce. (*Carr, J.*) *MAUNG KYE v. MAUNG THA HAN AND THREE.*

2 R. 488 : 1925 Rang. 87.

WHIPPING ACT, S. 3—*Fine in addition to whipping—If allowed.*

In lieu of punishing an offender with imprisonment and fine, a court can punish him with whipping alone. But it cannot add thereto a sentence of fine also. (*Venkatasubba Rao, JJ.*) *VARA-DARAJULU, In re.* 25 Cr. L. J. 1185 (1) :

82 I. C. 491 (1) : 20 L. W. 881 : 1925 Mad. 183.

S. 5—Whipping and fine—If legal.

L R. 5 A. 54 (Cr.).

WILL—*Capacity of testator—Undue influence, etc. in getting will executed—Onus of proof. See BURDEN OF PROOF—WILL.* 1924 P. C. 28.

Charity—Bequests challenged—Advocate-General proper party.

Where the bequests in favour of charity in a will are being challenged, the Advocate-General is a proper though not a necessary party. (*Bilaram, A. J. C.*) *SHAMBAI v. GOVERDHAN.*

78 I. C. 249.

Construction. Mt. SHERA KHATUN v. MAHOMED ALI SHAH. 77 I. C. 539.

Construction—Earlier and later clauses—Priority.

The principle that where two clauses of a will are inconsistent with each other the later has preference over the earlier does not apply to a case where the earlier clause is clear and unambiguous whereas the later one is ambiguous and can be read in such a manner as not to interfere with the earlier one. (*Phillips and Venkatasubba Rao, JJ.*) *KUDITHIPUDI VENKATRAMAYYA v. PITCHAMMA.* 78 I. C. 274.

Construction—Estate to daughter—What passes.

Where a Hindu testator gives his estate to his only daughter using the words "*malik*" and "*Kabiz*" she takes an absolute estate. (*Baker, O. J. C.*) *BHAYARAM v. NATHU.* 1924 Nag. 195.

Construction—Extrinsic evidence—Admissibility of—Intention of testator—Probate and Administration Regulation (VII of 1914) Ss. 9, 61 and 74—Executor—Right to probate.

When the terms of a will have been reduced to writing evidence of oral statements in derogation of those terms ought on principle, to be excluded from consideration or if admitted at all, should only be admitted in those very rare cases in which the evidence tendered is quite unexceptionable in all respects. The question is not one of mere formality but of real substance affecting the integrity of the testamentary intentions of a person who is no longer alive to maintain them.

When such a person has expressed his intentions deliberately and solemnly in writing it is not in the interests of justice to allow those intentions to be set at naught as having been subsequently revoked by him, when he is not shown to

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have done so in an equally deliberate and solemn manner.

The law as to testamentary disposition among Hindus is itself a matter of recent growth, founded on modern usage and custom judicially recognised and sanctioned and it has to a large extent been moulded in British India by decisions of courts based on general principles. Legislation so far has dealt with matters relatively of detail. In Mysore, where there is no specific rule applicable to the question under consideration courts are bound to decide it in accordance with justice, equity and good conscience. Even in British India the Courts seem disposed to act on principles of general application in regard to the revocation of wills irrespective of whether the Hindu Wills Act applies or not, 30 M. 369 Rel. It is in the last degree inconvenient and illogical to apply one rule of revocation to wills governed by the Hindu Wills Act and a different one to wills of Hindus not coming under it.

The Court would not, as a rule, be justified in ignoring the appointment of an executor made by will except for some legal disability. The court has the discretion in a proper case to include in the grant of probate an executor who may not actually have joined in applying for it, if it sees good cause to dispense with a separate application. It is not incumbent on the Court to grant probate to a person who has not only not joined in the application, but whose attitude shows that he does not consider the will propounded to be a valid instrument but maintains that there is an intestacy. (*Chandrasekara Aiyar, C. J. and Plumer, J.*) *SADASIWA RAO v. RUKMANIAMMA*
2 Mys. L. J. 125.

—Construction—"Malik" meaning of.

It has been well established that in the absence of anything to the contrary the words of a will, in India are to be taken as having their ordinary meaning. A will provided "if my wife aforesaid should adopt a son in accordance with the authority given by me, the aforesaid adopted son and my wife aforesaid shall succeed to the ownership of the entire properties in equal shares, vested with the power of sale and gift, and no violation of such provision shall be permitted." Further it provided "If the aforesaid adopted son or my wife aforesaid should find it necessary to sell any of the properties left by me, they shall be entitled to sell it to a stranger if my heirs and co-sharers refuse to purchase it for an adequate consideration. If no son is taken in adoption by my wife (which is the event which has occurred) she shall succeed to all the properties left by me after my death, with powers of sale and gift, and my wife aforesaid shall be 'malik', and be in possession and she shall have power of sale and gift in accordance with the provisions in paragraph.

Held in every one of those provisions it is clear that the testator's intention was to give the absolute property to the wife either in the whole of the property, or if there was an adopted son in one half of the property. The word "malik" in itself has considerable force as indicating that the person in reference to whom it is used should take absolute interest in the properties conferred.

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(*Lord Atkinson, Sir John Edge and Mr. Ameer Ali.*) *SUDHAMANI DAS v. SURAT LAL DAS.*

18 L. W. 86 : L. R. 4 P. C. 115 :
28 C. W. N. 541 : 1923 P. C. 65 :
33 M. L. T. (P. C.) 277 : (1923) M. W. N. 601 :
38 C. L. J. 253 : 73 I. C. 530 :
45 M. L. J. 247 (P. C.).

—Construction—Principles of—English rules how far applicable to India—Intention to be gathered from language of will—Other circumstances to be considered as laid down in 37 Mad. 199 (P. C.) See 79 I. C. 1026.

—Construction—Property bequeathed for performance of ceremonies—Stranger—Rights of. *MOTILAL v. RAMKHELWAN DAS.* 1924 Pat. 171.

—Construction—Testatrix bequeathing half the rents to the plaintiff, and the whole to the executrix—Subsequent litigation which reduced the testatrix' interest to one half—Whether Plaintiff is entitled to one half of the rents of the whole property.

Where under a will, the defendant was given a garden and Bungalow, with other moveable and immoveable properties with a specific direction by the testatrix that half the net income of the garden, should be paid for life to the plaintiff under a mistaken view that the garden was free absolute property and as a result of litigation only half the garden was available for the bequests under the will, and it was contended that the pff. was not entitled to anything as the share purported to have been bequeathed to her, was obtained by her father.

Held (1) that the pffs. was entitled to $\frac{1}{2}$ of the net rents and profits accruing from the moiety left in the hands of the executrix, (2) and that there being no words of residuary disposition the defendant was not a residuary legatee in respect thereof and (3) that under the terms of the will in question the bequest to defendant and plaintiff of the bungalow, and rents respectively, are specific legacies—relying on illustration (c) to S. 159 of the Indian Succession Act, and (4) if there is a redemption of any portion of the legacy by reason of the loss to the estate, there ought to be proportionate reduction to specific legacies carved out of the whole. (*Spencer and Srinivasa Aiyangar, JJ.*) *JULIA MARY MARGARET FERNANDEZ v. SEVERINA SOBINA.* 20 L. W. 748.

—Construction—Vested or contingent bequest—Bequest of residuary estate to posthumous son. See SUCCESSION ACT, S. 107.

47 M. L. J. 850 (P. C.).

—Costs—Litigation due to testamentary directions.

It is usual to award costs out of the estate of the testator where the litigation owes its origin to the fault of the testator by reason of the testamentary directions being vague or uncertain in law or in fact. (*Bilaram, A. J. C.*) *SHAMBAI v. GOVERDHAN.* 78 I. C. 249.

—Executor—When can renounce office—Liability.

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An executor who has one acted cannot subsequently evade his liabilities by renouncing his office. Such renouncement is void. (*Scott-Smith and Fforde, JJ.*) **KESAR SINGH v. INDAR SINGH**, 1924 Lah. 543 : 76 I. C. 172 : 6 Lah. L. J. 454.

———*Legatee—Suit for accounts—Suppression of account books—Burden of proof.*

Where a residuary legatee sues the other legatees for accounts, if the latter are found to have suppressed the account books and taken possession of major part of the estate the residuary legatee could make out only a *prima facie* case. The onus is on the defendants to account for what they had. (*Phillips and Venkatasubba Rao, JJ.*) **KUDUTHIPUDI VENKATARAMAYYA v. PITCHAMMA**, 78 I. C. 274.

———*Nuncupative will—Proof of.*

As stated by the Privy Council in 12 M. I. A. 1 the party setting up a nuncupative will should be required to prove with the utmost precision the words on which he relies with every circumstance of time and place. (*Kotwal, A. J. C.*) **MANAJI v. SHRI RAMACHANDRA MAHARAJ**, 1924 Nag. 175.

———*Property belonging to another—Legacy to owner—Election.*

Where a testator bequeaths property belonging to another and in the will gives a legacy to the owner the latter must elect either to take under the will the legacy or to retain his own property in which case he cannot get the legacy. (*Phillips and Venkatasubba Rao, JJ.*) **KUDUTHIPUDI VENKATARAMAYYA v. PITCHAMMA**, 78 I. C. 274.

———*Revocation—Animus revocandi—Oral direction to destroy will.*

A will may be revoked by parol and where definite authority is given by the testator to destroy the will with the intention of revoking it, that is in law sufficient revocation although the instrument is not in fact destroyed. There must be very cogent evidence to prove the *animus revocandi*. (*Kinkhede, A. J. C.*) **BAYA v. BHAAURAO**, 1924 Nag. 375.

———*Proof.*

Where the will was executed twenty-five years before it was disputed and hence there was paucity of evidence but it was acted upon and was natural.

Held, the will was genuine and was sufficiently proved notwithstanding that it was not produced for probate and though residents of the place where the testator lived were not witnesses. (*Lord Dunedin.*) **THAKUR CHANDRIKA BAKSH SINGH v. MADHO SINGH**, 1924 P. C. 231 : 20 L. W. 699 : 40 C. L. J. 466 : 10 W. N. 595 : 10 O. & A. L. R. 931.

———*Testamentary capacity—Majority—Proof of—Onus on propounder.*

It is incumbent on the person propounding a will to prove not only the soundness of the testator's mind but the fact that he was not a minor at the time it was executed. The burden of proof lies on the person who sets up the will, not upon

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the person who is prepared to impeach it. (*Broadway and Campbell, JJ.*) **RAJINDAR SINGH v. MT. RAMJOWAL**, 1924 Lah. 541 : 5 Lah. 263.

———*Testamentary capacity—Requisites of.* 1924 Cal. 512.

WITNESS—Omission to read over deposition—Illegality vitiating the trial—Defect not cured by S 537. *See* CR. P. CODE, S. 360.

28 C. W. N. 968.

———*Partly false—No conviction for murder can be based wholly on his testimony*

A part of the statement of a witness having been proved to be false, no absolute reliance can be placed on the rest of his statement and it would be unsafe to base a conviction for murder on the uncorroborated testimony of such a witness. (*Kotwal and Prideaux, A. J. Cs.*) **LAXMAN v. EMPEROR**, 1924 N. 33.

WORDS—*Amaldastak—What is.*

An *amaldastak* is not a lease, but is merely an order to go and take possession. (*Jwala Prasad, A. C. J. and Kulkarni Sahay, J.*) **HARGOVIND RAI v. KESHWAS PRASAD SINGH**, 1924 P. H. C. C. 297 : 1925 P. 168.

———*'Auladdar aulad'—Meaning of.* **MIRZA SAHEB v. BAI CHHOTI BEGAM**, 1924 Bom. 281.

———*Chalchurbhagam—What is.*

See 78 I. C. 287.

———*Jote.* 76 I. C. 324.

———*Land—Whether trees growing on agricultural land.* 5 Lah. 385.

———*Malguzar—Meaning of.*

The word *malguzar* means primarily rent payer. It may equally be applied either to a tenure holder or a raiyat although the word is generally used in North Bihar to mean tenure holder. (*Miller, C. J. and Mullick, J.*) **UCHIT KOPRI v. ADHIK MANDAL**, 78 I. C. 492 : 1925 P. 194.

———*Malik and kabiz—Meaning of.*

The words *malik* and *kabiz* in a will carry the signification of full ownership. (*Baker, O. J. C.*) **BHAYARAM v. NATHU**, 1924 Nag. 195.

———*Mokurari—Meaning of.*

The use of the word *mokurari* does not in itself imply any permanent interest but merely fixity of rent. (*Miller, C. J. and Mullick, J.*) **UCHIT KOPRI v. ADHIK MANDAL**, 78 I. C. 492 : 1925 P. 194.

———*Months—Vernacular document—Calculation of.*

See DEED—CONSTRUCTION. 78 I. C. 338.

———*"Thavanai"—Meaning of. See* LIM. ACT, ART. 53. 47 M. L. J. 844.

WORDS AND PHRASES—*Bhai and Beradarzadah—Wazib-ul-arz.*

The words *Bhai* and *Beradarzadah* are not limited in Urdu language to brother and his son

WORKMAN'S BREACH OF CONTRACT ACT, XIII OF 1859. ZURIPESHGI LEASE.

but extend to more distant relations. (*Rafique and Lindsay, JJ.*) SYED FAZAL HAQ v. AZIZ HASAN. 1923 All. 163.

— On cause shown. See 48 Bom. 471.

WORKMAN'S BREACH OF CONTRACT ACT, XIII OF 1859 - Applicability—Artificer—Contractor. 77 I. C. 233 : 25 Cr. L. J. 345.

— S. 2—Breach of contract—Complaint made more than 3 months afterwards—Conviction—Conviction by Second-class Magistrate—Repayment of money.

The accused was convicted under S. 2 of Act XIII of 1859 on a complaint made more than three months after his neglect to perform the contract. *Held*, that the defect vitiated the whole trial and conviction. An offence under S. 2 is triable by a Magistrate of the second class. It is clear that some period of grace, what the period

should be is in the discretion of the Magistrate, was intended to be allowed to the accused. (*Boys, J.*) KHAL BAL v. MAHOMED YUSUF.

L. R. 5 A. 158 (Cr.) : 82 I. C. 366 : 25 Cr. L. J. 1294 : 1924 A. 616.

— S. 2 - Slavery—Agreement for service—When amounts to—Applicability.

(1924) M. W. N. 41 : 25 Cr. L. J. 209 (1) : 76 I. C. 641 (1) : 1924 Mad. 351.

ZURIPESHGI LEASE—Object of—Occupancy rights—Claim to.

The object of a *zuripeshgi* lease is not to create the relation of landlord and tenant but to provide a security as between debtor and creditor. The *zuripeshgidar's* possession is in the capacity of mortgagee and not raiyat and so he is not entitled to occupancy rights. (*Das and Ross, JJ.*) KHARAE NASHIN v. DWARKA PRASAD SINGH.

78 I. C. 588 : 1924 P. 560 : 3 Pat. 465.

II--SELECT ENGLISH CASES.

ACCRETION.

ACCRETION—*Natural and artificial causes—Foreshore—Erection of groynes.*

The general law as to accretion *i. e.*, that lands gained from the sea by small and imperceptible degrees belong to the owner adjoining, while sudden and considerable growths belong to the King, applies to cases brought about by natural causes even if it has been assisted by groynes erected for protecting the shore from erosion. The general law applies even where the alteration of the high water mark has been brought about by artificial means or where it has taken place at any time, however distant, after its position has once been clearly ascertained. Case law discussed. *BRIGHTON AND HOVE GENERAL GAS COMPANY v. HOVE BUNGALOWS, LTD.* (1924) 1 Ch. 372.

ADMINISTRATION — *Lunacy—Advances to relations out of income—Directions to deduct at the end—Discretions of court to enforce.*

A Receiver was appointed to the property of a lunatic and under the orders of the Master in Lunacy a portion of the income was spent every year as allowances to various relations of the lunatic, the same being considered as advancements and to be finally taken into account if under the will of the lunatic they happened to get any share of the estate. By the time of the death of the lunatic some of the relations who drew allowances were dead, some were given under the will only life interests and still others were not entitled to anything at all. *Held*, the court in administering the estate of the deceased had a discretion not to enforce the stipulations as regards treating the allowances as advancements and as such the whole of the Master's directions could be ignored *in toto*, if that would be the most equitable thing under the circumstance. *In re MERRALL; GREENER v. MERRALL.* (1924) 1 Ch. 45.

ADULTERATION—*Milk — Samples how to be taken.*

An Inspector of nuisances took samples from three big vessels containing milk sent by the same consignor to the same consignee and after analysing the same preferred one information based on the average result of the analysis of the three samples. Expert evidence was let in that the result would have been the same if all the milk had been mixed together and a sample analysed. *Held* the method adopted in taking the samples was not only the most convenient one, but quite legal and proceedings could be taken on the basis of the information. *WILDRIDGE v. ASHTON.* (1924) 1 K. B. 92.

ARBITRATION—*Evidence — Difference between arbitrators—Reference to umpire—Arbitrator if can give evidence.*

BANKER AND CUSTOMER.

Where disputes arising out of a commercial transaction are referred to arbitration, but on account of differences of opinion among the arbitrators the matter is referred to an umpire for decision, there is no rule of law which prevents one of the arbitrators from being called to give evidence.

An arbitrator can in commercial transactions act as an advocate or agent of the party who appoints him. In this respect there is a difference between arbitrations conducted as legal arbitrations and those conducted as commercial arbitrations. *BURGEON v. WEDDELL AND CO* (1924) 1 K. B. 539.

—*Refusal to appoint arbitrator—Application to Court to appoint—Applicant a foreigner—Power to order security for costs.*

A contract with a foreigner contained a clause for reference to arbitration to settle disputes and differences. It provided for a single arbitrator in accordance with the Arbitration Act. Disputes arose and foreigner gave notice to the other party to appoint an arbitrator. As this was not done, he applied to the court, under the Act to have an arbitrator appointed. *Held*, the applicant being a foreigner, the court had the discretion to refuse an order except on condition that he gave security for costs. *In re, BJORNSTAD v. THE OUSE SHIPPING CO., LTD.* (1924) 2 K. B. 673.

ATTORNEY-GENERAL—*Powers of—Fiat at the instance of relators—Propriety of action—If can be gone into by courts.*

A grave and important public duty is cast on the Attorney-General as to whether or not he will grant his fiat and allow an action to be brought either in his own name or at the instance of relators. If he decides it is a right and proper action to bring, he is entitled to bring the matter to court, and the court must accept the discretion which has been exercised by him and not consider if the action was properly laid. *ATTORNEY-GENERAL v. WESTMINSTER CITY COUNCIL.* (1924) 2 Ch 416.

BANKER AND CUSTOMER — *Payment in of cheques not belonging to him—Crediting of amount before cheque is cleared—Bank if a holder in due course.*

A person paid into his banking account certain cheques to which he had no title. The cheques were credited to his account even before they were cleared. *Held* this fact alone does not make the Bank a holder for value. To have such an effect, there must be a contract between banker and customer, express or implied, that the bank will before receipt of the proceeds honour cheques of the customer against that amount. *A. L. UNDERWOOD, LTD. v. BARCLAYS BANK.* (1924) 1 K. B. 799

BANKER AND CUSTOMER.**Secrecy of accounts—Implied contract—Extent of.**

The plaintiff had accounts in the defendant Bank. A third person who also had accounts in the same Bank drew a cheque in favour of the plaintiff who indorsed it in favour of a stranger who paid it for collection into a different Bank. When the cheque came to the defendant Bank for cashing, the manager inquired of the Bank which had sent it to be cashed as regards the person in whose favour plaintiff had indorsed the cheque and got the information he was a book-maker. This information the defendant disclosed to third persons.

Held, by the majority of the Court of appeal. (*Scrutton, L.J. dissenting*) the information having been acquired *qua* banker of plaintiff, the defendant bank ought not to have disclosed it to third parties.

Per Banker, L.J.—The duty on the part of a Bank not to disclose the state of accounts of a customer to third parties is a legal one arising out of contract and is not absolute but qualified. Such qualifications can be classified under four heads: (a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer.

Per Scrutton, L.J.—It is an implied term of a banker's contract with his customer that the banker shall not disclose the account or transactions relating thereto of his customer except in certain circumstances. Nature of circumstances considered.

Per Atkin, L.J.—The obligation of secrecy goes beyond the state of the account. It must extend at least to all the transactions that go through the account and the securities in respect thereof. It extends beyond the period when the account is closed and includes information obtained from other sources than the customer's actual account, if the occasion upon which the information was obtained arose out of its banking relations. *TOURNIER v. NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND.* (1924) 1 K. B. 461.

BANKER AND CUSTOMER—Two accounts opened—Bills specifically put in one account—If can be transferred by Banker—Rights of parties—Equitable assignment.

If a Banker agrees with his customer to open two accounts for him and certain bills are specifically appropriated to one the Banker cannot without the assent of the customer transfer their proceeds to the other account. If a person making a payment of money to another states definitely that such payment is for a particular purpose and the person to whom it is made does not dissent, he accepts it for that purpose and must use it only for that purpose; if the purpose is for payment to a third party and he is informed of the same, he can recover the money from the person into whose hands it has been put as money had and received for his benefit. Where two parties have contracted that the money of one in the hands of a third party shall belong to the other, there is an equitable assignment of that money and such assignment is binding upon any

BANKRUPTCY.

third party who takes that money knowing of the equitable right of the party to whom it had been assigned and such third party can only take it subject to the right of the equitable assignee. *GREENHALGH & SONS v. UNION BANK OF MANCHESTER.* (1924) 2 K. B. 153.

BANKRUPTCY—Deed of arrangement—Provision not to register—Validity—Agreement by assenting creditors not to proceed in respect of debts—Estoppel.

A debtor executed a document in the form of a memorandum of agreement by which he transferred his property to trustees for the benefit of his creditors. It contained a clause to the effect that it was not to be registered as a composition deed. On the same day his creditors signed a statement in the form of a letter which recited as a composition or arrangement, and that if the debtor complied with the terms of his undertaking they would abide by the same and not proceed against him. One of the creditors subsequently issued a bankruptcy notice on the ground that one of the terms of the undertaking had not been complied with. *Held* (1) the memorandum of agreement and the letter were void for want of registration the Deeds of Arrangement Act, 1914, and (2) as all the parties knew it was invalid, the creditor was not estopped from issuing the bankruptcy notice. Case law referred to.

Per Pollock, M.R.—In order to amount to an estoppel, the representation must be of some existing fact and not a statement of promise, something to be done in future.

Per Warrington, L.J. Quaere.—Where the doctrine of estoppel can be made use of to render valid a transaction which the legislature on grounds of public policy has declared invalid? A BANKRUPTCY NOTICE, *in re.* 1924 2 Ch. 76.

Money paid to agent on behalf of creditor—Fraudulent preference—If can be recovered from agent—Agent if trustee—English Bankruptcy Act (1914), S. 44.

Where an agent in the ordinary course of his employment receives payment of a debt for the use of his principal and in good faith pays the money over to, or otherwise deals to his detriment with, his principal in the belief that the payment is good and valid payment, then the money cannot be recovered from the agent, although it turns out that, in fact, the payment was a fraudulent preference; in such a case the money must be recovered from the principal. If the agent knows the debtor is insolvent and is making the payment with a view to prefer the creditor, the trustee in bankruptcy can recover it from the agent on the ground he was party or privy to the fraudulent preference.

In the ordinary case of payment to an agent for the use of his principal, the agent is not a person in trust for the creditor within the meaning of S. 44 of the Bankruptcy Act. *In re MORANT: EX PARTE THE TRUSTEES.*

(1924) 1 Ch. 79.

Mortgage of shares—Bankrupt selling shares without knowledge of mortgagor—Trustee's action to recover balance from mortgagor—Set off—Date of ascertaining value of shares.

BANKRUPTCY.

A person with whom some shares had been deposited as security for moneys due sold the same improperly without the knowledge of his mortgagor and subsequently became bankrupt. The trustee claimed from the mortgagor the difference between the amounts due on accounts being taken and the amount realised by sale by the bankrupt. *Held* (by the majority of the Court of Appeal *Pollock, M. R.* dissenting) the value of the shares ought to be ascertained as on the day on which the Master's certificate was drawn up.

Per Pollock, M. R.—As the bankruptcy put an end to the state of accounts between the parties, the value of shares should be calculated as on the date of the receiving order. The mortgagor has a right of set-off and if after set-off the balance is in his favour, he can prove for it in bankruptcy.

Per Warrington, L. J. The bankruptcy of the mortgagee is an immaterial circumstance, but if it is, and the mortgagee is allowed to prove, his rights must be measured by the state of things at the date of the receiving order.

Per Sargant, L. J.—A mortgagee or his assignee cannot recover his debt from the mortgagor except upon performing his reciprocal obligation of reconveying the mortgaged property to the mortgagor. If through the unauthorised act of the mortgagee it has become impossible to restore the estate at law, the mortgagee loses the right to sue for the debt. *ELLIS AND COMPANY'S TRUSTEE v. DIXON JOHNSON.* (1924) 2 Ch. 451.

———*Practice—Right of Trustee to rely on admissions in affidavit filed by opposite party—Fraudulent preference—Voluntary payment—Essentials of.*

Under the practice of the Bankruptcy court, the trustee in bankruptcy cannot rely on admission made in an affidavit filed by the opposite party before the latter elects to make use of it at the hearing of the application.

The trustee in bankruptcy applied to set aside a certain payment made by the bankrupt as a fraudulent preference. The evidence disclosed that the payment was made voluntarily without any provision being exercised at a time when bankruptcy was imminent. *Held* by the majority of the Court of appeal. (*Pollack M. R.* dissenting) in the absence of any other reason forthcoming to explain the payment the court could infer it was a case of fraudulent preference. Under S. 44 of the Bankruptcy Act, 1914 the payment must have been made by a person unable to pay his debts as they fall due; the payment must prefer one creditor over others and the dominant motive for the payment must be a motive to prefer the particular creditor to whom the payment was made. Case law discussed. *COHEN EX PARTE COHEN, In re.* (1924) 2 Ch. 515.

———*Proof of creditor accepted by Trustee and dividend paid on that basis—Subsequent reduction of claim by Court—Effect—Adjustment.*

The Trustee in Bankruptcy accepted the proof of a creditor as to debts due to him and paid him the first dividend thereon. Subsequently the Bankruptcy Court reduced the amount of his claim, after rejecting a portion of the claim which had been accepted by the trustee. *Held,*

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before getting first dividend on the basis of the reduced claim, he must first give credit for the overpayment received on the prior occasion. The mere fact that the trustee cannot recover either payments made to a person whose proof is subsequently expunged or overpayments, made to a creditor whose proof is subsequently reduced does not prevent the operation of the well known principle of equity that a beneficiary who has been overpaid is not entitled to receive any further payments out of the trust fund until the payments to the other beneficiaries are levelled up to the amount received by the overpaid beneficiary. The amount overpaid can be set off against future dividend that may become payable *SEARLE HOARE AND COMPANY, In re.* (1924) 2 Ch. 325.

———*Proof of debt—Liability of creditor to give credit for securities held—Separate estates.*

Per P. O. Lawrence, J.—The general rule in bankruptcy is that when a creditor proves against the estate he must give up or value any securities which if not retained by him would go to augment the estate against which he seeks to prove. But the rule presupposes that the security held by the creditor is a security for the debt which he is seeking to prove. A creditor is entitled to prove for an unsecured debt without giving up a security he holds on part of the debtor's property for a different debt altogether. So also where the creditor has a claim against the separate estate for an unsecured debt and also a claim against the joint estate for a secured debt he can prove against the separate estate for his unsecured debt without bringing into account the property on which he holds a security in respect of his claim against the joint estate, although part of such property consists of the separate property of the debtors.

View affirmed by the Court of Appeal. *In re, DUTTON, MASSEY AND CO EX PARTE MANCHESTER AND LIVERPOOL DISTRICT BANKING CO., LTD.* (1924) 2 Ch. 199.

———*Property divisible among creditors—"By consent or permission of true owner"—Possession in his trade or business—Motor car under hire purchase—Bankruptcy Act (1914), S. 38 (c).*

A person purchased a motor car on the hire purchase system and in the agreement it was stated to be "a pleasure car". During the pendency of the agreement, it was used "in the trade or business" of the purchaser. He became an insolvent and the trustee in bankruptcy claimed ownership under S. 38 (c) of the English Bankruptcy Act, 1914 as being "Goods in the possession of the bankrupt in his trade or business, by the consent or permission of the true owner under such circumstances that he is the reputed owner thereof." *Held* in order to sustain the claim of the trustee in bankruptcy, the true owner must have consented not only to their being in the possession of the insolvent but also to their being used in his trade or business; also the article must not only be visibly employed in the trade or business but acquired and used for such business. *LAMB v. WRIGHT AND CO.* (1924) 1 K. B. 857.

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—Written authority of debtor to creditor to sell goods and apply proceeds pro rata to paying creditors—If an assignment—Deeds of Arrangement Act, 1914.

Where a debtor gives a written authority to a creditor to realize his estate and apply the proceeds in satisfaction of preferential claims and pay the balance to creditors *pro rata*, the document does not contain any of the essential elements of an assignment property so called, that is of that form of transfer which law recognizes as *cessio bonorum* and it does not fall within the deeds of Arrangement Act, 1914.

Per *Banker, L. J.*—There is a well known meaning attached to the term "assignment" in Bankruptcy law. It applies to cases where a debtor had executed a deed which assigned all or substantially all his property to a trustee or trustees for the benefit of his creditors generally. No declaration of trust or mere contract is an act of bankruptcy. *In re, Spackman*. 24 Q. B. D. 728 and *In re, Hughes* (1893) 1 Q. B. 595 followed.

Per *Atkin, L. J.* There is no reason for giving to "assignment" in the Deeds of Arrangement Act a meaning different from the meaning of the same word in the Bankruptcy Act. SUMMARY OF ENGLISH CASES (JUNE 1924) B. LIPTON, LIMITED v. BELL. (1924) 1 K. B. 701

BILL OF EXCHANGE—Indorsement and delivery to drawer—Subsequent indorsement by drawer to himself—Liability of first indorser—Bills of Exchange Act, 1882, S. 20.

A vendor of goods drew a bill of exchange on the vendee payable six months after date to the order of the vendor. This was indorsed by the defendant who undertook to render help to the vendee and to be liable. At the time of indorsement some space was left blank above the name of the defendant for the indorsement of the name of any person to whom the vendor should direct payment. Shortly before the bill became due, the vendor indorsed his name as payee in the blank space and duly presented the same for payment to the vendee who dishonoured it. He then gave notice of dishonour and claimed payment from the defendant, who denied liability. *Held*, though at the time of indorsement by the defendant a material particular was wanting under S. 20 of the Bills of Exchange Act by the space being left blank, the bill became enforceable by the subsequent filling up. Case Law discussed. GERALD MC DONALD & Co. v. NASH & Co. (1924) A. C. 625.

BILLS OF EXCHANGE ACT, 1882, Ss. 20, 29 and 56—Bill of exchange—Indorsement—Delivery to drawer—Subsequent indorsement by drawer—Liability of indorser to drawer.

The appellants sold to A & Co., certain cases of tinned soup, cash against delivery order. A & Co. not being able to find the necessary money applied to the respondents. The three parties meeting together agreed that the appellants should draw a series of eight bills of exchange on A & Co., to be paid to the appellants' order and hand over the delivery orders in consideration of their being duly endorsed by the respondents. The bills were drawn up and endorsed by the respondent's leaving open above their names for the

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endorsement of the name of the appellant's nominee. The bill having fallen due the appellants endorsed their own name in the blank space and presented them to A & Co., for payment. The bills were dishonoured. Notice of dishonour was given and payment was claimed from the respondents who denied liability.

Held, (1) on the facts the respondents had made themselves liable to the appellants for payment, (2) the bills were wanting in a material particular within the meaning of S. 20 of the Bills of Exchange Act and the appellants held implied authority to fill their names which when done made the bill retrospectively enforceable. 5 A. C. 754 distinguished. (1908) 1 K. B. 203 and (1901) 2 K. B. 593 applied. MC DONALD (GERALD) & Co. v. NASH & Co. (1924) A. C. 625.

BILL OF LADING—Indorsement to pledgee—Pledgee taking delivery after paying freight—Right to sue—Estoppel—"Apparent good order and condition."

Goods were shipped in a wet condition but the shipowners gave a bill of lading that they were shipped in "apparent good order and condition." The bill of lading was indorsed to pledgees who advanced money thereon and when the ship arrived, paid freight, demurrage, etc., and took over the goods. They then brought an action for damages for delay in delivery and for excess taken from them for expenses incurred in order to remove the wet condition of the goods. *Held* (1) though title to the goods had not passed to the pledgees under the Bills of Lading Act, by the presentation of the bill of lading, payment of freight, etc., and their acceptance by the shipowners, a contract had arisen between them and the latter to abide by the terms of the bill of lading, and on that basis a suit for damages was maintainable, (2) that the statement in the bill of lading that goods were received "in apparent good order and condition" estopped the shipowners from contending that goods were received wet and that the delay was due to making them fit for transit; and (3) as a result of the estoppel the ship owners could not claim the expenses incurred in rendering the goods fit for transit.

Per *Banker, L. J.* Where the holder of a bill of lading presents it and offers to accept delivery if that offer is accepted by the ship owner, the holder comes under an obligation to pay freight, demurrage, etc., and the contract so made by the offer and acceptance covers so as to include, the terms of the bill of lading.

Per *Green, J.* (In the court of first instance). The statement in a bill of lading that goods are shipped in good order is addressed to all those persons who in the ordinary course of business acquire an interest in the goods entitling them to obtain delivery under the bill of lading if they chose to do so. Those persons include bankers advancing money and agents financing the transaction. BRANDIT v. LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY, LTD. (1925) 1 K. B. 575.

BROKER—Right to indemnity—Funds not remitted by principal—Right to close accounts—Sale and purchase by broker—Effect.

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A principal while engaged in speculative purchases in cotton through a broker became heavily indebted to him, which entitled the latter under the terms of their contract to close the accounts. The broker sold the cotton which he had purchased for his principal at the market rate which had fallen down considerably and purchased the same simultaneously from the vendee. *Held* the simultaneous purchase did not vitiate the sale by the broker and the accounts as between him and his principal were correctly closed.

Per *Viscount Cave*. The well-known equitable rule which forbids an agent for sale from becoming the purchaser himself does not apply to the facts of the case, as he was entitled to protect himself from further loss and to close the account. If he had sold the cotton, at an under value, he would be liable in damages. *CHRISTOPORIDES v. TERRY*. (1924) A. C. 566.

CERTIORARI—Writ when can issue—Ministerial and Judicial acts.

A writ of *certiorari* will not lie against an act which is purely ministerial. If the issue of a distress warrant involves a judicial act, it is subject to the procedure by which an excessive exercise of jurisdiction can be challenged; but if it is mere ministerial act following on the exercise of powers possessed by other people, then the writ of *certiorari* is not the proper remedy to apply. *HETHERINGTON v. SECURITY EXPORT COMPANY, LTD* (1924) A. C. 988.

CHARITY—Gift for express purpose—Surplus—How to be disposed—Absence of general charitable intention.

A testator gave a certain sum of money to the Cambridge University on trust for publishing a compilation of the testator and one of the executors was the residuary legatee. Out of the amount given a portion remained after the work was published and the University claimed it was beneficially entitled to the surplus or in the alternative the *cypres* doctrine would apply. *Held*, (1) the University was only a trustee for an express purpose and that being over, the surplus did not belong to them and (2) there being no general charitable intention except as regards the particular publication, there was no scope for the *cypres* doctrine to apply; and (3) that therefore there was a resulting trust to the testator and those claiming under him of the surplus. *In re, STANFORD: UNIVERSITY OF CAMBRIDGE v. ATTORNEY GENERAL*. (1924) 1 Ch. 73.

CHOSE IN ACTION—Locality of—Simple contract debts—Company—Residence.

Strictly speaking choses in action have no locality but for some purposes of the law it is necessary to assign to them a locality. Thus judgment debts are assets where the judgment is recorded, leases where the land lies; speciality debts where the instrument happens to be. A simple contract debt is situated in the country where the debtor is for the time being residing even though the debt be expressly payable in another country. Where the debtor is a company, it resides in the place where its administrative business is carried on. Case law discussed. *NEW YORK LIFE INSURANCE COMPANY v. PUBLIC TRUSTEE*. (1924) 1 Ch. 15.

COMPANY.**COMPANY—Directors—Liability of—Infringement of Patent.**

Where it is sought to fix a defendant with liability for a tort it must be established either that he is himself the tortfeasor or that he is the employer or principal of the tortfeasor, in relation to the act complained of, or at any rate the person on whose instructions the tort has been committed. Where a Company had infringed patent rights, the directors cannot be made liable simply because of their position as such. *BRITISH THOMSON HOUSTON CO., LTD. v. STERLING ACCESSORIES, LTD.* (1924) 2 Ch. 33.

Goodwill written off out of profits—Restoring goodwill as asset—Right to divide profits subsequently earned.

In keeping accounts, a company applied its profits in writing off a corresponding amount of the value of goodwill instead of carrying these profits to a goodwill depreciation fund, in which case they would have been at liberty at any time to distribute the profits. *Held* the shareholders cannot thereby have intended for all time and in all circumstances to give up their claims to these profits and to treat them as capital only. They can, if they think fit, write back to the profit account so much of the depreciation written off goodwill as has proved to have been in excess of proper requirements. *STAPLEY v. READ BROTHERS, LTD.* (1924) 2 Ch. 1.

Life insurance policy—Mortgage of—Winding up—Set off, if allowed—Bankruptcy Act, 1914, S. 31.

A person who had effected life insurance in a certain company mortgaged his policy to the Company and borrowed some money. Prior to his death, the Company was wound up and the policy holder claimed to set off the mortgage debt against the value of his policy. *Held* he was entitled to do so, as they were both contractual obligations which could be proved under S. 31 of the Bankruptcy Act. Case law discussed. *In re NATIONAL BENEFIT ASSURANCE COMPANY, LIMITED*. (1924) 2 Ch. 339.

Single director—Payment of company's cheques into private account—Conversion—Bank crediting payment into private account—Absence of inquiry—Liability.

A merchant who had a banking account at the defendant's bank converted himself into a limited company. All the shares were allotted to him and he was the sole director. A large number of cheques drawn in favour of the company were paid by him into his own account, instead of into the company's account which was with another bank and misappropriated by him. The defendants knew that his business had been transferred to a Company, but did not enquire whether the company had a separate banking account, treating him as identical with the company. In an action by the company on behalf of a debenture holder for conversion, *held* the Bank was guilty of conversion of all the cheques, unless they proved they acted without negligence. In the case of a Bank dealing with a company the former must be

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taken to have had knowledge of the duties of the directors and the ordinary mode of doing business under the articles. In the case of cheques presented for collection by an agent of the company and put into his own account, they are put on an enquiry as to whether the company had not got its own banking account and the failure to do so amounts to negligence, disentitling them from relying on a defence founded on the ostensible authority of the agent. *A. L. UNDERWOOD, LTD v. BANK OF LIVERPOOL AND MARTINS.*

(1924) 1 K. B. 775.

—*Voluntary liquidation—Decree against—Stay of execution—Subsequent recovery of damages—If enures to decree holder—Practice.*

The manager of a company fraudulently put his employer's name to some bills of exchange for which the company received no consideration and on the basis of the bills an action was brought against the company. Pending the same the company went into voluntary liquidation. The liquidator thereafter submitted to judgment for the amount claimed. Subsequently the company sued a third party for facilitating their manager in committing the fraud in respect of which they had been made liable and obtained a decree for damages, whereupon the decree holder whose judgment against the company had not been satisfied obtained a garnishee order *nisi* attaching the damages awarded to the company. The liquidator applied for stay of execution of judgment. *Held* the general practice is to stay execution where a company is in voluntary liquidation, because the execution, if allowed, would necessarily interfere with the distribution of the assets *pari passu*. The result of the company's obtaining damages did not either in law or in equity enure for the benefit of the judgment creditor solely but was to be divided rateably among all creditors. S. 186 of the Companies Act relied upon. *ANGLO-BALTIC AND MEDITERRANEAN BANK v. BARBER AND COMPANY.*

(1924) 2 K. B. 410.

—*Winding up—Promoter making secret profits—Liability to make good to company—Certificate of incorporation—If conclusive as to date—No prospectus issued—Allotment of shares before filing statement—Validity—Companies (consolidation) Act, 1908.*

The certificate of incorporation of a company is conclusive as to the date on which it states the company was incorporated and allotment of shares on that day is valid irrespective of whether it was made before the company came into existence.

Where the promoter of a company had been allotted a large number of shares to provide for promotion profits even before a statement in lieu of prospectus was filed but he transferred them to another and realized a considerable sum, he was bound to account to the company or in cases of winding up, to the liquidator, for the profits he had made.

Where no prospectus is issued and before a statement in lieu of the prospectus is filed, allotment of shares is made, *held per Lord Sumner* (Lord Dunedin holding *contra*) the allotment is

CONFLICT OF LAWS.

not wholly void. *OFFICIAL RECEIVER AND LIQUIDATOR OF JUBILEE COTTON MILLS, LIMITED v. LEWIS.* (1924) A. C. 958.

CONFLICT OF LAWS—Contract with carrier—Exemption clause—Void by the law of the country where it was entered into—Express provision that English law applied—Validity under English law—Which governs—Injuries sustained—Notice of claim—Absence of—Effect.

A person entered into a contract with a British Steam Navigation Company to be carried from New York to England in one of their ships. The contract contained a clause that the Company would not be liable for the negligence of the servants and also that no claim would be enforceable against the Company unless written notice of it was given within 3 days of the termination of the voyage. It also expressly provided that all questions arising under the contract would be governed by English Law. In a suit for damages for injuries sustained by the negligence of the Company's servants, *held*, though the exemption clause regarding non-liability for negligence of servants was invalid under the American law, it was valid under the English law. In a case of conflict of laws, the presumed intention of the contracting parties is the governing factor in determining which law applies and where the contract expressly stipulates that English Law would govern, it is the law to be applied.

Where in contravention of the terms of the contract, notice of the claim was not given within 3 days of the termination of the voyage, no action lay. *JONES v. OCEANIC STEAM NAVIGATION COMPANY, LTD.* (1924) 2 K. B. 730.

—*English will—French domicile—Law applicable—Personally.*

An Englishman who was long resident in France and whose domicile was decided to be French left a will in the English form, appointing an English executor and the legatees to his estate which consisted only of personalty were all Englishmen. The will was proved in England. On the question arising about the construction of the will, *held*, the domicile of the testator being French, in the case of moveables the will must be construed according to the law of the domicile unless the will contains expressions showing an indication that it should be construed according to English Law. *In re, CUNNINGTON HEALING v. WEBB.* (1924) 1 Ch. 68.

—*Sale of goods—Contract to be performed at place different from that at which it was made—Mode of performance—Law governing—Privy Council practice—New point.*

Where a contract is made in one country and is to be performed wholly or partly in another country the law as to the mode of performance may be presumed to be the *lex loci solutionis*, i. e. of the country where performance is to take place. In a contract for sale the vendee's right to reject the goods falls within the above principle.

Where a party succeeds before the Privy Council on a point not raised in the courts below, he can be deprived of his costs in the courts below. *BENIAM AND CO. v. DEBONO.*

(1924) A. C. 514.

CONSPIRACY.

CONSPIRACY—*Agreement among employers to employ only members of particular union—Action if maintainable by person who is refused employment.*

The shipowners in a certain country entered into an agreement with a certain trade union that they would employ no one who was not a member of the union. An employee, who had been offered a job and was fit for the same, was ultimately rejected as he was not a member of the union. In an action for conspiracy, *held* as the agreement or combination was not against a particular individual but merely operated to exclude such individuals as might not from time to time satisfy a qualification which was within the reach of any one who desired employment, and the motive was not a malicious desire to inflict a loss on any individual or class of individuals but a desire to advance the business interests of employed alike by means of collective bargaining and control, an action would not lie. *Moghuil Steamship Co. v. Mc Gregor, Gow and Co.* (1892) A. C. 25 foll. *REYNOLDS v. SHIPPING FEDERATION, LTD.* (1924) 1 Ch. 28.

CONTRACT—*Consideration—Police Agreement—to pay for services—If illegal.*

During a colliery strike, the manager required some policemen being billeted there. The police authorities proposed to protect them in the ordinary course, but if police men were to be billeted they required the men to be specially paid for and provided with food, etc. The manager agreed to the terms. In an action to recover the amount due, *held* (by the majority of the Court of Appeal, Atkin, L. J. dissenting) the agreement was quite legal; nor was there want of consideration for the same.

Per *Banker, L. J.* Though every citizen is entitled to police protection without payment there is nothing unlawful or against public policy in demanding payment for special police services rendered.

Per *Atkin, L. J.* At common law, it would be plainly contrary to law to charge for the performance of a public duty and the onus is on the persons entrusted with the duty to establish some exception to the general rule, validating such a power. *GLAMORGAN COUNTY COUNCIL v. GLASBOOK BROTHERS.* (1924) 1 K. B. 879.

———*Consideration—Advance of—Impossibility of performance—War—Restitution—If can be claimed—Scottish Law.*

Prior to the outbreak of the European war, a Scotch Company agreed to supply to an Austrian firm some marine engines. The price was to be paid in instalments and after the first instalment was paid, war broke out and nothing more was done on either side. *Held* the contract had been determined by the war, but by the Scottish Law the Austrian firm was entitled to restitution of instalment paid as there was failure of consideration, subject to any counter-claim for work performed in pursuance of the contract.

The Roman Law principle of *condictio* explained.

Per *Lords Dunedin and Shaw* *Quære* whether the *coronation* cases have laid down the law

CONTRACT—Sale of goods.

correctly? *CANTIAVE SAN ROCCO v. CLYDE SHIP BUILDING AND ENGINEERING CO., LTD.* (1924) A. C. 226.

———*Illegality—Statutory provisions—Failure to comply with—Policy of Statute—Fertilisers and Feeding Stuffs Act, 1906—Contravention of.*

Under the Fertilisers and Feeding Stuffs Act, 1906, a person who sells for use certain fertilisers has to give the purchaser an 'invoice stating the percentage of certain chemicals contained therein and the Act provides that on failure to do so, the vendor is without prejudice to any civil liability, liable to a penalty on conviction. In a suit by the vendor of such a fertiliser to recover the sale price, the *ve. dee* pleaded non-liability as the statutory invoice had not been given to him. *Held*, the action was not maintainable, the sale being illegal.

Per *Banker, L. J.* It is not necessary to show a contract is illegal *ab initio* in order to avoid it; it is enough to show the vendors failed to perform the contract in the only way in which the statute allows it to be performed, and the vendor in such a case is exactly in the same position as if the contract had been illegal and void *ab initio*. Nor is the prohibitive expense or physical impossibility of analysis of the substance sold an excuse for the absence of an invoice.

Per *Scrutton, L. J.* When the policy of an Act is to protect the general public or a class of persons by requiring that a contract shall be accompanied by certain formalities or conditions and a penalty is imposed on the person omitting the same, the contract and its performance without those formalities or conditions is illegal and cannot be sued upon by the person liable to the penalties.

Per *Atkin, L. J.* The question of illegality in a contract may arise in connection with its formation or its performance. In either case, the contract is unenforceable by either party. *ANDERSON, LIMITED v. DANIEL.*

(1924) 1 K. B. 138 (C. A.).

———*Procuring breach of contract—Justification—Failure to give living wage—Immorality.*

The defendants who were members of a protection committee had as one of their objects protection of chorus girls and to prevent their leading a life of immorality they had fixed a minimum living wage for chorus girls. The plaintiff, a theatrical manager used to pay much below the minimum wage and as a result the girls were supplementing their income by leading a life of prostitution. To bring pressure on the plaintiff, the defendants induced theatre proprietors not to lend their theatres and to break existing theatres. In an action for an injunction against defendants, *held* the latter were justified, considering the nature of the contract broken the position of the parties, the grounds of the breach and the means employed to procure the breach. *BRIMELOW v. CASSON.* (1924) 1 Ch. 302.

———*Sale of goods—Reels of cotton—Condition as to objection regarding goods—Construction—Damages.*

COPYRIGHT.

In a contract of sale of 200 yards' reels of sewing cotton there was a condition that unless the buyer within fourteen days after the arrival of the goods ratifies that they are not in accordance with the goods, he would have to pay for the same at the rate fixed. More than a year after delivery it was discovered that the reels were much less than 200 yards in length and an action for damages for breach of contract was filed. *Held*, by the majority of the House of Lords (Lord Buckmaster dissenting) the condition fixing fourteen days for objections related only to the quality of the goods and not the length of cotton in each reel and the failure to object within such time was not a valid defence to the action. *EARNEST BEEK AND COMPANY v. SZYMANOKWSK AND COMPANY.* (1924) A. C. 43.

COPYRIGHT — *Dramatic play founded on novel—Agreement granting rights of production—Construction—Cinematograph rights—Copyright Act, 1911.*

The plaintiff was the authoress and owner of the copyright in a novel called "The Scarlett Pimpernel". In 1903 a dramatic version of the same was composed and the plaintiff entered into an agreement with the defendants by which on the fulfilment of certain conditions the entire rights for the United Kingdom, the United States and the Dominion of Canada should become theirs inalienable.

Held, that the entire right in the play became vested in the defendants by the agreement and when the Copyright Act, 1911, came into operation the rights so vested included the right in the cinematograph production of the play. *BARSTOW v. TERRY.* (1924) 2 Ch. 316

—*Future works—Assignment of rights—Infringement—Assignee if can sue for injunction—Assignor necessary party.*

A person to whom the performing rights in certain musical works to be composed in future are assigned becomes by the completion of such works merely the equitable owner of the same and he cannot therefore obtain a perpetual injunction against persons who infringe the copyright in such work without joining the legal owner as party to the action. *PERFORMING RIGHT SOCIETY, LIMITED v. LONDON THEATRE OF VARIETIES LIMITED.* (1924) A. C. 1.

—*Infringement—Servant and independent contractor—Distinction between—Liability of master.*

The defendants engaged a band of musicians to play in their theatre, but in the agreement it was expressly stipulated they would not be liable for any infringement of copyright by the latter. It was also notified publicly that no music was to be played in the hall which would be an infringement. Without the knowledge of the defendants an infringement took place and in an action for damages *held* the musicians were the servants of the defendants and as the infringement took place in the course of employment, the latter were liable. Even if the musicians were independent contractors, if the defendants had actively directed, counselled or aided the infringement they would be liable.

CORPORATION.

The question whether a man is a servant or independent contractor is a question of law or at least a mixed question of fact and law. Tests for deciding the question discussed. *PERFORMING RIGHT SOCIETY, LTD v. MITCHELL AND BOOKER, LTD.* (1924) 1 K. B. 762.

—*Infringement of musical work—Company licensee of theatre—Managing Director—Liability of—Authorizing performance—What amounts to.*

A company took the lease of a theatre. Its managing director who had been licensed to stage plays entered into an agreement with the Company under which an orchestra was to be engaged by the latter to provide music during the performance. In his absence abroad and without his knowledge the band infringed the musical copyright of the plaintiffs in certain works for which an action was brought against the managing director, in his personal capacity, as apart from the company.

Held, he had not infringed the copyright of the plaintiffs and would not be liable.

Per Banker, L.J.—The musicians being the servants the Company cannot be said to have been authorised by the Director to perform the musical works nor could he be said to have permitted the use of the theatre for such performance.

Per Scrutton, L.J.—The question is one of the liability for infringement by a person not actually taking part in the performance but only more or less interested in it. The obvious remedy would be to sue the performers who infringe the copyright. In law a man cannot be said to permit a performance if he cannot control it; nor can he be said to permit the use of a place for performance, if he does not know the work is being performed.

Per Atkin, L.J.—*Prima facie* a managing director is not liable for tortious acts done by servants of the company unless he himself is privy to the acts by ordering or procuring them to be done. *PERFORMING RIGHT SOCIETY, LTD. v. CYRIL THEATRICAL SYNDICATE, LTD.* (1924) 1 K. B. 1.

CORPORATION — *Residence—Simple contract debts—Where recoverable.*

Debts for choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced. A corporation being an incorporated company may have more than one residence and may for the purpose of carrying on its business be equally subject to a number of local jurisdictions. Where a company had its central office at New York and a Branch in London and an insurance policy was issued in New York, but the policy moneys and the insurance money were payable in London, the debts were recoverable in London. It was permissible in such a case to look at the terms of the contract and to determine from them what is to be the place at which the debt would be recoverable. *Decision of Romer, J in (1924) 1 Ch. 15 reversed; case law discussed, NEW YORK LIFE INSURANCE COMPANY v. PUBLIC TRUSTY.*

(1924) 2 Ch. 101.

CORPORATION TAX.

CORPORATION TAX—*British Company—Residence in England but business wholly abroad—Liability to pay tax—Finance Act, Ss. 52, 53.*

Under S. 52 of the Finance Act, 1920, Corporation Profits Tax is leviable "on the profits of a British Company carrying on any trade or business." *Held* the words were wide enough to include a British Company which is carrying on business entirely outside the United Kingdom. *Held* further the fact that the same company was not liable to Income Tax has no bearing on the question. *ALLIANZA CO. LTD v. COMMISSIONERS OF INLAND REVENUE.* (1924) 1 K. B. 870.

COUNTER CLAIM—*Setting up—What amounts to—Rules of Supreme Court, O. 21, R. 16.*

The "setting up" of a counter-claim must refer to a setting up in a pleading or in some proceeding which is recognized or directed by the rules and which becomes a part of the record or something which is filed in the court.

Per *Sarjant, L. J.* A general intimation outside the proceedings of the intention of the defendant to proceed by way of counterclaim is not enough; nor is the filing of an affidavit enough. The setting up of the counterclaim means the delivery of the counterclaim according to the rules. *THE SAXICAVA.* (1924) P 131.

CRIMINAL TRIAL—*Possibility of bias—Course of trial—Presence of Justice's Clerk at consultation—Possessional connection with one of parties—Effect.*

As a result of collision between two motor cycles, a civil action ensued, and at the same time a criminal prosecution was launched at the instance of the Police. The person who acted as justice's clerk in the criminal proceedings belonged to a firm of solicitors who were acting on behalf of the plaintiff in the civil action. In the usual course of things the justices after hearing the evidence retired for consultation and according to the usual practice the justice's clerk went along with them with the notes of evidence but it was subsequently proved he did not take any part in the consultation. The trial ended in a conviction and then a writ of certiorari was taken out to quash the proceedings. *Held* by *Lord Hewart, C. J.* It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done. Nothing is to be permitted which creates even a suspicion that there has been an improper interference with the course of justice. The position of the clerk's firm in the civil proceedings made it impossible for him to discharge his duties, properly in the criminal proceedings and in the absence of waiver of irregularities, the conviction should be quashed. *THE KING v. SUSSEX JUSTICES: Ex parte MC CARTHY.* (1924) 1 K. B. 256.

—*Habitual criminal—Prior Conviction—If admissible as evidence of character—Function of Jury—Prevention of Crimes Act, 1908 S. 10 (Cr. P. Code, S. 110).*

A person who had been found to be a habitual criminal on a prior occasion, was subsequently charged and convicted for certain offences like burglary. At the trial upon proof being given that he had been already sentenced before as a

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habitual criminal, he was told by the Court that evidence on his part was of no avail, and the jury was simply directed that under the law it had no other alternative except to find he was a habitual criminal. *Held* by a majority of the Court of Criminal Appeal (*Lord Hewart, C. J. Horridge, Lush, Mc Cardie, Roche, Green, Swift and Branson, JJ.*) the direction to the jury was wrong in law. Unless the offender makes that admission, it is in each case a question, not of law for the judge, but of fact for the jury whether the offender is or is not a habitual criminal (1920) 2 K. B. 235 overruled.

When the language of a statute admits of more than one construction, and one construction leads to obvious injustice, it should be rejected and in penal enactments that which is most favourable to the person affected should be followed. S. 10 of Prevention of Crimes Act, 1908, construed. *THE KING v. CHARLES LESLIE NORMAN.*

(1924) 2 K. B. 315.

—*Indecent Assault—Separate assaults on different persons—Joint trial and general verdict—Propriety of—Corroboration of evidence against each.*

A person was charged for indecent assault, and the indictment contained a number of counts, each constituting a separate assault on a different person. The trial was a joint one. *Held* in such cases a careful distinction should be drawn between each count and every other count, and the jury should be warned as to the source from which evidence came, and to weigh the evidence with care with reference to each particular charge, and not to supplement the evidence on any one charge by helpful evidence upon some other charge. A general verdict cannot be supported. *THE KING v. BAILEY.*

(1924) 2 K. B. 300.

—*Sentence—Absence of prisoner—Prosecution—Right to reply—Evidence put in for the defence.*

Where the charge against the accused is one of felony, the court has no jurisdiction to pass sentence in respect to a charge of that nature in the absence of the prisoner.

If any witness other than the accused is called for the defence or a document is put in evidence for the defence, counsel for the prosecution has a right to make a second speech, but not otherwise. Where by leave of the judge the accused read a portion of a document to the jury, but that document was not properly admissible in evidence and was not exhibited, the prosecution has no right to make a second speech. *THE KING v. JAMES THOMAS HALES.*

(1924) 1 K. B. 602.

—*Separate indictments—Joint trial—Consent of counsel—Effect.*

It is always the duty of a criminal court, even though no objection is put forward by counsel, to take note of a point which goes to the jurisdiction of the Court of trial. Where two indictments against two different persons were proceeded with at one and the same time, even the consent of counsel for the prosecution and the defence

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does not give jurisdiction to the Court. *THE KING v. DENNIS AND PARKER.*

(1924) 1 K. B. 867.

DEBT PAYABLE IN FOREIGN CURRENCY—Rate of exchange—Date of conversion.

In actions of damages for breach of contract and in actions for debt for goods sold and delivered the rate of exchange current at the date of the breach or when the debt became due and payable should be taken in calculating the amount. *PEYRAE v. WILKINSON.*

(1924) 2 K. B. 166.

DEED—Construction—Month—Meaning of—Mortgage transactions.

Under the Common Law, the expression 'month' in a legal document *prima facie* means a lunar month but there are exceptions to that meaning in the case of mercantile transactions and in the Ecclesiastical courts. In mortgage transactions the word "month" must be taken to mean calendar month. *SCHILLER v. PETERSEN AND CO. LTD.*

(1924) 1 Ch. 394.

DEFAMATION—Slander—Test of words used—Proof—Question to be put to jury—"Or words to the like effect."

Per *Banker, L. J.* The strictness of the old rule of the Common Law that there should be absolutely no variance between proof and pleading in actions for libel and slander has long ago disappeared. If the very words pleaded are not proved but only words to a similar effect, plaintiff cannot succeed without an amendment.

Per *Scrutton and Atkin, L. J.* The old test applied in cases of defamation, *i. e.*, whether the words used tended to expose the plaintiff to "hatred, contempt or ridicule" is not sufficient in all cases, for words may damage the reputation of a man as a business man which no one would connect with hatred, ridicule or contempt.

Per *Scrutton, L. J.* It is sufficient to prove the substance of the words alleged or of a material and defamatory part of them. So far as the words proved make a materially different allegation, amendment is necessary if that allegation is to be relied on; but the jury should be directed to consider whether or not part of the words proved was a material and defamatory part of the words complained of. *TOURNIER v. NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND.*

(1924) 1 K. B. 461.

DISCOVERY—Banker's Books—Defendant's objection that they are of an incriminating nature—Procedure—Banker's Books Evidence Act, S. 7.

Before the trial of an action, the plaintiff applied for inspection and to take copies of entries in certain Banker's Books. The defendant objected to the same on the ground the entries would incriminate him. *Held* by the majority of the Court of Appeal (*Scrutton, L. J.* dissenting.) the exercise of discretion under S. 7 of the Banker's Books Evidence Act is just the same as in ordinary cases of inspection before trial and leave to inspect ought not to be granted at that stage. (1892) P. 137 and (1895) 2 Q. B. 669 *fold.* *WATERHOUSE v. BARKER.*

(1924) 2 K. B. 759.

DIVORCE.**DIVORCE—Adultery—Birth of child—Evidence on non-access by husband—Admissibility.**

The statute which makes husbands and wives competent witnesses in divorce suits does not affect the common law rule that they should not be allowed to give such evidence as will in effect bastardise a child born in lawful wedlock. *RUSSEL v. RUSSEL.*

(1924) A. C. 687.

—Adultery—Proof of—Confession of wife—If admissible—Separation order—Presumption of non-access.

In a petition for divorce on the ground of the wife's adultery, the only proof of the adultery was her own confession that the co-respondent was the father of her child. There was a separation order obtained from the magistrates and the child could have been conceived only during the subsistence of the order. *Held* the presumption of non-access and consequent bastardy arose and a decree *nisi* could be granted. *ANDREWS v. ANDREWS AND CHALMERS.*

(1924) P. 255.

—Adultery of petitioner—Court if can grant decree—Discretion—Principles guiding.

As between the parties to a divorce proceeding a petitioner may not claim divorce on account of misconduct to which the petitioner has conduced and on the same principle a respondent may not rely upon misconduct of a petitioner to which the respondent has conduced. The discretion of the court in such cases cannot be regulated by a classified system laid down in advance. *TICKNER v. TICKNER.*

(1924) P. 118.

—Costs of wife—Prior abortive trial—Right to stay second trial till costs of prior are paid—Waiver—What amounts to.

In petition for divorce against wife, the jury disagreed and thereupon the husband applied for a second trial. *Held* it is one of the rights of the respondent wife to have the trial stayed till the costs of the first trial have been paid. The mere fact that she accepted an order for payment of costs of the second trial or security for the same without claiming the unpaid costs of the prior abortive trial does not amount to a waiver of her right to stay the proceedings.

Per *Warrington, L. J.* The option is not a matter of discretion but as of right. *SILVER v. SILVER AND GRENFELL.*

(1924) P. 163.

—Custody of Child—Adultery of wife—Effect of—Jurisdiction of court to direct access to child.

Where as a result of a wife's adultery a divorce has been effected, it does not follow that she is thereby *ipso facto* disentitled from access to or having custody of her minor daughter who is below sixteen years of age. In considering the limits of an order granting access to the child, the court should always view the question from the stand point of the child's interests. Case law on the subject reviewed. *B v. B.* (1924) P. 176.

—Decree for nullity—Refusal by wife of sexual intercourse—Impotency—Repugnance to intercourse—Evidence.

In a petition for a nullity decree on the ground of impotency, it was proved that though the wife

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had no structural incapacity, she always resisted the frequent attempts of the husband to consummate the marriage even after her finally consenting to render conjugal duties. *Held* it was a safe inference that the refusal was due to an invincible repugnance to sexual intercourse and that the will of the wife was so paralysed at the time of attempts at consummation as to amount to incapacity and hence a decree of nullity should be passed. *G. v. G.* (1924) A. C. 349.

—*Adultery of wife—Husband's denial of intercourse—If admissible—Legitimacy proceedings—Difference.*

The husband in a petition for divorce alleged as the ground the adultery of his wife, resulting in the birth of a child. He gave evidence that at the time when conception was normally possible, he occupied the same bed with her, but neither then nor at any time when the child could possibly have been conceived had he sexual connection with her. *Held*, the question at issue being one of adultery, his evidence was relevant to the issue and perfectly admissible. On a question of legitimacy, the matter might stand on a different footing. The objection to admissibility on the grounds of morality, decency and public policy considered and commented on. *RUSSEL v. RUSSEL.* (1924) P. 1.

—*Desertion—What amounts to—Turning out the wife after acts of cruelty—Subsequent repentance—Effect of.*

A husband after many acts of cruelty towards his wife actually turned her out of the house. He repented of his last act the next day and offered to amend his conduct. On a question arising whether the acts amounted to desertion and whether the subsequent repentance did not terminate the desertion, *Held* though desertion may be put an end to by subsequent cohabitation, a husband cannot obliterate his previous conduct by subsequent offers, as to the genuineness of which the wife may, upon reasonable grounds, entertain doubts.

Per Pollock, M. R.—Desertion is not a single act complete in itself and revocable by a single act of repentance.

Per Warrington, L. J. Quare. Where there is nothing but a turning away of the wife, followed by a genuine expression of a desire on the husband's part for her return, whether the desertion would still continue? *THOMAS v. THOMAS.*

(1924) P. 194.

—*Husband acquiring new domicile—Effect on wife—Absence of notice to wife—Validity of decree.*

The domicile of origin can be changed only by the strongest evidence of determination to acquire a fresh one of choice, the onus of proof being on the party who alleges it.

Where an English husband after settling down in the United States obtains a decree of divorce against his wife who remained in England but she had no knowledge or notice of the proceeding the same is not binding on her. *RUDD v. RUDD.*

(1923) P. 72.

DONATIO MORTIS CAUSA—Possession by donee—Placing it for safe custody with donor—Effect.

For a valid *donatio mortis causa* the possession of the donee must continue till the death of

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the donor. Where after receiving possession the donee places them with the donor in order to ensure its safe custody, the donee does not part with possession and the gift remains perfectly valid. *In re HAWKINS WATTS v. NASH.* (1924) 2 Ch. 47.

EASEMENT—Ancient lights—Obstruction threatened by putting up building—Power to award damages in lieu of injunction.

Held by a majority of the House of Lords (*Lords Sumner and Carson dissenting*) that the Court of Chancery has jurisdiction to award damages in lieu of granting an injunction in the case of an obstruction to ancient lights which is being threatened by the raising of a new building. The fact that no obstruction had as yet taken place does not limit its jurisdiction to the grant of an injunction. 43 Ch. D 316 disapproved and (1923) 1 Ch. 431 reversed. *LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. SLACK.*

(1924) A C. 851.

—*Ancient lights—Obstruction threatened—Slight interference with plaintiff's rights—Compensation in damages.*

In an action for injunction and damages for obstruction of ancient lights the Court found there would be an infringement of plaintiff's rights, but that it was small in extent. *Held*, though the general rule is that when a right is invaded, an injunction will be granted, yet if the injury is small and capable of being estimated in money and compensated for by a money payment and at the same time it would be oppressive to the defendant to grant an injunction, the damages in lieu of injunction should be awarded. *SLACK v. LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD.* (1924) 2 Ch. 475.

—*Right of way—Abandonment—Non-user—If amounts to—Obstruction—Acquiescence in.*

Non-user of a private right of way is not by itself conclusive evidence that a right of easement has been abandoned. It must be considered with the surrounding circumstances. The non-user must be the consequence of something which is adverse to the user.

Where even at the time of the grant there were obstructions to the right of user and fresh ones were created later and they were acquiesced in by the plaintiff for more than 40 years, *Held* by the Court of Appeal. (*Pollock, M. R. dissenting*) an abandonment could be inferred. *SWAN v. SINCLAIR.* (1924) 1 Ch. 254.

—*Right of way—Level-crossing—Character of user—Change of—Increase of burden.*

When constructing a Railway, the Company purchased lands abutting on a highway and thereby affected the access of the rest of the land to the road. To obviate this difficulty, they constructed a level-crossing and granted the owner a general right of way in wide terms for all purposes over the same. For over 80 years it was used only for agricultural purposes and then the owner opened mines on his land and began to cart minerals over the level-crossing. On the Company seeking to restrict the easement right to what it had been throughout the period, *held* it was an unrestricted grant and was not *ultra vires* of the Railways Clauses Act. Viewed as a grant

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of way, the grantee would be entitled to use it for any purpose without reference to the purpose for which the dominant tenement was used at the time of the grant and notwithstanding that the burden on the servient tenement was thereby increased. *SOUTH EASTERN RAILWAY COMPANY v. COOPER*. (1924) 1 Ch. 211.

EVIDENCE—Admissibility—Divorce proceedings—Adultery—Birth of child—Evidence by husband of non-access.

Held by the majority of the House of Lords (*Lords Sumner and Carson dissenting*) reversing the order of the Court of Appeal in (1924) P. 1 it is an old established rule of law that it is not open to a husband or wife to give evidence of non-access or of circumstances tending to prove the same as it would result in bastardising children born in wedlock. The rule is one "founded on decency, morality and policy". Case-law referred to.

Per Lords Sumner and Carson.—The above rule of law is applicable only in cases where the legitimacy of a person is directly in issue but does not apply to proceedings in divorce cases. *RUSSELL v. RUSSELL*. (1924) A. C. 687.

Admissibility—Oral testimony in prior action—Admission—Difference between documents and oral evidence.

In a prior litigation, the plaintiff in order to prove a certain contention of his cited certain witnesses who gave evidence in his favour. In another action by the same plaintiff against other defendants the latter claimed to put in oral evidence in the earlier case as amounting to *prima facie* evidence binding on the plaintiff. *Held* it was not admissible as evidence. There is a distinction in this respect between oral evidence and written evidence; for in the latter case, a party knows exactly what evidence he is letting in and will be bound by it, while in the former case he does not know exactly what a witness is going to depose to. Case-law referred to. *BRITISH THOMPSON-HOUSTON COMPANY, LTD. v. BRITISH INSULATED AND HELSBY CABLES, LTD.*

(1924) 1 Ch. 203.

Admissibility—Prior litigation—Oral evidence on behalf of plaintiff—If admissible against him—Reliance in appeal—Effect.

Held by a majority of the Court of Appeal *Sargent, L. J., dissenting*, affirming (1924) 1 Ch. 203, where in prior judicial proceedings oral evidence was let in on behalf of the plaintiff to support a certain contention, such oral evidence does not amount to an admission by the plaintiff of the same and is not admissible in other proceedings as evidence against the plaintiff. The case of affidavits or documents which a party knowingly uses as true in a judicial proceeding stands on a different footing. Case-law fully reviewed.

Held also per curiam.—The mere fact that such evidence was used by the plaintiff for purposes of appealing to the Court of Appeal or House of Lords does not affect the question of admissibility. *BRITISH THOMPSON-HOUSTON COMPANY, LTD. v. BRITISH INSULATED AND HELSBY CABLES, LTD.*

(1924) 2 Ch. 160.

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EXCHANGE—Rate of—Damages—Date of conversion. (1924) 2 K. B. 166.

EXTRADITION—Committal—Evidence disproving identity—Order of committal, if can be reviewed—Extradition Act, S. 11.

An accused was committed to prison by a Magistrate to await extradition to a foreign country. He then applied to the High Court for a writ of *habeas corpus* on the ground that since his committal to prison he had discovered evidence which conclusively proved that he was not the person whose arrest was required. *Held*, the Magistrate's decision could not be reviewed, but that the matter could be dealt with under the Extradition Act by the Secretary of State. *THE KING v. GOVERNOR OF BRIXTON PRISON*.

(1924) 1 K. B. 455.

FATAL ACCIDENT—Railway company—Death of passengers—Contract fixing liability—Defendants if bound by—Fatal Accidents Act (1846).

A railway passenger who was holding a workman's ticket was run over by the train and killed. One of the conditions of the ticket was the liability of the company was limited to a sum not exceeding £100. His widow brought an action under the Fatal Accidents Act for compensation. *Held* her claim was not limited by the agreement entered into by her husband and a Court can grant her more if the facts justify it. The cause of action of the dependents of the deceased is a new and distinct cause of action in respect of which damages are estimated on an entirely different basis. *NUNDAN v. SOUTHERN RAILWAY COMPANY*.

(1924) 1 K. B. 223.

FOREIGN JUDGMENT—Suit on—Finality of judgment—Test of.

In order that a foreign judgment may be enforceable in an English Court, it must be a final and conclusive judgment of the Court by which it was pronounced. The mere fact that it may be the subject of appeal to a higher Court does not prevent it from being final. The fact that the judgment does not contain in itself the amount sued for, but a simple arithmetical calculation is necessary does not make it any the less final. *BEATTY v. BEATTY*.

(1924) 1 K. B. 807.

HUSBAND AND WIFE—Agency of necessity—Guilty wife—Divorce proceedings—Wife's costs—Liability of husband.

Under the instructions of a wife, a solicitor commenced divorce proceedings against the husband on the ground of adultery and cruelty. The husband's solicitors admitted adultery but denied cruelty. Subsequently the husband came to know that his wife had committed adultery and communicated the same to her solicitor whereupon the divorce proceedings were dropped. The wife's solicitor then brought an action for the costs incurred in the divorce proceedings against the husband. *Held*, under the common law a guilty wife has no authority to pledge her husband's right for the service of a solicitor and the action did not lie.

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Quære.—Whether the law is the same in respect of costs incurred by a guilty wife called upon to defend herself against proceedings brought by the husband? *DUNFORD v. BAKER*.

(1924) 2 K. B. 587.

———*Desertion—What amounts to—Refusing sexual intercourse—Effect*.

Where a husband and wife live under the same roof the mere fact that the former refuses or abstains from sexual intercourse with the other does not amount in law to desertion. An exhaustive definition of what amounts to desertion is impossible; abandonment amounts to it. So also if one causes the other to live separate and apart.

Case-law on the subject discussed. *JACKSON v. JACKSON*.

(1924) P. 19.

———*Matrimonial proceedings—Solicitor—Suit for costs of wife—Liability of husband—Right to recover—Necessity for proceedings or result thereof*.

In an action by the solicitor of a wife against the husband for costs incurred in matrimonial proceedings against him, wherein adultery, cruelty, etc., were alleged it is not necessary for the solicitor to prove that the husband was guilty of cruelty or that he committed adultery. Not is it essential to show the wife had actually procured a decree in her favour. But the solicitor must prove that he acted on reasonable grounds, that he made adequate inquiries and that he showed proper diligence and full care.

Quære.—Whether the action is maintainable if the wife is proved to have separate estate?

Case-law discussed. *MICHAEL ABRAHAMS SONS & Co. v. BUCKLEY*.

(1924) 1 K. B. 903.

———*Separation order—Resumption of cohabitation—Subsequent desertion—If possible in law*.

So long as an order of separation between husband and wife remains undischarged, a husband cannot be guilty of desertion in the eye of law. Even if the spouses co-habit after the order, that does not *ipso facto* result in a discharge of the separation order, and as the husband was not bound to co-habit, he could not be guilty of desertion. *JONES v. JONES*.

(1924) P. 203.

INCOME TAX—Deductions—Interests paid on Estate duty—If a deduction—Income-tax Act, 1918, Sch. D, Case III, Rr. 1 and 2.

For the purpose of assessment to income-tax under Sch. D, Case III of the Income-tax Act, 1918, the trustee of an estate cannot deduct from the untaxed interests that has accrued to the estate any amount paid as interest or unpaid estate duty to the Crown. *LORD INVERLEYD'S TRUSTEES v. MILLAR*.

(1924) A. C. 580.

———*Deduction—Travelling expenses—Office of Recorder—Income-tax Act, 1918, Sch. E, R. 9.*

A man cannot claim a deduction in respect of travelling expenses from his place of residence, which is his own choice, to the place where he exercises his office. Such expenses are not "expenses of travelling in the performance of the duties of the office or employment" within the meaning of R. 9, Sch. E of the Income-tax Act, 1918. *RICKETTS v. COLQUHOUN*.

(1924) 2 K. B. 347.

INCOME TAX.

———*Employment abroad—Possessions out of the United Kingdom—Income-tax Act, 1918, Sch. D, Case V.*

Under the terms of a contract of service, an Englishman was to serve most of the year in West Africa, and was to be paid a yearly salary and certain commission, the whole amount being payable into a Bank in England. The Special Commissioners of Income-tax assessed him under Sch. D, Case V of the Income-tax Act, 1918, as in respect of income "arising from possessions out of the United Kingdom." *Held* affirming the decision in (1923) 2 K. B. 413, the contract of service did not amount to a "possession" within the meaning of Case V which really contemplates some form of "property" as a source of income. Though the contract may be a source of income it was not a "possession". *PICKDEO v. FOULSHAM*.

(1924) 1 K. B. 323.

———*Exercising trade within the United Kingdom—Non-resident persons—Broker arranging business—If taxable*.

A firm of cotton merchants in Egypt used to sell cotton in Manchester through a certain person. He used to forward applications to Egypt, and if accepted exchange documents and receive his commission. Goods used to be shipped C. I. F., from Egypt and payments made by bills drawn on the buyers and discounted in Egypt. The firm were under no obligation to do business through that individual nor was he prevented from doing business for others. *Held* his position was only that of a broker and the Egyptian firm could not be said to be exercising a trade within the United Kingdom in order to be taxable. It cannot be laid down that whenever a contract is made in England, trade is necessarily exercised there. *WILCOCK v. PINTO AND COMPANY*.

(1924) 1 K. B. 304.

———*Foreign possessions—Shares—Income from—Basis of assessment—Income-tax Act, 1918, Sch. D, Case V, R. 1.*

A person who possessed shares in a Company in Ceylon received dividends in England in respect thereof for 3 years. For the fourth year no dividend was declared, but he was sought to be assessed under Sch. D, Case V on the average dividend for the three preceding years. *Held* the liability to pay income-tax depends not on the possession of shares in the year of assessment but upon the receipt of profit in that year. In the absence of such receipt there was no liability to pay income-tax. (1921) 2 A. C. 22 followed. *WHELAN v. HENNING*.

(1924) 2 K. B. 421.

———*Income arising or accruing—Meaning of—Debt accruing but unpaid—Difference between.*

The words "income arising or accruing" are not equivalent to the words "debts arising or accruing" as the former means money arising or accruing by way of income. Where the amount has not actually been received, a debt has accrued but income has not. But from this it does not follow that income is confined to what the taxpayer actually receives. *ST. LUCIA UNIONS AND ESTATES CO., LTD. v. COLONIAL TREASURER OF ST. LUCIA*.

(1924) A. C. 508.

INCOME TAX.

—Lands leased to grow potatoes—Occupation of lands—Profits made by lessee by sale of potatoes—Assessment—Basis of—Sch. B or Sch. D, Income-tax Act, 1918.

Certain merchants dealing in potatoes took out on annual lease lands for growing potatoes. The owner was to be paid rent, and in addition was to supply labour for which also so much per acre was paid. *Held* in respect of profits made by sale of potatoes, the merchants would be assessable under Sch. B as persons in occupation of lands and not under Sch. D of the Income-tax Act, 1918. *BACK v. DANIELS*.

(1924) 2 K. B. 432.

—Salary of employee—Payment of tax by employer voluntarily—Basis of assessments—8 and 9 George V. C. 40, Sch. E.

Where an employer voluntarily pays the income-tax on the salary of his employee, the amount of such payment should be added to the salary actually received by the latter for ascertaining his income for purpose of income-tax. *HARTLAND v. DIGGINES*.

(1924) 2 K. B. 168.

—Trustee under a settlement—Provision for remuneration—If an employee—Liability to tax—Income-tax Act, 1918, Sch. V, Case II.

Under the terms of a deed of settlement, a person was appointed trustee and out of the income arising from the trust funds he was to draw out £100 per annum as remuneration. *Held* he is in no sense an employee and as such it did not represent remuneration in respect of any employment, and he could not be taxed under Sch. D, Case II of the Income-tax Act. The amount was only an annual payment falling within Case III, R. 1. *BAXENDALE v. MURPHY*.

(1924) 2 K. B. 494.

INDEMNITY—Right to when arises—Trustee and beneficiary—Breach of duty—Third party procedure.

A right to indemnity generally arises from contract, express or implied, but it is not confined to cases of contract. The right exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. A trustee who acts in breach of trust may be liable to indemnify the *cestuis que* trust if he commits a breach of trust.

A shipping company was allowed by the owners of a wharf permission to berth their ships on payment of the daily charges and they were also liable for the damages caused. The managing director of the shipping company berthed a private ship of his without the Company's authority and caused damage to the wharf. The owners of the wharf sued the company for damages, whereupon the latter served a third party notice on their manager and claimed indemnity. *Held* the managing director stood in a fiduciary position to the company and law implied a promise on his part to pay all damages caused by berthing a ship just in the same way as the company itself. The company was entitled to join him as a third party and claim indemnity from him. *EASTERN SHIPPING COMPANY, LIMITED v. QUAH BENG KEE*.

(1924) A. C. 117.

INSURANCE.

INJUNCTION—Interlocutory injunction—Registered design—Infringement of.

In an action for infringement of a registered design, where the registration is recent and there is a genuine dispute about it, the Court will refuse to grant an interlocutory injunction, as a general rule. *SMITH v. GRIGG, LIMITED*.

(1924) 1 K. B. 655.

INSPECTION—Right of—Books and accounts of Trade Union—Help of assistant—Case of companies and partners.

A member of a Trade Union has a right to inspect the books and accounts of the Union and may in proper case employ an agent such as an accountant to assist him. This principle is not confined to trade unions, but applies to members of companies, partners and others.

The onus of establishing that the help of an assistant is sought for *mala fide* is upon the persons who resist inspection. (1909) 1 Ch. 561 *folld.* *DODD v. AMALGAMATED MARINE WORKERS UNION*.

(1924) 1 Ch. 116.

INSURANCE—Life policy—Money payable to daughter if alive at the end of term of years—Death of policy holder within period—Policy amount is part of the estate of deceased—Trust.

A policy of insurance was taken out by a man and it was stated therein that at the end of the period fixed the amount was to be paid over to his daughter if she was then alive. The assured died before the expiry of the period fixed. *Held*, the policy amount belonged to the estate of the assured and should be paid to his executors. There was no legal estate vested in the daughter and being no party to the contract she could not sue thereon, nor could the assured be said to have constituted himself a trustee for his daughter. (1892) 1 Q. B. 147 *folld.* *In re ENGELBACH'S ESTATE : TIBBETTS v. ENGELBACH*.

(1924) 2 Ch. 348.

—Marine—Affidavit of ship's papers—Order for discovery—Form of.

In an action based on a marine insurance policy, the underwriters are entitled to a much wider discovery than are other litigants in an ordinary commercial case. They can require the production not only of documents in the possession of persons interested in the insurance, but all material documents irrespective of whether they are in the possession of interested persons or not. If the plaintiff satisfies the Court that he has made all reasonable endeavours to get the papers from a person over whom he has no control but has been unable to get them, the Court will usually dispense with their production. *TEVERIA MODERIA FRANCO ESPANOLA v. NEW ZEALAND INSURANCE COMPANY*.

(1924) 1 K. B. 79.

—Marine—Perils of the sea—Scuttling of ship—Connivance of owner—Effect.

A ship was insured against "perils of the sea and of all other perils, losses, misfortunes that shall come to the hurt, detriment or damage of the ship." She was lost by scuttling through the connivance of the owner. *Held* by *Viscount Cave*, *Viscount Finlay* and *Lord Parmoor* (*Lord Sumner*

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dissenting) the loss was not due to a peril of the sea and hence was not covered by the policy.

In all such cases it should first be determined what was the proximate cause of the loss. The term "perils of the sea" refers only to fortuitous accident or casualties of the seas.

Case-law and effect of Statute fully considered. *F. SAMUEL AND CO., LTD. v. DUMAS*

(1924) A. C. 431.

INSURANCE POLICY—Mortgage to company—Subsequent assignment to wife—Assignor's Estate—Liability to redeem.

An insurance policy holder borrowed some money from the Insurance Company on a mortgage of the policy and entered into a covenant with them to pay the same himself. He then assigned the policy to his wife without disclosing the existence of the mortgage. On his death the company gave the insurance amount to the widow deducting the amount due under the mortgage.

Held, the deceased being also under a personal liability to pay the amount due, the estate of the deceased was bound to pay the widow the amount deducted by the Insurance Company. (1907) 2 Ch. 465 *folld.* *In re BEST: PARKER v. BEST.*

(1924) 1 Ch. 42.

INTERROGATORIES—Question of foreign law—When allowed—Practice.

Questions of foreign law are treated in English Courts as questions of fact, but the only evidence which is admissible to prove it is that of experts skilled in such law. It is not enough to show the man in fact knows the law on the point; he must be one who from his training may be expected to know the law. When an interrogatory is sought to be served on the defendant on a question of Dutch Law, the plaintiff must first establish that the person interrogated is a competent witness. *PERLAK PETROLEUM MAATSCHAPPIJ v. DEEN.*

(1924) 1 K. B. 111.

JUDICIAL SEPARATION—Jurisdiction—Test of domicile or residence.

In proceedings for judicial separation domicile gives jurisdiction to the court; so also where the respondent resides within the jurisdiction of the court, case-law and the history of legislation dealt with. *EUSTACE v. EUSTACE.*

(1924) P. 45.

JURISDICTION—Objection to—Waiver—Effect.

An action before a Judge was referred for trial to the Official Referee. Under S. 36 of the Rules of the Supreme Court, it was to go to one of the Official Referees in rotation, but it was actually taken up and tried before a Referee who would not come in by rotation. The facts became known to the parties at some stage of the trial or other, but in spite of it, the case was allowed to proceed. *Held* that the irregularity has been waived by the parties and did not vitiate the trial.

Per Bankes, L. J.—The Rules of the Supreme Court relating to the distribution of business are rules of procedure and do not touch the question of jurisdiction at all. *SHRAGER v. BASIL DIGHTON LTD. AND OTHERS.*

(1924) 1 K. B. 274 (C. A.)

LANDLORD AND TENANT—Breach of covenant—Mesne profits—Assessment of.

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Where a landlord enforces his right of re-entry for breach of covenant and he is awarded mesne profits in addition to possession, the former is to be calculated as from the date of writ and not from the date of breach of covenant, because until the determination of the lease by the writ, his possession was under the lease and hence not wrongful. (1923) 1 Ch. 422 affirmed. *ELLIOT v. BOYNTON*

(1924) 1 Ch. 236.

—Covenant against alienation—"Assign or part with"—Meaning of—If includes subletting.

A lease contained a covenant against alienation in the following words:—"The lessee shall not assign or part with this lease or the premises hereby demised" *Held by Bankes and Atkinson, L. J. (Scrutton, L. J. not deciding the question)* the expression "assign or part with" means parting with the whole interest in the premises or in part thereof but do not include a sub-letting of part of the premises. Courts should put a strict construction on the words of a covenant which if broken entails forfeiture. *RUSSEL v. BEECHAM.*

(1924) 1 K. B. 525.

—Dwelling house—Alterations in house—First floor not materially altered but improved—Lessee if can claim apportionment.

A dwelling house which had been originally let as a whole was afterwards altered structurally and substantially at an enormous expense by the landlord in order to facilitate its being let out separately to various tenants and the identity of the house was destroyed. One particular floor was not altered structurally but improvements were made adding to the comfort and convenience of the lodgers. The tenant applied for the apportionment of the rent on the basis of what the house fetched when it was let out as a whole in order to determine the standard rent. *Held*, as the dwelling house taken as a whole had been so materially altered as to lose its identity, the tenant of the first floor was not entitled to the Relief claimed. The policy of the increase of Rent and Mortgage Interest (Restrictions) Act of 1920 was to encourage landlords and not to hamper them in adding to the number of dwelling houses. *STOCKHAM v. EASTON.*

(1924) 1 K. B. 52.

—Ejectment—Suit for portion only of demised premises—If maintainable.

It is open to the plaintiff in an action in ejectment after expiry of a lease or after valid notice to quit to recover only part of the demised premises, as for example when he has resumed possession of part of the premises already. *SALTER v. LASK.*

(1924) 1 K. B. 754.

—Forfeiture—Covenant not to sublet without permission—Period of subletting—Breach.

Under the terms of a lease, the lessee was not to sublease the premises without the consent of the lessor, but this clause was not to apply to subleases of the whole or part for terms of less than 3 years. The lessee sublet a portion on a weekly tenancy and then sublet the remainder for a period exceeding 3 years, in both cases without taking the consent of the landlord. The latter brought an action to recover possession of the

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premises for breach of covenant. *Held*, so far as the weekly tenancy was concerned, no consent was necessary; while as regards the sublease of the remainder also, no consent was necessary as it was not a sublease of the whole of the premises. Nor does the fact that the two sublettings taken together constituted a subletting of the whole amount to a breach of the covenant. (1923) A. C. 578 distinguished. *ROBERTS v. ENLAYDE, LTD.* (1924) 1 K. B. 335.

— *Lease of portion of premises to tenant—Remainder in landlord's possession—Roof—Duty to repair—Negligence—Liability.*

A landlord who lets out a portion of his house to a tenant and keeps the rest in his possession is under an obligation to take reasonable care that the premises retained in his occupation are not in such a condition as to cause damage to the parts demised to the tenant. Where the roof and guttering attached thereto were in his possession but through defects in the latter the roof became damp and in spite of notices the landlord did not repair the same he is liable in damages for injury caused thereby to the tenant's health. The fact that the landlord has expressly agreed to do certain specific repairs in which the repair of roof is not included does not relieve him of all duty to take reasonable care about the same. Basis of liability and case law referred to. *COCKBURN v. SMITH.* (1924) 2 K. B. 119.

— *Lease for 95 years—Covenant to keep premises well and sufficiently repaired—Damages—Measure of—Test—Commencement of lease to be looked to.*

Some newly constructed houses were leased out for a period of 95 years and the lessee covenanted to keep the premises well and sufficiently repaired. At the end of the term an action was brought for damages for breach of this covenant. *Held* reversing the decision of McCardie, J. in (1923) 2 K. B. 573 that in assessing damages, the lessee's liability should be measured from the standpoint of the requirements of tenants at the commencement of the lease and not the end of it.

Per Bankes, L. J.—The principle laid down in *Proudfoot v. Hart*, 25 Q. B. D. 42 is not of general application; it applies only to short term leases in which the class of tenants at the end of the tenancy would be the same as at the commencement and hence the standard of repairs required would be the same. In the case of long period leases the age of the buildings is the dominant feature and the locality and class of tenants is only taken into account in relation to or as a consequence of the age of the buildings. The decision in *Morgan v. Hardy*, 17 Q. B. D. 770 lays down the proper test in such cases.

Per Scrutton, L. J.—The Court in such cases should look to the character of the house and its ordinary uses at the time of the demise. It must then be put in repair and kept in repair. An improvement of its tenants or its neighbourhood will not increase the standard of repair nor will their deterioration lower that standard.

Per Atkin, L. J.—The repairs are such as are needful and necessary for the maintenance of the structure so that it may be expected to last for its

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normal life if properly kept in repair. *ANSTRUTHER GOUGH CALTHORPE v. MCOSCAR.*

(1924) 1 K. B. 716.

— *Monthly tenancy—Notice to quit—Validity.*

In the case of a monthly tenancy as in the case of a tenancy weekly, the period of the notice to quit must correspond with the length of the tenancy and must determine at the end of a periodic month from the commencement of tenancy. A notice to quit is always strictly construed and cannot be afterwards amended by the party who serves it. *PRECIOUS v. REEDIE.*

(1924) 2 K. B. 149.

— *Notice to quit—What to contain—Months—Lunar or calendar—Legal and business documents—Distinction between.*

A notice to quit, though it need not actually name the date for quitting, must indicate with reasonable clearness when possession will be demanded or given, so that the other party may know what is required of him, and the time must be the proper time as provided by the lease. If it is so worded as to mislead the other party or leave him in complete doubt as to when possession must be given, or if it is for a wrong date, it is a bad notice. If the notice is subject to uncertainty, it is bad in law. The term "months" in legal documents, which are not business or commercial documents, refers to lunar months. But the context may show the parties meant calendar months. Slight evidence is sufficient to show that calendar months were meant. The lease of a public house is a business document and the word "months" used therein means calendar months. *PHIPPS AND CO., LTD. v. ROGERS.* (1924) 2 K. B. 45.

— *Property tax—Repairs executed by tenant in lieu of first year's rent—Tax paid by tenant—If can be deducted from next year's rent—Income-tax Act, 1918, Sch. A, No. VIII, R. 1—If recoverable from landlord.*

A tenant who under an agreement with his landlord puts the demised premises in repair at his own expense, the agreement with the landlord being that no rent should be payable for the first year cannot deduct from the rent for the second year the property tax levied from him under Sch. A, No. VIII, R. 1 of the Income-tax Act, 1918. That rule applies only to cases where rent is payable for the year in which the tax was paid. Nor could the amount paid as tax be recovered as money paid for the use of the landlord, since the liability to pay the tax is on the tenant and he is statutorily entitled only to deduct it from the rent. *DRUGHORN v. MOORE.* (1924) A. C. 53.

— *Statutory tenant—Who is—Interest if can be assigned.*

A person whose tenancy has been determined by notice to quit but who has remained in possession against the will of the landlord on account of the provisions of some statute is known as a "statutory tenant". The term is a misnomer for he is not a tenant at all. His right is purely a personal one and cannot be assigned, under the Increase of Rent Act, 1920. *KEEVES v. DEAN.*

(1924) 1 K. B. 685.

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———*Weekly tenancy—Notice to quit—Duration of notice—When to expire—Possession if can be required on or before a certain date.*

A weekly tenancy commenced on a Saturday and a notice to quit was served on a "Friday for the termination of the tenancy one week from Monday next, on or before which vacant possession is required" *Held* the notice to quit was invalid.

Per Lush, J.—Quære whether a notice to quit can be said to be valid if the landlord mentions a specific date for the termination of the tenancy and adds that "on or before" that date possession will be required?

In the case of a weekly tenancy, a week's notice to quit is what is valid in law. In all periodical tenancies whether they be yearly, quarterly, monthly or weekly, the notice to quit must expire at the end of the current period and not in the middle of it.

Case-law discussed, *QUEEN'S CLUB GARDENS ESTATES, LIMITED v. BIGNELL.*

(1924) 1 K. B. 117.

LEASE—Construction—Option to buy during currency of lease—Extension of lease—If option extended.

A lease for a period of three years contained an option given to the lessee to purchase the freehold at a named sum during the currency of the lease. Just before the expiry of the term, the parties informally agreed to extend the period of the lease. *Held* the extension applied to all the provisions of the lease, collateral or otherwise and hence the period for exercising the option to purchase the freehold was also extended, *SHERWOOD v. TUCKER.*

(1924) 2 Ch. 42.

———*Period of three years—Option to purchase within the period of three years—Renewal of lease—If option also renewed.*

A tenancy agreement for a period of 3 years gave the lessee an option to purchase the property "during the three years" provided by the lease. The lease was subsequently renewed for a fresh term of 3 years. *Held* reversing the decision of *Astbury, J.* in (1924) 2 Ch. D. 42, the period for exercising the option was not thereby extended. In all such cases an essential distinction is to be drawn between the demise and the contract under which the option to purchase is given.

*Per Warrington, L. J.—*An option of purchase is not to be regarded as a provision incident to the relation of landlord and tenant but is a matter collateral and independent of it. *SHERWOOD v. TUCKER.*

(1924) 2 Ch. 440.

LIBEL—Defence of fair comment—Rolled up plea—What is—Particulars—When to be ordered.

A party is entitled to an order for particulars only for the purpose of ascertaining the nature of the opponent's case that he has to meet and not for the purpose of ascertaining the evidence by which his opponent purposes to prove it.

Where in an action for defamation the defendant has pleaded fair comment in general, *i. e.* on matters of public interest without indicating what those matters are an order for particulars should be made.

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Where the rolled up plea, *i. e.*, "In so far as the words consist of allegations of fact the said words are in their natural and ordinary meaning true in substance and fact and in so far as the said words consist of expressions of opinion they are fair comment made in good faith and without malice for the benefit of the public upon the said facts which are a matter of public interest?" is set up in an action for libel, particulars are rarely ordered, because it is for the jury to decide to which class the different statements belong. *THE AGA KHAN v. TIMES PUBLISHING COMPANY.*

(1924) 1 K. B. 675.

MARINE INSURANCE—Loss of goods—Constructive loss followed by actual loss—No notice of abandonment for several years—Liability of underwriter.

Where by a peril insured against, there is a constructive total loss and no notice of abandonment is given, then if in the ordinary course of an unbroken sequence of events following upon the peril insured against the constructive loss becomes an actual total loss, *e. g.*, capture followed by confiscation, the underwriter is liable in respect of the total loss. If, however, the total loss is not the result of a sequence of events following in the ordinary course upon the peril insured against but is the result of some supervening cause, the underwriter is not liable. It is an illustration of the doctrine, *proxima causa non remota spectatur.*

Goods insured against loss by restraint of princes were being carried in an Austrian ship. Before the voyage was completed on account of the imminence of war, the goods were landed on the way, the voyage being abandoned. No notice of abandonment was given and subsequently the Austrian Government requisitioned the goods for war purposes. *Held* there was an original constructive total loss when in the middle of the voyage the goods were abandoned, but as no notice was given for an unreasonable period of 5 years, a cause of action against the underwriters could not be based on that loss. The subsequent confiscation was an actual total loss, but it was not the necessary and direct result of the original peril, the restraint of princes and hence would not afford a cause of action against the underwriter. *FOOKS v. SMITH.* (1924) 2 K. B. 508.

MASTER AND SERVANT—Mine—Accumulation of inflammable gas—Negligence in inspection—Liability for injury in Common Law and under Employers' Liability Act, 1880.

On account of defects in the ventilation of a mine and the negligence in inspecting, inflammable gas accumulated in a section of the mine to such an extent as to become explosive if light were applied to it. *Held* (by the majority of the House of Lords, *Lords Phillimore and Blanesburgh dissenting*) it was a defect within the meaning of the Employers' Liability Act and the master was liable for personal injuries suffered by a workman as the result of an explosion. *Per Lord Dunedin (Lord Blanesburgh dubitante)* the owner of the mine could not be responsible at Law for the negligence of the fireman in allowing the gas to accumulate. *JAMES NIMONS AND COMPANY, LTD. v. CONNELL.* (1924) A. C. 595.

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MONEY-LENDER—*Promissory note—Heavy bonus taken—High rate—Pledge of furniture—Court's power to relieve against terms—Money-lenders' Act, S. 1.*

A lady on receiving £300 from a moneylender executed to him a promissory note for £500, the amount being payable in 24 monthly instalments. Interest was 60 p. c. and if default was made in any payment the whole would become payable at once. As security, the moneylender took possession of furniture which had been insured for £500 and which was purchased a year before for £1,750. If payments were duly made the average rate of interest would work out at 82½ p. c. while if there was default in the 1st instalment, rate of interest would work out at something like 1,000 p. c. The lady made default in the first payment and came to Court asking for relief against the terms of the contract. *Held* in the case of a person heavily in debt resorting to a moneylender, the rate of 82½ p. c. would not be so excessive as of itself to make the contract harsh or unconscionable if the loan had been made purely on personal security. But where it was adequately secured by the goods pledged, a rate of interest which might not have been regarded as excessive for a loan on personal security becomes outrageous and extortionate for an advance upon good security. The transaction was unconscionable and the court directed the contract to stand as a security for £300 with interest at 15 p. c. and the plaintiff was also directed to pay the costs of the storage of furniture and of the insurance. *KRUSE v. LEELEY*. (1924) 1 Ch. 136.

MORTGAGE—*Receiver—Suit for foreclosure—Possession—If can be taken up.*

In an action for foreclosure or sale, if a receiver has been appointed to collect rents and profits the Court should direct him to be put in possession of the mortgaged properties if the mortgagor is in possession and if the court thinks in its discretion such an order is necessary. *PRATCHETT v. DREW*. (1924) 1 Ch. 280.

MORTGAGE OF SHARES—*Mortgagee selling part of shares—Breach of contract—Damages—Set off—Basis of accounting.*

The principle that a mortgagee will not be permitted to sue his mortgagor for the debt, if he has parted with the mortgaged property otherwise than in exercise of the power of sale or with the concurrence of the mortgagor is based on the right which every mortgagor has for a reconveyance of the property on redemption. If a mortgagee, although unable to perform this duty insisted on suing on the covenant to pay, the courts of equity interfered. There is no reason why the principle should not be applied where the mortgaged property consists of investments.

Where a mortgagee of a large number of shares sells away some of the shares without the consent of the mortgagor and thereafter becomes insolvent, the trustee in bankruptcy can sue on the mortgage without offering to replace the shares sold. The Court in taking accounts will set off against the amount due the market value of the shares as on the date on which the shares ought to be restored to the mortgagor. The date on which damages ought to be ascertained is not the

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date of sale of the shares or when the mortgagor had first notice of the sale or the date of the receiving order. *ELLIS AND COMPANY'S TRUSTEE v. DIXON JOHNSON*. (1924) 1 Ch. 342.

MOTOR CAR—*License—Contravention of terms of—Master how far liable for acts of servant.*

Under certain Regulations framed for regulating traffic along the roads, a limited trade license was issued to the respondents according to which a motor car used by them was not to contain more than two persons in addition to the driver. Without the knowledge of the respondents and contrary to their express directions, one of their servants drove a car containing more than the fixed number of persons. *Held* failure to observe the conditions imposed by the license rendered the owners liable to the penalty thereunder. Neither the fact that they had taken precautions to prevent a breach of the Regulations nor the fact that the act was done by their servant contrary to orders affected their liability. *GRIFFITHS v. STUDEBAKERS, LIMITED*. (1924) 1 K. B. 102.

NEGLIGENCE—*Attempt to rescue husband from danger—Injury without impact—Liability—Remoteness of damage.*

While a husband and wife were doing some shopping, the skylight of the roof which was then under repair gave way and a pane of glass fell on the husband. The wife who was close to the husband saw the glass fall and clutching his arm tried to pull him. No glass fell on her, but she strained her leg severely. In an action for damages, *held* both husband and wife were entitled to it. The act of the wife in trying to pull her husband cannot be said to amount to contributory negligence. Where a person sustains injury through combination of acts some done by the defendant and some by himself, it is for the jury to say having regard to all the circumstances, whether (i) the injury is the natural and probable consequence of the defendant's act and (ii) whether the plaintiff is guilty of contributory negligence. *BRANDON v. OSBORNE GARRETT & Co.* (1924) 1 K. B. 548.

———*Contributory negligence—Plea of—What defendant has to establish.*

Per Lords Atkinson and Shaw.—In order that a defendant could sustain a plea of contributory negligence he must establish that he himself could not by the exercise of reasonable care and diligence have avoided the consequences of the plaintiff's negligence. This principle applies also to cases of collision on the Admiralty Side. *DAVIES v. MANN*. 10 M. and W 546 foll. *ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY, LTD. v. PACIFIC STEAM NAVIGATION COMPANY*. (1924) A. C. 406.

———*Motor-car—Friend of owner driving the car—Accident—Liability of owner—Extent of.*

The owner of a car was going in it with some of his friends the car being actually driven by one of the latter. Owing to the negligence of the driver, one of the company sustained damages as the result of an accident and died. In an action for damages against the owner under Lord Campbell's Act, *held* as the owner was in the car and

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had not abandoned control of the car, he was liable. (1912) A. C. 844 followed. *PRATT v. PATRICK AND OTHERS*. (1924) 1 K. B. 488.

———*Owner of flat—Workman repairing and decorating—Defective balcony—Death due to fall—Liability of owner—Licensee and invitee—Difference.*

The lessees of a flat employed a firm of contractors to repair and decorate the same. After finishing the work, one of the workmen went to the balcony where the firm's advertisement had been hung up and when removing the board the balustrade gave way and the workman fell down and died. It was found that the balcony was in a dangerous condition and the owners knew of it or ought to have known it. In a suit by the widow of the deceased under the Fatal Accidents Act for compensation, *held* the workman was in the position of a licensee with an interest whose rights were the same as those of an invitee and hence the defendants were liable as they knew or ought to have known of the defective condition of the balcony.

The responsibility of an occupier of premises to a bare licensee is merely not to set a trap for him, and apart from dangers which the occupier knows and the licensee does not know, the licensee must take the premises as he finds them. There is no material difference between the position of a licensee with an interest and an invitee both of whom stand in a better position than a bare licensee. In their case the occupier is bound to see the premises are reasonably safe and if they are not safe and the owners could know of their dangerous condition and negligently did not know of it, they are liable for damages caused. *SUTCLIFFE v. CLIENTS INVESTMENT COMPANY, LTD.* (1924) 2 K. B. 746.

———*Trespass of animals—Liability of owner.*

The general rule of law is that a man is liable for the trespass of his cattle. But this rule does not apply to damage caused by a horse straying off a highway in which it lawfully was and the owner is liable only on proof of negligence.

Where a pony and van, wholly unattended, dash into the plaintiff's shop window adjoining a highway, there is a *prima facie* proof of negligence and unless the owner satisfactorily explains the situation, he is liable in damages.

Case-law and principles fully discussed. *GAYLER AND POPE, LTD. v. B. DAVIES & SON, LTD.* (1924) 2 K. B. 75.

NUISANCE—Public and private—Derelict land—Fire arising from rubbish—Liability of owner—Knowledge if essential.

Rubbish which had been heaped on the adjoining lands of plaintiffs and defendants, with the knowledge and consent of the latter but not of the former, went on smouldering for some months. The defendants finding it on fire on the land of the plaintiffs called upon them to extinguish it and later under an agreement with the plaintiffs extinguished the same, leaving the question of legal liability open. In an action brought by the plaintiffs for a declaration they

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were not liable to pay any part of the costs incurred, *held* by the majority of the Court of Appeal (*Scrutton, L. J.* dissenting) it did not amount to a public nuisance and in the absence of evidence that they caused the fire or continued it or were negligent with respect to it, the plaintiffs were entitled to the declaration sought for.

Per Banks, L. J.—In the case of a public nuisance when once its existence becomes known to the owner or occupier it is his duty to abate it or endeavour to abate it, even though he is entirely innocent of either causing the nuisance or of allowing it to continue. The same standard of duty is not required in the case of injury resulting from a private nuisance on his land. In such a case, the person threatened with injury has the exceptional right to enter upon the land and abate the nuisance.

Per Scrutton, L. J.—A landowner in possession is liable for a nuisance created by a trespasser which causes damage to others, if he could, after he knows or ought to have known of it, prevent by reasonable care its spreading.

Per Astbury, J.—The mere omission by the occupier of premises to abate a nuisance created thereon without his authority and against his will does not amount to a continuance of it by him so as to render him responsible for it. *JOB EDWARDS, LTD. v. THE COMPANY OF PROPRIETORS OF THE BIRMINGHAM NAVIGATIONS*. (1924) 1 K. B. 341.

PERPETUITIES—Will—Annuity to daughter and then to her husband—Family arrangement—Powers of lease—Life of surviving husband contemplated—Power void.

By means of a will, the testator directed the trustees appointed thereunder to pay annuities for life to his daughters and after the death of the daughters to their husbands (if any) for life. After the death of the testator, a family arrangement was entered into, to which the daughters were parties, according to which power of leasing the estate for periods not exceeding 99 years was given to the lessees and the trust under the will were incorporated in the same, *Held* as the power of leasing is exercisable at any time during the life of the surviving husband of a daughter, who will not necessarily be a person who was alive at the time of the family arrangement, it was one which would be capable of being exercised so as to create a new interest in the land for the first time after the perpetuity period had expired and hence was void as being contrary to the rule of perpetuities.

Per Warrington, L. J.—If a power of this sort which is inserted in a settlement is capable of being put an end to or of itself comes to an end with the determination of the trust within a period not affected by the rule against perpetuities, then the power is good although there are no express words limiting its execution to such period. *In re ALLOTT HANMER v. ALLOTT*, (1924) 2 Ch. 498.

PETITION OF RIGHT—Amendment—Powers of—Limits.

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A Court in England has got power to allow an amendment in a Petition of Right provided it does not substantially alter the cause of action.

Per Bankes, L. J.—The amendment of the petition in such a way as substantially to deprive the Crown of the right to refuse the fiat, such as an amendment which introduced an entirely fresh cause of action in respect of which the Crown had never an opportunity of considering whether it would grant a fiat or not, would be inconsistent with the Petition of Right Act, 1860 and therefore not permissible.

Per Atkin, L. J.—The test in every case would be:—Is the Court satisfied by the representatives of the Crown that there is no reasonable probability that if the petition as amended had been presented in the first instance the fiat would not have been granted? There is no authority to support the view that the power of amendment is limited to amendments of the Crown's answer. *BADMAN BROTHERS v. THE KING.*

(1924) 1 K. B. 64.

POOR LAW—*Wilful refusal or neglect to work—Willingness to work but prohibition by Trade Union—Effect—Vagrancy Act.*

Under the Vagrancy Act a person "wilfully refusing and neglecting to maintain himself and his family" was liable to be convicted. The evidence in a case showed the person convicted was willing to work and did work at a certain rate of wages, but that his Trade Union informed him not to work for less than the Union rate or otherwise action would be taken against him under the rules. *Held* on these facts a Court is competent to conclude that there was no wilful refusal or neglect to work within the meaning of the Act. *LEWISHAM UNION GUARDIANS v. NICE.*

(1924) 1 K. B. 618.

PRINCIPAL AND AGENT—*Agency of necessity—Applicability of doctrine—Sale of goods—Impossibility of delivery or communicating with buyer—Resale—When valid.*

A firm of merchants in Rumania purchased some furs through their agents in England. On account of the German occupation of Rumania it was not possible for the agent to communicate with the principals or send the goods to them till the war was over. They therefore sold the goods, but the evidence disclosed there was no necessity to sell nor was the act of sale *bona fide*. In an action for conversion of goods and for damages, *held* the defendants were not agents of necessity and were liable.

The doctrine of agency of necessity took its rise from maritime adventure and under the doctrine in cases of necessity the master of a ship has power and it is his duty to sell the goods in order to save their value or some part of it. The doctrine is not now confined to shipmaster cases; its basic principle is a good and useful one.

In the case of sale of goods the doctrine cannot apply unless the agent is unable to communicate with the principal. The agent has next to prove that sale was necessary—an actual and definite commercial necessity. Then he must prove that he was acting *bona fide* in the interests of his principal. *PRAGER v. BLATSPIEL STAMP AND HEACOCK, LIMITED.*

(1924) 1 K. B. 566.

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—*Extent of agent's authority—Sale of goods—Right to receive payment of price.*

There is no hard and fast rule of law that an agent employed to sell has necessarily power to receive the price. In an action by the seller of goods against the buyer for the price, it would be open to the latter who had paid the agent to show either that the agent had actual authority to receive payment, or that he had ostensible authority by reason of the fact that the payment was made to him in the ordinary course of the business of agencies of the kind in question. *BUTWICK v. GRANT.* (1924) 2 K. B. 483.

—*Vendor carrying on business on vendee's account—Indemnity clause—Super-tax paid—Right to reimbursement.*

Where under the terms of a contract of sale the vendor is to remain in possession until completion and to carry on the business for the benefit of the vendee and was to be entitled to indemnity he can recover from the latter supertax paid with respect to it. The fact that supertax is imposed only on individuals and not on companies and that the vendee happens to be a company does not affect the agent's right to indemnity. *ADAMS v. MORGAN AND COMPANY, LIMITED.*

(1924) 1 K. B. 751.

QUO WARRANTO PROCEEDINGS—*Nature and incidents of—Relief discretionary.*

The grant of *quo warranto* process is to some extent discretionary. The Crown Office practice requires that an application for *quo warranto* must be made by a competent relator and the Court will exert inquiry on the point. The application is to be by way of motion and not by means of an action. The relator is to file a verifying affidavit and the defendant who does not want to defend can "enter a disclaimer". As distinguished from an action, a "judgment of ouster" can be given in proper cases. The Court can and will inquire into the conduct and motives of the relator. *EVERETT v. GRIFFITHS.* (1924) 1 K. B. 941.

RESTITUTION OF CONJUGAL RIGHTS—*Suit for—Sincerity of applicant.*

In an action for restitution of conjugal rights it is essential that the petitioner should prove a sincere desire for the relief claimed, with a corresponding willingness to render conjugal rights to the other spouse. *HARNETT v. HARNETT.* (1924) P. 126.

—*Suit for—Absence of sincerity on the part of applicant—Effect.*

The petitioner for restitution of conjugal rights should satisfy the Court that he or she sincerely desires the relief asked for. Before the Matrimonial Causes Act, 1857, the only defence to such petitions was that the petitioner had committed a matrimonial offence. The sincerity that is required to be proved is not inconsistent with an intention to take further proceedings in the Divorce Court if the course of refusal is persisted in. *HARNETT v. HARNETT.* (1924) P. 41.

RESTRICTIVE COVENANTS—*Enforcement of—Original attachment to road—Subsequent vesting of road in Local Authority—Effect—Damages—Injunction—When granted.*

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The owner of certain premises through which a road ran sold a part thereof to others and one of the conditions of the sale was that buildings erected thereon should only be used as private residences. The road was subsequently taken over by the local authority, and the defendant who became by subsequent purchase the owner of one of the houses fronting the road began to use it as a private nursing home. An action was begun by the representatives of the original covenantor and covenantee to enforce the original restrictive covenants. *Held*, after the road had become vested in the local authority, the successor in interest of the original owner has not got the surface of the road vested in himself but only an interest in the subsoil and hence has not such an interest in the road as entitles him to enforce the restrictive covenants. The land to which the benefit of a restrictive covenant can be attached must be land, the occupation or enjoyment of which is liable to be affected by the prohibited user.

Essentials of a building scheme discussed.

Per Tomlin, J.—In actions to enforce restrictive covenants, whether or not proof of damage is essential, where there is no priority of contract, the Court has to exercise judicial discretion with regard to granting an injunction and where there is no damages caused, damages in lieu of injunction ought not to be awarded. (Pollock, M. R. and Warrington, L. J. do not give a decision on this point but doubt its correctness.) *KELLY v. BARRETT.* (1924) 2 Ch. 379.

SHIPPING—*Charterparty—Agreement to load alternative cargo—Prohibition of loading a particular cargo—Effect on charterer—Time for arranging alternative cargo.*

Under the terms of a charterparty a ship was to be loaded with wheat, maize or rye. The charterers decided to load wheat, and while they were doing it, the export of wheat was prohibited from the particular port. *Held*, the decision to load wheat did not prevent the charterers from loading one of the other cargoes nor did the embargo on wheat exempt them from their liability to perform the contract by loading one of the other cargoes. Where a particular length of time was fixed for the loading the prohibition of wheat export entitled the charterers to a reasonable extension of time to make arrangements for loading another cargo or to wait and see if the prohibition would not be removed. *BRIGHTMAN AND CO. v. BUNGEY BORN LIMITADA SOCIEDAD.*

(1924) 2 K. B. 619.

—*Collision—Damage due to two vessels—Judgment against one—If bars suit against the other—Joint tort-feasors—Who are.*

Where by separate and independent acts of negligence on the part of two vessels, a third ship is sunk, a judgment obtained against one of them for a portion of the liability does not bar an action against the other. The cause of action against each is different and they are not joint tort-feasors simply because one *damnum* resulted from their acts; who are joint tort-feasors considered.

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Per Bankes, L. J.—*Quære*: How far the defendant in the subsequent action can credit anything obtained in the prior action? *THE KOURSK.* (1924) P. 140.

—*Damage to cargo—Vessel unseaworthy—Defective rivet—Exemption clause in Bill of Lading—How far a defence.*

Exceptions in a Bill of Lading do not apply to protect a ship-owner who furnishes an unseaworthy ship where the unseaworthiness causes damage, unless the exceptions are so worded as clearly to exclude or vary the warranty of seaworthiness. One of the exceptions in a Bill of Lading was for "any latent defects in hull". There was a defective rivet and this allowed water to flow in and damage the cargo. In a suit for damages, *held* the exemption clause did not qualify the implied warranty of seaworthiness and the shipowner was liable for the whole loss. *THE CHRISTEL VINNEN.* (1924) P. 208.

—*Maritime lien—Damages for wrongful dismissal—Extent of lien—Wages.*

A seaman has no maritime lien in respect of damages for wrongful dismissal from his service under a special contract of service. The lien in respect of wages under a seaman's simple contract of service is not limited to the wages actually earned on board the ship, but includes wages due after a wrongful dismissal.

The distinction between a claim for wages and a claim for damages under a seaman's contract which is broken is this. If there has been merely a breach of the contract by the employer the contract subsists and can be made the subject of a claim for wages. If the employer has repudiated the contract and it has been accepted by the seaman, the contract is at an end and only a claim for damages will lie. *THE BRITISH TRADE.*

(1924) P. 104.

—*Salvage—Claim of ship repairers—Priority.*

In a case of salvage, the claims of a ship repairer rank after the maritime liens already accrued. (1883) 9 P. D. 37: (1903) P. 26 followed. *THE RUSSLAND.*

(1924) P. 55.

—*Salvage—Possession of salvors—Trespass—Jurisdiction to interfere.*

Where certain salvors were for some time working on a wreck and had incurred considerable expense in salvage works, and thereafter another salvage company tried to work on the wreck, and interfere with the former's possession, *held* a suit in respect of injurious acts done upon the high seas was within the undisputed jurisdiction of the Court of Admiralty and the trespassers could be prevented by injunction from interfering with the rights of the first salvors.

The nature of the possession which will be protected by courts of law in such a case discussed. *THE TUBANTIA.*

(1924) P. 78.

—*Writ in rem—Sovereign State—Intervention of—Effect—Writ to be set aside—Immunity from process.*

A French Company issued a writ in rem claiming possession of a certain ship. A foreign Sovereign State entered appearance in protest and

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took out notice of motion to have the writ set aside. *Held* the writ should be set aside as otherwise it would be contrary to the principles of international comity to make a foreign Sovereign appear in an English Court to defend an action. *THE JUPITER*. (1924) P. 236.

SOVEREIGNTY—Status—Letter of Secretary of State—If conclusive in a court of law—Waiver—What amounts to—Submission to arbitration—Effect of.

Under an agreement between the Kelantan Government and an English Company, disputes arising thereunder was to be settled by arbitration and one such dispute was referred to arbitration. The Kelantan Government applied to the Chancery Division to have the award set aside, but were unsuccessful there, as well as in the Court of Appeal and the House of Lords. Thereafter the Company applied to the King's Bench to enforce the award, when the Government claimed immunity as a Sovereign State. In a requisition from the Court, the Secretary of State for the Colonies informed the Court that the Kelantan Government was an independent Sovereign State. *Held* it is the settled practice of English Courts when a question of sovereignty is raised to take judicial cognizance of the status of a foreign State and in cases of uncertainty to seek information from a Secretary of State, which would be conclusive on the matter. *Rationale* of the rule and tests of sovereignty explained.

Held also by the majority of the House of Lords (*Lord Carson dissenting*) neither the agreement to submit disputes to arbitration, nor appearing before the arbitrator, nor the attempts made to set aside the award in the English Courts amounted to a submission to the jurisdiction of the Court and as such the objection of Sovereign State could be raised in defence.

History of the law regarding enforcement of awards set out by Viscount Finlay.

The question whether a foreign Sovereign who submits to judgment thereby submits to execution under the judgment upon the property in England left open. *DUFF DEVELOPMENT COMPANY, LTD. v. GOVERNMENT OF KELANTAN*.

(1924) A. C. 797.

SPECIFIC PERFORMANCE—Mistake—Rectification and specific performance if can be granted together—Effect of—Defeating statute of frauds.

Where a written contract entered into by the two parties does not express the true intention of the parties on account of a mutual mistake, it is open to a Court to rectify the mistake and direct specific performance of the rectified contract in one and the same action, although that would involve a partial variation contravening the statute of frauds. *UNITED STATES OF AMERICA v. MOTOR TRUNKS LIMITED*.

(1924) A. C. 196.

STATUTE—Construction—Landlord and tenant—Excess rent paid—Suit for recovery—"Shall be recoverable within 6 months"—Filing of suit within 6 months if enough.

Under the Rent and Mortgage Interest Restrictions Act excess rent paid by a tenant could be recovered at any time within six months. *Held* it

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was sufficient compliance with the law if the action was brought within the six months and it was not necessary that judgment should have been recorded within that period. *LEWIS v. MACKAY*. (1924) 2 K. B. 136.

———*Presumption of validity—If can be drawn—Illegal acts—Validity.*

The Court of Appeal doubted if an Act of Parliament could be presumed to have been made and lost within the last hundred and fifty years in order to give validity to an act otherwise illegal. *HARPER v. HEDGES*. (1924) 1 K. B. 151.

———*Provincial legislation—Conflict with Dominion—Construction—Statute—Effect.*

By a treaty between the King of England and the Emperor of Japan the subjects of each were to have full liberty to reside in the territories of the other on the same basis as the citizens of the most favoured nation. That was declared to have the force of law throughout Canada by an Act of the Dominion Legislature. Subsequently the Legislature of British Columbia passed an enactment under which no Japanese were to be employed in connection with certain leases and concessions granted by the Columbian Government. *Held* the enactment was invalid as it violated the provision of the Dominion Legislation. *ATTORNEY-GENERAL OF BRITISH COLUMBIA v. ATTORNEY GENERAL OF CANADA*. (1924) A. C. 203.

SUCCESSION DUTY—Rate of payments—Alteration of rate by Finance Act.

The Finance Act of 1910 increasing the succession duty from 5 per cent to 10 per cent provides that increase shall take effect in the case of a succession arising under a disposition only if the first succession under the disposition arises on or after April 30th, 1909. A testator who died in 1900 bequeathed the fee of his heritage to a cousin subject to a life rent to the testator's mother who died in 1910.

Held, that the first succession arose in favour of the cousin at the death of the testator and the duty payable was only the smaller amount. (1921) 1 K. B. 159 considered. *LORD ADVOCATE v. MACLISTER*. (1924) A. C. 586.

SUPERTAX—Company—Winding up—Undivided profits of prior years—Distribution of—If profits.

Where a Company is wound up voluntarily and undistributed profits which have accumulated during past years is handed over to the shareholders, they cease to be profits because of the winding up and are assets. Hence they are not liable to supertax. *INLAND REVENUE COMMISSIONERS v. GEORGE BURRELL*. (1924) 2 K. B. 52.

———*Non-resident assessee—Liability for—Service by post—Validity—Income-tax Act, 1918, S. 7.*

A citizen of the United States resident there is liable to pay supertax in respect of annual profits and gains accruing to him in the United Kingdom. Where the Special Commissioners sent the assessee a notice by registered post requiring him to submit a return and on failure to do so, he was assessed by the Commissioners to the best of their judgment, *held* the notice was validly served

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and the assessment was perfectly valid. (1923) 2 K. B. 563 foll.

Super-tax is only an additional duty of income-tax but it does not follow that all statutory provisions with regard to income-tax or supertax are the same. S. 7 of the Income-tax Act, 1918, considered. There is no *prima facie* implication that the area within which a notice may be served is the area of territorial jurisdiction as in the case of a writ. *WHITNEY v. COMMISSIONERS OF INLAND REVENUE.*

(1924) 2 K. B. 602.

Will—Trustee directed to accumulate surplus income and spend what is proper for minor's benefit—Amounts accumulated if income.

Under the terms of a will, trustees were directed to accumulate the surplus income of an estate and pay the guardian of a minor beneficiary such sums as they thought fit for his maintenance. After attaining majority, the minor was to receive all the amounts in the hands of the trustees. *Held*, during the period of minority, the surplus income accumulated was not income of the minor and as such not assessable to supertax. *INLAND REVENUE COMMISSIONERS v. BLACKWELL.*

(1924) 2 K. B. 351.

TORTS—Restraint of trade—Expulsion of member by Medical Association—Propriety of—Professional misconduct—Liability—Privilege.

A doctor of medicine, who was a member of the British Medical Association, was expelled by a Resolution of the Council which was duly confirmed at a general meeting, after being heard in his defence. One of the rules of the Association was that such an expelled member was not to be met in consultation or recognized, and the resolution was communicated to all the members in writing. In a suit for damages, *held* rules were not in restraint of trade; and the publication of the resolution being made on privileged occasions the Association was not liable.

If any body rightly convened and properly composed is burdened with the discharge of some judicial or quasi judicial duty affecting the rights, liberties or properties of a subject, makes as the result of a just and authorized form of procedure, a decision it has jurisdiction to make, that decision if legal evidence be given in the course of the proceeding adequate to sustain it, cannot in the absence of some fundamental error be impeached or set aside, save on the ground that this body was interested or biased by corruption or otherwise or influenced by malice in deciding as it did. *THOMPSON v. NEW SOUTH WALES BRANCH OF THE BRITISH MEDICAL ASSOCIATION.*

(1924) A. C. 164.

TRADE COMBINATION—Procuring withdrawal of supplies—Protection of trade interests—When legal—Cause of action to sue.

A union of newsgagents in order to ward off certain newsgagents who had set up shops in their area without their permission requested the plaintiff, one of their own members to withdraw his custom from the newsgagents who supplied papers to the new-comers and transfer it to another. The defendants, a committee of newspaper proprietors thought the action of the union

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was wrong and threatened to cause a discontinuance of the supply of papers to the persons to whom the plaintiff had transferred his custom: they had not enquired into the merits of the original dispute but *bona fide* believed the action of the union was injurious to them. In an action by the plaintiff for an injunction restraining the defendants from procuring or attempting to procure a breach of contract, *Held per curiam* the defendants, even if their action was *prima facie* unlawful, were justified in adopting a policy which they honestly believed was necessary in the interests of their trade.

Per Bankes, L. J.—The defendants had not committed any actionable wrong or done anything more than what the law allowed them to protect their interests. (1921) 3 K. B. 40 foll. *SORRELL v. SMITH.* (1924) 1 Ch. 506.

TRADE MARK—Goods imported from abroad—Claim to exclusive right of sale—Suit if maintainable.

The plaintiffs obtained from the manufacturers of a certain brand of cigarettes the trade-mark and good-will to sell them in India. The defendants purchased from some foreign purchasers a big stock of the same brand and were in a position to undersell the plaintiffs. *Held* in the absence of contract, misrepresentation or infringement of any rights, a suit was not maintainable at the instance of the plaintiff. So long as the defendants did nothing to mislead customer or to infringe any covenants, they were not liable. *IMPERIAL TOBACCO CO. OF INDIA, LTD. v. BANNAN.* (1924) A. C. 755.

TRADE NAME—Infringement—Word signifying brand and size—Seller to clear up ambiguity.

In the cigar market the term "Corona" used to imply cigars manufactured by a particular company; later on it also came to denote cigars of a particular size and shape. A hotel keeper when asked by one of his customers for a "Corona cigar" supplied one of the corona size and shape but of some other brand. In a passing off action for restraining him from doing so the defendants contended that the word being ambiguous in its meaning, it was not for them to clear up the ambiguity. *Held*, as the evidence showed that customers when they used the word intended to signify the brand and not the size or shape, an injunction should issue. The duty in such a case is on the hotel keeper to ascertain what was actually meant by the order or to indicate by word of mouth or otherwise that what was supplied was not a cigar of the corona brand. *HAVANA CIGAR AND TOBACCO FACTORIES, LTD. v. ODDENINO.* (1924) 1 Ch. 179.

ULTRA VIRES—Corporation—Statutory powers—Navigation of river—Right to increase tolls—Fettering of.

A Corporation entrusted by statute with the control and management of a river as they deemed necessary entered into an agreement with a firm allowing the latter the sole right to carry cargo across the river on payment of a fixed annual sum. *Held* as the effect was to bind the Corporation for a period, the duration of which depended on the volition of the firm, not

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to exercise their statutory powers of increasing the amount under any emergency whatsoever, agreements are *ultra vires* the Corporation. Such an agreement cannot become *intra vires* by reason of estoppel, lapse of time, ratification, acquiescence or delay. *YORK CORPORATION v. HENRY LEETHAM & SONS, LTD.*

(1924) 1 Ch. 557.

VENDOR AND PURCHASER—*Abstract of title—Recitals in one of the title deeds when binding—Incomplete abstract—If entitles vendee to rescind.*

In the abstract of title furnished by a vendor, the title to the properties was traced to one X and after his death his administrator conveyed the properties to one Y by deed, reciting therein that Y had become entitled to the properties in equity. The vendee wanted to be satisfied how Y became entitled in equity. *Held* the vendee was entitled to go behind the recital as to Y's title; as the recital by the administrator would not bind the heirs of X but reasonable opportunity should be given to the vendor to supply a complete abstract of title and the vendee was not entitled to rescind the contract then and there on the basis of defect in title.

The principle entitling a vendor to rely upon a recital to the effect that a grantee to whom the property is conveyed is entitled in equity rests on this, that where a grantor is on the face of the abstract entitled legally and beneficially, he can admit and is bound by a recital of the equitable title of his grantee and that a purchaser taking from the grantee or his successor in title is not bound to inquire as to the instruments, acts in the law, and events which found the grantee's equitable title, and getting the legal estate will not be affected with notice of any adverse equitable claim if in fact the grantee's equitable title was defective. *In re BALEN AND SHEPHERDS CONTRACT.*

(1924) 2 Ch. 365.

—*Agreement to pay deposit and the balance in instalments—Forfeiture of deposit in case of default—Rescission by vendor—Instalments if can be recovered.*

A contract to sell land provided for an initial deposit and the payment of the balance in three instalments, the last being payable on a certain certificate being produced. There was a clause for forfeiture of the deposit in case of default. The deposit was made and the instalments were duly paid except the last one and the vendor after producing the certificate claimed the last instalment within a certain time. As it was not complied with, he rescinded the contract, whereupon the vendee sued for return of the instalments he had paid. *Held* the contract made a clear distinction between deposit and instalments and as it was only the former that was made forfeitable, the instalments paid could be recovered. *MAYSON v. CLOUET.*

(1924) A. C. 980.

—*Agreement to sell—Deposit—Purchaser finally refusing to complete sale—Recovery of deposit.*

A certain person entered into an agreement with another to purchase freehold land "subject

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to a proper contract being prepared by the vendor's solicitors." A portion of the consideration fixed was paid as deposit and in part payment. The purchasers finally refused to complete the transaction and claimed back the deposit amount. *Held* by the Court of Appeal reversing the decision of Astbury, J. in (1923) 1 Ch. 576 that the original agreement was only conditional and until the formal contract was signed the parties were not bound by it, and as such the deposit amount could be recovered.

Per Pollock, M. R.—The word "proper" must be given its full meaning and the intention of the parties was that the full conditions should be considered in a further contract and until that further contract was executed there should be no binding contract for the purchase of the property.

Per Warrington, L. J.—Where there is no binding contract and the whole matter is left indefinite, it is impossible to say the purchasers pay the deposit as a guarantee to carry out the bargain, when by the documents they have entered into they have not bound themselves to carry out any bargain; case-law reviewed. *CHILLINGWORTH v. ESCHE.*

(1924) 1 Ch. 97.

—*Onerous clause is lease—Effect of non-disclosure by vendor—Specific performance—If can be claimed.*

During the course of negotiations regarding the purchase of a leasehold property, the vendee asked his vendor to see a copy of the lease, but was told it was quite in the ordinary form. Later on, it was seen to contain an onerous clause and the defendant refused to complete the purchase unless the clause was deleted. In a suit for specific performance by the vendor, *held* the existence of such a covenant ought to have been brought to the notice of the defendant even at the time of negotiations and he could not be compelled to accept the bargain, unless the covenant was deleted. *ALLEN v. SMITH.*

(1924) 2 Ch. 308.

WILL—*Bequest—Assent by executors—Subsequent sale by them—Title—Implied covenant—Notice—What amounts to.*

Where after the death of the testator the executors assent to a specific bequest their title as executors comes to an end and thereafter they become trustees and hence cannot effect a sale of the subject-matter of the bequest as executors, (1913) A. C. 85 followed.

Where the purchasers from the executors after such assent knew of the fact that the legatee was in possession under the will, it amounts to actual notice of the executors' assent and their position is not that of purchasers for value without notice. *WISE v. WHITBURN.*

(1924) 1 Ch. 460.

—*Bequest—Legatees to apply property in accordance with memorandum—Express direction that memorandum was not to create trust—Agreement by legatee to carry out wishes—Effect.*

Under a will the property was given to two legatees absolutely as joint tenants with the request that they would dispose of it in terms of her memorandum. It further provided that the memorandum was not of a testamentary character nor was it to create any trust. It was in evidence that the legatees who were the solicitors who

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prepared the will actually advised the testator to include in the will itself the beneficiaries mentioned in the memorandum, but that the advice was rejected. *Held* the legatees took their interests absolutely for their own benefit.

If a gift made absolutely by will is induced by a representation that the donee will apply the same in some special manner indicated by the testator, Courts will impose a trust on the donee binding on his conscience and will give effect to it. *Held*, on the facts of the case, there was no such agreement creating a trust. 57 L.T. 519 reld. to. *In re FALKENER; MEAD v. SMITH.*

(1924) 1 Ch. 88.

———*Bequest—Portrait—Description inaccurate—Effect on gift—If passes to legatee.*

A testator made a bequest of "my portrait of X" to the National Gallery and the executors sent it on, there being no doubt as to the identity of the thing bequeathed. The trustees of the National Gallery expressed doubts as to whether it was a portrait of X, whereupon the executors claimed it back for the residuary legatee. *Held* even assuming the description was wrong, the gift was valid and the portrait passed to the trustees of the Gallery. *In re MILNER GIBSON CULLUM CUST v. ATTORNEY-GENERAL.*

(1924) 1 Ch. 456.

———*Charity—"Patriotic purposes or objects"—Validity of bequest.*

A testator gave a portion of his properties "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees think proper." *Held* affirming the decision of the Court of Appeal (1923) 1 Ch. 258 the gift was void for uncertainty. The words of the trust are to be read, not conjunctively but disjunctively. Nor is a patriotic purpose necessarily a charitable one. (1902) A. C. 37 and (1918) A. C. 337 folld. *ATTORNEY-GENERAL v. NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND.*

(1924) A. C. 262.

———*Charitable trust—Test of—Bequest for "New South Wales returned soldiers"—Validity.*

To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity the first enquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. It is not necessary that the class should be confined to poor persons to the exclusion of persons not poor.

A gift "Unto the trustees for the time being of the Repatriation Fund or other similar fund for the benefit of New South Wales returned soldiers" is a valid charitable trust. *VERGE v. SOMERVILLE.*

(1924) A. C. 496.

———*Codicil—Construction—Brothers and sisters—Parents living—Legal possibility of after-born brothers and sisters—Gift in codicil void for remoteness—Inconsistent gift in will, if revoked.*

A testator by his will devised all his estate to trustees in trust to pay the income thereof to his wife for life and after her life to his children and if there should be no children, the testator gave

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to his wife a power of appointment among the children of his brothers and sisters.

By a codicil he expressly revoked the power of appointment given to his wife and declared that the life interest of his wife should terminate if she married a person who was not a natural born British subject and the trust funds should be held in trust for all or any of the children or child of his brothers and sisters who should be living at the death of his wife or may be born at any time afterwards before any one of such children for the time being in existence attained a vested interest.

The testator left no issue, and his father died after him. His widow remarried a Dutch subject. The testator's brothers and sisters were all over 30 years of age at the time of the will. All had children and one of them was born after the remarriage of the widow.

Held, the gift in the codicil was void for remoteness. 1 Cox, 324 followed.

On the failure of the gift in the codicil, there was no implied revocation of the gift in the will and it therefore took effect.

The persons in whose favour the gift was to take effect should be determined as on the date of distribution, i. e., the remarriage of the testator's wife and the child born after remarriage would not take under the will.

Even though the parents were over sixty years the legal possibility of issue was not extinct. Law Reports 2 H. L. Sc. 397 applied. 43 I. A. 20 referred to. *WARD VAN DER LOEFF BURNYEAT v. VAN DER LOEFF.*

(1924) A. C. 653.

———*Construction—Bequest of "dividends, bonuses and income"—Undistributed profits—Shares in lieu of money—Nature of.*

A testator whose property consisted of shares in a company made a direction in his will for the payment of "dividends, bonuses and income" accruing from his shares to a certain person for life and after his death the shares were to go to some charitable institution. The Company had in its hands a large reserve fund and also undistributed profits which had not been carried into the reserve fund. It decided to distribute a large sum as bonus to the shareholders, but instead of paying it as cash distributed it as fully paid-up shares. On the question arising whether the tenant for life was entitled to these shares under the bequest, *held* it was a distribution of capital and not of income and as such did not pass to the tenant for life. 12 A. C. 385 and (1921) 2 A. C. 171 folld. *In re SPIER; HOLT v. SPIER.*

(1924) 1 Ch. 359.

———*Construction—Codicil inconsistent with will—Perpetuity—Gift in codicil void for remoteness—If revokes gift in will—Gift to children of brothers and sisters—Parents living—Legal possibility of after-born brothers and sisters.*

A testator by his will devised and bequeathed his estate to his wife for life and after her death in trust for his children. In the absence of children the wife was to have a power of appointment among the children of his brothers and sisters and in default of exercise of the power the estate

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was to go to all the children of his brothers and sisters. By a codicil he revoked the appointment and trustees were to hold the estate for all the children of his brothers and sisters who should be living at the death of his wife or born at any time before any one of such children attained the age of 21 years. At the time of death, both parents were living though about 65 years old.

Held, reversing the decision of the Court of Appeal in (1923) 2 Ch. 52 the gift in the codicil was void as being against the rule of perpetuities and being inoperative does not impliedly revoke that in the will, the express revocation being confined only to the power of appointment and not to what follows.

Per Viscount Cave.—In considering whether a testamentary gift is void for remoteness, the proper course is first to construe the gift without regard to the rule against perpetuities and then to consider whether the gift as so construed offends against the rule. In determining whether the rule is so infringed possible and not probable or actual events are to be taken into account.

Per Lord Dunedin.—If when a subject has been disposed of in a will and the same subject is again disposed of in a codicil, if there are express or implied words of revocation it will stand whatever the fate of the subsequent disposition; but if the only revocation is what is to be gathered from the inconsistency of the subsequent record disposition with the earlier one, then if the disposition fails from any reason to be efficacious there will be no revocation. *WARD AND OTHERS v. VAN DER LOEFF.* (1924) A. C. 653.

—Construction—Gift to children—Nomination—Death of one at the time of will—Effect—Mistake as to number of legatees—Rules relating to.

A testator had three children by his first wife and three children by the second wife. He made a general bequest of all his real and personal estate excluding what he had inherited from his second wife to all his six children in equal shares and out of the property inherited from his second wife, he gave small legacies to his children by the first wife and the rest he directed to be divided among the three named children by her. One of these latter had been reported missing during the war, but the testator refused to believe it. It was subsequently proved he had died before the date of the will. *Held* on a construction of the will the third share of his mother's estate lapsed and fell into the general residue and did not devolve on his two brothers and sisters: distinction between a bequest to a class and a bequest nomination pointed out. (1908) 2 Ch. 190 distd.

As regards the one-sixth share of the testator's real and personal estate of the testator, that must be deemed undisposed of, the real estate going to the testator's heir at law and the personalty to his next of kin.

22 Ch. D. 111 is a decision on a particular will and lays down no principles of general applicability.

Per Sargent, L. J.—*Quaere*: Whether 22 Ch. D. 111 is correctly decided? *In re WHISTON: WHISTON v. WOOLLEY.* (1924) 1 Ch. 122.

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—Construction—Referential trusts—Rule against multiplication of charges—Power of appointment—Incorporation of.

A testator gave a legacy to his daughter for life with remainder in trust for her children and also conferred on her a testamentary power of appointment to confer a life estate on her husband. The residue of the estate was dealt with as regards one moiety "upon the same trusts as heretofore declared of the legacy to my daughter." The daughter died childless but she had made a testamentary disposition conferring a life estate on her husband. On the question arising whether the power extended only to the legacy or to the legacy as well as the residue, *held*, it applied to both. Such a construction did not offend the rule against multiplication of charges. The referential trusts declared concerning the residue include the trust which arises in favour of husband upon an exercise of the power of appointment on his behalf. *In re ARNELL AND EDWARDS PRICKETT v. PRICKETT.* (1924) 1 Ch. 473.

—Construction—Trust in favour of sons of "Brother"—Ultimate trust in favour of "own right heirs"—brother found illegitimate—Daughters of brother—If right heirs.

Under a will, the testatrix demised her estate to the second son of her "brother" X for life, and then to his son in tail male and in default of issue to her own "right heirs". All the prior limitations having failed, the daughters of X claimed as her "right heirs". It was proved that the testatrix and her brother were illegitimate, but there was nothing to show she was aware of it nor that they were children of the same mother. *Held* the claimants had not proved they were the rightful heirs of the testatrix.

The words "children and brother" and other words indicating relationship when used in a will refer *prima facie* to a relationship traced through a legitimate tie but a testator can with sufficient clearness show in his will that he meant to include by the use of such word even persons claiming through other than a legitimate tie. (1902) 2 Ch. 542 distinguished. *In re CULLUM MERCER v. FLOOD.* (1924) 1 Ch. 540.

—Gift subject to a condition—Time if of the essence—Annuity to wife subject to condition—Death of wife without performance—Executors if can perform—Personal nature.

Where a gift in a will is made subject to a condition to be performed within a specified time but it is not so performed then at any rate in the absence of an express gift over the Court has to determine if time was of the essence of the matter. In deciding the question, the Court will have to look to what was presumably the intention of the testator in inserting the condition, what it was he desired to bring about or guard against, and if the Court finds that a performance of the condition at a time subsequent to the time fixed in substance provides for the very thing the testator intended, so that all parties can be put in substantially the same position as they would have been in had the condition been performed in time, time is not regarded as of the essence and

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such performance is treated as a sufficient compliance with the condition.

A husband who had covenanted to pay a certain annuity for his wife, by means of his will bequeathed to her a higher annuity, but the latter was to become void if within 6 months of his death she did not release her claims to the prior annuity. There was no gift over on default. As the solvency of the estate was doubtful, she did nothing to indicate her desire either way for more than 3 years after his death. On her death, her executors proposed to release the first annuity and claim arrears on the basis of the bigger sum. *Held* the condition was not personal to her and there would be a sufficient compliance with the condition. *In re GOODWIN : AINSIE v. GOODWIN*. (1924) 2 Ch. 26.

——— *Bequest to son—Son predeceasing father—Codicil reciting death and lapse of bequests—Effect—"Contrary intention"—Wills Act, S. 33.*

A testator made a provision in his will for a legacy to his son. The son pre-deceased the father leaving children and the testator evidently thinking that the legacy had lapsed, made a codicil reciting the death of his son and the consequent lapse and added further directions giving legacies to the grandchildren. *Held* a "contrary intention" within the meaning of S. 33 of the Wills Act, 1837, could be inferred from the words of the codicil and the legacy to the son would not operate as if the son died only immediately after the testator. If the codicil had simply recited the fact of the son's death and given a legacy to the grandchildren, such a "contrary intention" could not be inferred. [S. 33 of the Wills Act, 1837, corresponds to S. 96, Indian Succession Act.—Ed.] *In re MEREDITH : DAVIES v. DAVIES*. (1924) 2 Ch. 552.

——— *Interlineation—Declaration of testator before and after execution—If admissible in evidence.*

Where a will contains unattested interlineations and additions, declarations by the testator after execution are not admissible to prove such addition or interlineation; but declarations of intention made before execution are admissible to prove that the addition gave effect to such intention. *In re JESSOP*. (1924) P. 221.

——— *Revocation—Intention—Partial tearing of—Burden of proving animus.*

Where a will is found carefully folded and put in an envelope among the papers of the testator, but torn across in such a way that even in spite of the tearing the whole will could be read with certainty, the presumption of law is that the testator tore it; but the burden of proof is on the party who alleges revocation to prove the *animus revocandi*. *In re COWLING JINKIN v. COWLING*. (1924) P. 113.

——— *Tenant for life—Duty cast to repair—Failure to do—Remedy—Nature of—Limitation.*

Under the terms of a will, a person became a tenant for life of the suit premises, the will also providing that he should keep the property in

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good tenable repair. He defaulted in making repairs and the remainderman brought an action against the executors of the tenant for life to which the latter pleaded limitation. *Held* a person who obtains a benefit under a will must also shoulder the burden, and the cause of action accruing to the remainderman can be regarded as arising (1) out of a tort, or (2) out of an implied contract, or (3) by reason of a Court of Equity compelling the person who has taken the benefit to fulfil the conditions upon which he took it. The true view to take is the last mentioned one and the moment a Court of Equity recognizes the equitable liability, it will enforce it regardless of any statute of limitation. *JAY v. JAY*. (1924) 1 K. B. 826.

WORKMEN'S COMPENSATION ACT—*Labourer returning from work—Slipping down on platform—Arising out of and in course of employment.*

A Railway employee was ordered by the Company to travel to a certain Station and repair a watermain. After finishing his work he was hurrying across the platform to catch his train, when he slipped and fell, as a result of which he died. *Held* the injuries arose out of and in the course of employment and his widow was entitled to compensation. (1923) 2 K. B. 879 reversed.

Per Viscount Haldane—The interpretation placed on the words "in the course of" in (1918) A. C. 304 and (1920) A. C. 757, i.e., that the workman must be doing something which in contemplation of law is part of his service is the proper test to apply in such cases. *UPTON v. GREAT CENTRAL RAILWAY COMPANY*. (1924) A. C. 302.

——— *"Out of and in the course of employment"—Meaning of—Accident while returning by specially provided train—If amounts to.*

The managers of a colliery for the convenience of their workmen had arranged with a Railway Company to run a number of special trains daily to bring their workmen to the colliery and to take them home. The workmen were not under any obligation to use the trains but such of them as wanted it were given a concession rate which the colliery paid to a Railway Company out of the wages due while they on their part agreed to hold the company free from liability in case of accident, etc. A workman was injured as the result of an accident while returning home and he sued the Colliery Company for compensation. *Held*, by the majority of the House of Lords (*Lord Shaw dissenting*) the workman could not be said to have been injured while he was in the course of employment and as such no action lay.

Per Lord Atkinson.—The decision must turn on whether the workman was, when the accident which injured him occurred, in the course of performing some duty arising out of his contract of service which he owed to his employer.

Per Lord Wrenbury.—A useful test in many cases is whether, at the moment of the accident, the employer would have been entitled to give the workman an order, and the man would have owed a duty to obey it. *ST. HELEN'S COLLIERY COMPANY, LIMITED v. HEWITSON*. (1924) A. C. 59.

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—(1923), S. 7—*Workmen prohibited from going to particular place—Disregard of—Fatal accident—Liability of employer.*

The workmen in a certain colliery had been prohibited from going to a part of the premises which was in a dangerous condition and rails had been put up to prevent access. A workman arriving early on a dark morning switched on the electric light and then went into the prohibited area for hanging his coat, but while returning fell through an old machinery and was fatally injured. In a suit for compensation under the Act, *held* the accident did not arise out of and in the course of the workman's employment. Scope of S. 7 of the Act of 1923 considered. *DAVIES v GWAUNCAEGURWEN COLLIERY.* (1924) 2 K. B. 651.

WRITS OF PROHIBITION AND CERTIORARI—

When can be issued and to whom—Scheme to come into effect after approval by Parliament—Distinction between the two writs.

Under the Electricity Act, schemes were to be proposed by Commissioners and after confirmation by the Minister of Transport to be laid before both Houses of Parliament and approved by resolution and then only to come into force. One such scheme being proposed certain persons affected by it applied for writs of prohibition and certiorari on the ground the scheme was *ultra*

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vires but Divisional Court dismissed the same on the ground the applications were premature, as it could not then be predicted the scheme would be sanctioned by Parliament. The Court of Appeal found the scheme was *ultra vires* and as such it was never too early for a writ of prohibition to issue, as otherwise much waste of time and money would occur. The fact that the scheme becomes law only on being approved by Parliament does not oust the jurisdiction of Civil Courts in inquiring into the validity of the same.

A writ of prohibition is a judicial writ issuing out of a court of superior jurisdiction and directed to an inferior court for the purpose of preventing the latter from usurping a jurisdiction with which it is not legally vested. As statutory bodies come into existence exercising legal jurisdiction, issue of such writs came to be extended to such bodies.

Per Atkins, L. J.—Prohibition restrains a tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or order of the inferior court to be sent up to the King's Bench Division to have its legality inquired into. There is no difference in principle between the two except that the former may be invoked at an earlier stage. *THE KING v. ELECTRICITY COMMISSIONERS; Ex parte LONDON ELECTRICITY COMPANY, LTD.* (1924) 1 K. B. 171.

SUPPLEMENT.

C. P. LAND REVENUE ACT (II OF 1917), S. 49.

ABSOLUTE OCCUPANCY TENANT—Mortgagee obtaining possession of a holding under his mortgage decree ejected by landlord. Tenant seeking reinstatement. *See* Tenancy Act XI of 1898, S. 41 (d) (8). 2 RAGHUBARDAYAL v. MT. JANKI.

7 N. L. J. ii.

—— Valid transfer by—Prior to 1st May 1920 if the landlord has the right of pre-emption. *See* Tenancy Act I of 1920, S. 6, cl. (4) (c), 6 GHASIRAM v. RAMJIVAN.

7 N. L. J. vi.

ACT XI OF 1898.—*See* Tenancy Act XI of 1898.

ADVERSE POSSESSION—By stranger against permanent lessee of sir land—His suit against a trespasser for a portion of his sir plot was dismissed as being barred by limitation. *See* S. 104 with Sch II, Art. 1 of Tenancy Act I of 1920. *Quaeri*:—What is the position of this trespasser with reference to S. N. L. R. 163. 12 MD HUSSAIN v. TUKARAM.

7 N. L. J. xii

BERAR INAM RULES—Rule V—The inam holder for the time being of certain fields in the capacity of Madatmash Inamdar cannot mortgage the fields held by him in a way as to bind the successive future inamdars. The transaction may be binding during the life-time of any member, but not beyond that. *Held*, the particular mortgage in the suit did not bind the newly coming inamdari. 29 BALIRAMSINGH v. RAMCHANDRA.

7 N. L. J. xxxix.

BERAR LAND REVENUE CODE, 1896, S. 101 cl. (5)—Dhura land—Right of passage over. Neither the power given to Tahsildar to impose fine under S. 102 nor the direction by the Commissioner regarding the vacant strip. Dhura constitutes the Government the owner of the land. The contiguous tenants will be entitled to the strip half and half. The contiguous tenants or owners may have a right of passing over this strip; but not a tenant who is not in that position, as a matter of general right. 5 SURAJMAL v. ARJUN.

7 N. L. J. v.

BERAR PATELS AND PATWARIS LAW, 1900, S. 5, cl. (4)—It controlled by cl. (3) (b). Minority is not an absolute bar to the appointment of a patel and patwari. Minor may be appointed if custom demands it. 14 GOPALJI v. NATHU.

7 N. L. J. xi.

—— S. 5, cl. (3), sub-cl. (b) and (c)—A male relative has a preference over a woman; but where the woman belongs to the family of the deceased, and where the male relative does not, e.g. sister's son, the woman has preference. 10 PRAHLAD WAMAN v. JANKIBAI.

7 N. L. J. x.

—— S. 6, cl. (1) read with S. 8, cl. (4)—Educational qualification governs the case of patels in

jhagir villages; and where the applicant is a major, he may, for the time being, be declared unfit for personal service. He may also be permitted to give a substitute for the time being. 15 YESHWANT v. TULSIRAM.

7 N. L. J. xvi.

—— S. 7—A man appointed as patel is not bound to do the work though the family may be so bound. Hence an individual of that family can resign if he liked. 9 TUKARAM v. MARUTI.

7 N. L. J. ix.

—— S. 13—Section 21 (a) *ibid*, applied to jhagir villages. Non-fulfilment of educational qualification is not a defect covered by this section. 15 YESHWANT v. TULSHIRAM.

7 N. L. J. xvi.

—— S. 21, Rules VIII (iii) and IX (i)—Insolvency is a sufficient reason for relieving a patel of his duties. 13 VITHU v. RAJARAM.

7 N. L. J. xiv.

—— S. 21, Rule X—A member of the watandar family took exception to the appointment of an outsider substitute. His application was rejected on the ground that he did not belong to the same sub-division of the family to which the malik belonged. Editor of N. L. J.—Editor doubts the correctness of this decision. *See* Editor's remarks on page xviii. 16 WAMAN v. NILKANTH.

7 N. L. J. xvii.

C. P. ACT I OF 1914, GENERAL CLAUSES ACT, S. 5—Vested right is not interfered with. *See* Tenancy Act XI of 1898, S. 41 (8), tenant seeking reinstatement. 2 RAGHUBARDAYAL v. MT. JANKI.

7 N. L. J. ii.

—— **II OF 1917**—*See* Land Revenue Act II of 1917.

—— **I OF 1920**—*See* Tenancy Act I of 1920.

C. P. LAND REVENUE ACT II OF 1917, S. 24—*See* S. 182 *ibid*.

—— S. 47, cl. ii—*See* S. 49, cls. i and ii.

—— S. 47, cl. iv—*See* S. 49, cls. i and ii.

—— S. 49, cls. i and ii—Mutation entry of 16 annas took place in favour of one of the many Mohamedan co-heirs. One of them was a widow of the late Uboridar. Litigation on the basis of dower debt followed wherein 14 annas share of the several co-heirs excluding the widow was sold in auction. Mutation entries with respect to these 14 annas were effected as per result of auction sale and the assignments following thereon. The widow claimed mutation with respect to the remaining 2 annas; on the objection of the Uboridar-beir that there was no fresh occasion for a change, *Held* overruling the contention that the mutation register was rightly altered

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suitably to the changed circumstances brought about by the auction sale whereby the Ubaridar-heir ceased to represent the widow. 23 JAMAL-BAX v. JAITUNBAI 7 N. L. J. xxvi.

—S. 49, cl. iii.—On the death of the proprietor, the obvious heir, according to the law, ought to receive the support of Revenue Courts, but where the successor is indicated by sane action of the last proprietor, e.g., by will, then the latter person ought to receive support where no complicated inquiry is involved. 20 MT. BABI v. MT. CHANDRABHAGA. 7 N. L. J. xxiii.

—S. 181—See S. 182 (a) *ibid*.

—S. 182—Date of partition taking effect is the date on which agricultural year commences following the date of proclamation. The date of confirmation by the Deputy Commissioner is not the starting point. For mode of proclamation see S. 24 *ibid*.

The consent of the lambardar on 11—5—21 to the transfer by an absolute occupancy tenant was sufficient; as the same was prior to 1—5—22 in spite of the fact that the partition proceedings were confirmed by D. C. on 27—4—21, as the date of proclamation was later to 20—5—41, 1 MAROTI v. MAHEBUB HUSSEIN. 7 N. L. J. i.

—S. 188—Change in law—Lambardar is the only landlord within the meaning of the Tenancy Act. Hence transfer in favour of a co-sharer is not tantamount to a surrender. Therefore the same is avoidable under S. 13 of the Tenancy Act. 4 N. L. R. 120 and Revenue Rulings in Tansukhdas v. Aheliyabai are no longer applicable in cases arising under the new Land Revenue Act. 3 BALA v. GOPALA. 7 N. L. J. iii.

—S. 189 (a)—Removal of a lambardar—Gumashta is (unlike agent) within the discretion of the Deputy Commissioner. The word 'may' does not in this case create an obligation. Apparently some good reasons must be assigned. 11 DURGA PRASHAD v. MT. SARDARAN BAHOO. 7 N. L. J. xi.

C. P. TENANCY ACT XI OF 1898, S. 41 (8)—Mortgagee ejected under S. 41 by the landlord in accordance with this Act. Vested right of tenant to apply under cl. (8) is not interfered with by Tenancy Act I of 1920. Also see S. 5, C. P. General Clauses Act I of 1914. 2 RAGHUBARDAYAL v. MT. JANKI. 7 N. L. J. ii.

—S. 2, cl. (ii)—Unsatisfactory mortgage with all rights prior to the year 1883—Foreclosure of all rights in favour of mortgagee followed; mesne mortgagee was not a party to it. The first mortgagee after foreclosure in his favour makes a grant of about 70 acres to the previous malguzar; mesne mortgagee sues for redemption and foreclosure but seeks no special remedy with respect to grant of land referred to above; Held the grant of land created tenancy rights only. No relief was sought against that land in his mortgage suit by the mesne mortgagee though he might have (*vide* Atter v. Lord Vaux). Held further that for the above reason the mesne mortgagee in the capacity of a proprietor could

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not get possession of the said tenancy fields, the relief having become barred. 24 PYARELAL AND OTHERS v. SARDARSING AND OTHERS. 7 N. L. J. xxxi.

—(I OF 1920), S. 6—No right of pre-emption to a landlord where he gives his consent. For consent of the lambardar while partition proceedings are going on, see Land Revenue Act II of 1917, S. 182. 1 MAROTI v. MAHEBUB HUSSEIN. 7 N. L. J. i.

—S. 6, cl. 4 (c)—The clause 4 (c) will not apply to a case where one obtains possession of an absolute occupancy holding in pursuance of a transfer of a date prior to 1st of May 1920. *Vide* 6 N. L. R. 69; General Clauses Act I of 1914, S. 5; Tenancy Act XI of 1898, S. 41, cl. (5).

Quaeri—If it did apply would the provision have benefited the landlord as he had already consented to it. See Editor's note. 6 GHASIRAM v. RAMJIVAN. 7 N. L. J. vi.

—S. 12, sub-s. 1, cl. (ii)—An occupancy tenant who has his heirs living can now exclude them and transfer his holding to one who comes within seven degrees of kindredship, and is a male member. 7 GAJANAN v. JAYDEO. 7 N. L. J. vii.

—S. 13—Transfer to a co-sharer if avoidable like any other. See Land Revenue Act II of 1917, S. 188. 3 BALA v. GOPALA. 7 N. L. J. ii.

—S. 13—Transfer to a fractional co-sharer avoidable by the Lambardar—Change in old Law. See Land Revenue Act, S. 188.

The Lambardar can now take even in opposition to the wishes of a fractional co-sharer who has taken a transfer of tenancy holding. Change introduced into old theory of law. 21 MT. GIRJABAI v. MT. RUKHMABAI. 7 N. L. J. xxiv.

—S. 13—See Tenant and Trespasser.

An occupancy tenant (widow) got the name of her niece substituted in her place during settlement proceedings, S. O believing that S. 12, cl. (2) of the Tenancy Act (1920) applied to it. The widow and the niece fell out later on, but the widow did not succeed in getting back the possession. The landlord brought a suit against the niece treating her as a trespasser. Held, the landlord need not show that the widow had abandoned the holding. The question that no civil suit lay and that application under S. 13 of the Tenancy Act (I of 1920) was not pressed. 25 MT. MUKTAI v. R. S. RAMCHANDRA. 7 N. L. J. xxxii.

—S. 13—See cognate case, 7 N. L. J. iii.

Transfer to a co-sharer may in cases be equivalent to a surrender, e.g., where all co-proprietors have authorized a particular one to act on behalf of the whole body. The co-proprietors must strictly prove this authority. Where this is not proved, it will be deemed a transfer and not a surrender.

4 N. L. R. 120 and C. P. Revenue Rulings, 41 dist.

(i) S. 188, cl. (ii) does not prohibit a co-proprietor from acting on behalf of the whole proprietary body. In such a case he may be treat-

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ed as a landlord within the meaning of S. 89 of the Tenancy Act (1921).

(iii) The case of a transfer of possession under unregistered instrument (not invalid under Reg. Act) is governed by Ss. 12 and 13 of the Tenancy Act, 17 C. P. 49 and 8 Nag. 21 not followed. Editor's note.—See also 7 N. L. J. xxxvi. 22 GOPALA v. MT. BALA. 7 N. L. J. xxv.

—S. 13—Whether under S. 47 of Tenancy Act (1898) or under S. 13, C. P. Tenancy Act I of 1920 a sale of an occupancy holding whether for rupees less than 100 or for 100 and more, it was always invalid. No suit could be based on the basis of such a sale. Therefore the landlord in such a case cannot bring a suit on the ground of the defendant being a trespasser. But an application must be made to the Revenue Officer under suitable sections. The civil suit was dismissed. 27 SETH MOHANLAL v. VITHAL LALA. 7 N. L. J. xxxvi.

—Ss. 13 and 89—A lambardar trying to take possession of a widow's holding by obtaining a decree for arrears in execution of which the widow in possession of her tenancy allowed herself to be ejected, is practically obtaining an unregistered surrender deed. Hence a reversioner can treat the transaction as transfer and follow his remedy under S. 13 of the Tenancy Act.

NOTE:—In this case the executing Court accepted the arrears and put the reversioner in possession. 4 PANDURANG v. PANDURANG. 7 N. L. J. iv.

—S. 13 read with Sch II, Act I.—Until a person applying under this section is placed in possession, the person is not a tenant within the words of Sch II, Art 1. Hence two years' rule would begin to operate only from the date on which such an applicant is placed in possession by the Revenue Officer. 8 BARKU v. BHAGIA. 7 N. L. J. vii.

—S. 24—Widow occupancy tenant in arrears—About to be ejected—The reversioner alleges collusion—Pays up arrears. The latter is placed in possession. Held, valid. Where no direct provision equity prevails. 4 PANDURANG v. PANDURANG. 7 N. L. J. iv.

—Ss. 37 and 49—Proprietors of a Mouza gave a mortgage of a village to the plaintiff in 1909. In 1913 the same proprietors issued a lease for twenty years to the same persons. The plaintiffs got a final decree for foreclosure in their mortgage suit on 20th Nov. 1918. In the meantime a suit in 1916 was brought on the basis of the aforesaid lease. Possession was decreed in pursuance thereof on 30-9-1919 for the period of twenty years. Execution of this decree was taken out in Nov. 1921. Held that the lease was not of proprietary rights but it gave cultivating possession to the lessee.

The question whether S. 49 of the C. P. Tenancy Act (I of 1920) applied to the case or not, did not arise. The decree was allowed to be executed treating the D. H.s as sub-tenants of the former proprietors. 28 DURGA PRASAD v. TAKUR PRASAD. 7 N. L. J. xxxvii.

CIVIL PROCEDURE CODE, O. 41, R. 33.

—S. 104, Sch I, Art 1—B who had become the absolute occupancy tenant of a holding in Mouza Rehta Khurda, in place of A, the original tenant, alleged dispossession by the former tenant A, more than three years prior to the suit. Held claim was barred. Art I, Sch. 12 covered the case of a trespasser. In this respect the old law was changed.

Ed. Note :—Page XX reference to C. P. Legislative Council Proceedings at pp. 50-55, dated 28th Nov. 1921. 17 MEGHRAJ vs. RAMGOPAL. 7 N. L. J. xix.

—S. 104 read with Sch. II, Art 1—Scope of that article applied where a permanent tenant of sir land claims possession from one who is apparently a trespasser.

Quaeri : What would be the position of the trespasser with reference to S. N. L. R. 163. 12 MD. HUSSEIN v. TUKARAM. 7 N. L. J. xii.

—S. 104 with Sch II, Art 1—As to when a successor seeking to set aside a surrender is a tenant within the words of the Sch II, Art I. See S. 13 *ibid*. 8 BARKYA v. BHAGIA. 7 N. L. J. vii.

CIVIL PROCEDURE CODE, O. II, R. 2—*Vide* Tenancy Act, S. 2, cl. 11, No. 24. 7 N. L. J. xxix.

—O. 21, R. 19—Conditional decree for possession—Payment of costs—Right to set off—Delay in deposit—Treasury closed on the last day—Effect of.

Plaintiff obtained a decree for possession on condition of paying a sum of Rs. 38 and odd to the defendant within thirty days and the parties were ordered to pay and receive proportionate costs. Under the decree as drawn up plaintiff was entitled to get Rs. 70 and odd from the defendant and the defendant to Rs. 15 and odd from the plaintiff. On the thirtieth day the plaintiff tendered Rs. 39 and odd to the Court and was given a chalan to the treasury officer. By the time the plaintiff reached the treasury, it was closed and the deposit was made on the next day. On a question arising as to whether the plaintiff had fulfilled the condition in the decree, Held that the plaintiff must be deemed to be entitled to set off Rs. 38 and odd directed to be paid to the defendant against Rs. 70 and odd awarded to him as costs and that the condition about payment within thirty days must be deemed to have been automatically fulfilled. Apart from this, the plff. had not fulfilled the condition in the decree. (Ryves and Mukerji, JJ.) GULZARI v. LACHMI DHAR. L. R. 5 A. 59.

—O. 41, R. 33—Scope of—Proper exercise of judicial discretion—Appeal against a portion of decree—No memo of objections—Power of Court to set aside whole.

Per Srinivasa Aiyangar, J.—The terms of R. 33 of O. 41 are wide. By the use of the words 'respondents or parties' the power was intended to be exercised in favour of parties to the litigation, though they may not be represented in the Court of Appeal, and not against them. Under O. 41, R. 33 the Appellate Court has power to set aside the whole decree, even though the defendants may not have filed cross-objections and that on the

CIVIL PROCEDURE CODE, O. 41, R. 33.

present case, the defendants had valid grounds for not filing the memo of objections since the decision in 37 Mad. 418 was against them, and the fact of 44 M. 232 having overruled the previous decision was not known to them and that the Court can interfere under O. 41, R. 33. (*Srinivasa Aiyangar, J.*) SUBRAMANIA CHETTIAR v. SINNAMMAL. 20 L. W. 761 : 1925 Mad. 266.

—S. 110—*Suit by adopted son for possession—Widow disputing adoption and claiming maintenance—Rate of maintenance varied in appeal—Leave to appeal.*

In a suit by an adopted son for possession of properties more than Rs. 10,000 in value, the widow denied the adoption and claimed an annual maintenance of Rs. 3,000. The trial Court found in favour of the adoption, but gave her Rs. 800 maintenance. In appeal it was enhanced to Rs. 1000. Leave to appeal to the Privy Council was refused on the ground that the appellate decision was one of confirmation except in respect of a small change. *Held*, on an application for special leave to appeal under S. 110, C. P. Code, the widow had a right of appeal as regard her maintenance allowance. (*Lord Dunedin.*) ANNAPURNA BAI v. RUPRAO. 51 I. A. 319.

COLLUSIVE EJECTMENT :—*See* Tenancy Act I of 1920, Ss. 13 and 24. 4 PANDURANG v. PANDURANG. 7 N. L. J. iv.

CONTRACT ACT, S. 65—*Tenant and creditor—Suit for refund of consideration. See* Contract Act, S. 65.

A tenant and a creditor made certain arrangements between themselves whereby a real sale was given the colour of a mortgage of crops for 16 years. The finding of fact was that this was a device to evade the Tenancy Act. *Held* by L. A. C.—No cause of action for refund till the lapse of 16 years. *Held* by H. C. that the transaction violated the provision of S. 23 of the contract. Hence no refund. NARSING AND SEETARAM GUJAR v. NARAYAN AND GOVINDA. 7 N. L. J. xxxiv.

CO-SHARER—*Transfer in favour of—If avoidable See* Land Revenue Act II of 1917, S. 188. BALA v. GOPALA. 7 N. L. J. iii.

CUSTOM—*Binding force of—Appointment of Patel and Patwari. See* Berar Patels and Patwaris Law, 1900, S. 5, cl (3) (b) and (c). 10 PALHAD WAMAN v. JANKIBAI. 7 N. L. J. x.

DHURA LAND.—*Right of passage over. See* Berar Land Revenue Code, 1896, S. 101, cl 3. 5 SURAJMAL v. ARJUN. 7 N. L. J. v.

EQUITY.—*Application of, where no provision of Tenancy Law. See* Tenancy Act I of 1920, S. 24. 4 PANDURANG v. PANDURANG. 7 N. L. J. iv.

INSOLVENCY—*Patel—Exemption of duties—Substitute. See* Berar Patels and Patwaris Law, 1900, S. 21, Rr. VIII (iii) and IX (i). 13 VITHU v. RAJARAM. 7 N. L. J. xiv.

INTERPRETATION OF STATUTES.—*An instance where the word 'may' is not used in an obligatory sense. See* Land Revenue Act II of 1917, S. 189 (a). 11 DURGA PRASHAD v. MT. SARDARAN BAHOO. 7 N. L. J. xi.

JAHGIR VILLAGES.

JAHGIR VILLAGES.—*Application of rules made under S. 21 of the Berar Patels and Patwaris Law, 1900. 15 YESHWANT v. TULSHIRAM. 7 N. L. J. xvi.*

LAMBARDAR.—*See* Landlord.

LAMBARDAR GUMASHTA.—*Removal of. See* Land Revenue Act II of 1917, S. 189 (a). 11 DURGA PRASHAD v. MT. SARDARAN BAHOO.

7 N. L. J. xi.
LAMBARDAR AND CO-SHARER—*Transfer in favour of the latter—If avoidable. See* Land Revenue Act, S. 188. 3 BALA v. GOPALA.

7 N. L. J. iii.
LANDLORD AND CREDITOR.—*Mortgagee obtaining possession of absolute occupancy holding in execution of decree—Landlord's right. See* Tenancy Act XI of 1898, S. 41 (8). 2 RAGHUBAR-DAYAL v. MT. JANKI. 7 N. L. J. ii.

LANDLORD AND STRANGER.—*Apparent trespasser holding adversely against tenant. See* Tenancy Act I of 1920, S. 104, Sch. I, Art. 1. 12 MD. HUSSEIN v. TUKARAM. 7 N. L. J. xii.

LANDLORD AND TENANT.—*Who is a tenant within the meaning of Tenancy Act, Sch II, Art 1. See* Tenancy Act I of 1920 read with S. 13, Sch. II, Art 1 *ibid*. 8 BARKYA v. BHAGIA. 7 N. L. J. vi.

MINORITY—*Disqualification—Appointment—Patelship. See* Berar Patels and Patwaris Law, 1900, S. 5, cl 4. 14 GOPALJI v. NATHU. 7 N. L. J. xv.

PARTITION—*Date of taking effect. See* Land Revenue Act II of 1917, S. 182. 1 MAROTI v. MAHEBUB HUSSEIN. 7 N. L. J. i.

SUBSTITUTE—*An outsider—Person entitled to object to his appointment. See* Patels and Patwaris Law, 1900, S. 21, R. X. 16 WAMAN v. NILKANTH. 7 N. L. J. xvii.

TENANT AND TRESPASSER—*PROCEDURE—(1) Former tenant dies, leaves five collateral heirs of the same status—One alone sues a trespasser. Held following 39 Mad. 501 that it is competent for one to sue a trespasser. Dist. the case of a lessee. 18 GOPAL v. VITHAL. 7 N. L. J. xxi.*

(2) The trespasser as a defendant cannot plead the rights of the alleged tenant by way of *jus tertii* as against the landlord, the plaintiff. The case of a licence may be different. 11 N. L. R. 124 ; 18 N. L. R. 82 referred to. 19 DEBURAM v. PAHLAD PRASAD. 7 N. L. J. xxii.

TRANSFER TO A CO-SHARER—*Whether avoidable.*

(1) *See* Land Revenue Act II of 1917, S. 188. 3 BALA v. GOPALA. 7 N. L. J. iii, xxv, xxx.

(2) Of a date prior to 1st May 1920—*Landlord's consent. See* Tenancy Act I of 1920 S. 6, cl. 4 (c). 6 GHASIRAM v. RAMJIVAN. 7 N. L. J. vii.

(3) To person within seven degrees of relationship—*Nearer her living. See* Tenancy Act I of 1920, S. 12 sub-sec. 1, cl. (ii). 7 GAJANAN v. JAYDEO. 7 N. L. J. vii.

VESTED RIGHT—*Mortgagee obtaining possession by operation of land—Ejectment by landlord. Tenants' right to be reinstated. See* Tenancy Act XI of 1898, S. 41 (8). 2 RAGHUBAR-DAYAL v. MT. JANKI. 7 N. L. J. ii.